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Article abstract

The use of celebrity imagery, or style, in advertising has become prevalent in recent times. Occasionally advertisers have used photographs of celebrities without having first obtained their consent. The author examines the possible legal bases existing in Quebec civil law which may serve to protect the celebrity against such non-consesual use of his or her picture, drawing on the experience of France, common law in Canada and the United States. Concluding that the right to style is an intellectual property right, the author applies this basis to other instances of style appropriation : the use of voice, sound-alikes, look-alikes and typical expressions.

Publicity exploitation of celebrities: protection of a star's style in Quebec civil law*

Susan H. ABRAMOVITCH**

Les procédés actuels de publicité comportent souvent le recours à des caractéristiques d'expression de vedettes, à leur style. Des publicitaires ont ainsi utilisé des photographies de vedettes sans leur consentement. Dans quelle mesure le droit civil québécois protège-t-il ces célébrités contre l'utilisation, sans leur consentement, de leur image ? L'auteure cherche à répondre à cette question en faisant appel aux droits français, américain, de même qu'à celui des provinces canadiennes de common law. Qualifiant le droit à l'image de propriété intellectuelle, elle examine différentes espèces d'approbation de moyens d'expression de la vedette : sa voix, ses expressions typiques, son apparence.

The use of celebrity imagery, or style, in advertising has become prevalent in recent times. Occasionally advertisers have used photographs of celebrities without having first obtained their consent. The author examines the possible legal bases existing in Quebec civil law which may serve to protect the celebrity against such non-consesual use of his or her picture, drawing on the experience of France, common law in Canada and the United States. Concluding that the right to style is an intellectual property right, the author applies this basis to other instances of style appropriation: the use of voice, sound-alikes, look-alikes and typical expressions.

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> A sign of a celebrety is often that his name is worth more than his services.
>
> (Daniel J. Boorstin)[1]

Despite his cynicism with respect to the artistic and intellectual value of contemporary America's popular heroes, lawyer/historian Daniel J. Boorstin in these words realistically identifies a key by-product of stardom : commodity endorsement. Cultivating a visible public personality requires a serious investment of money, time and creative energy. The tastes and desires of the masses must first be distilled and then accommodated by the aspiring celebrity, culminating in the development of a public style. The public's ability to identify the star upon perceiving an aspect of his or her style confirms that person's celebrity, i.e., that condition defined as :

> [...] fame ; renown ; the distinction or honor publicly bestowed on one because of noted character or exploits.[2]

1. D.J. BOORSTIN, *The Image : A Guide to Pseudo-Events in America*, New York, Harper & Row, 1964, p. 220.
2. *Webster's New 20th Century Dictionary of the English Language*, 2e éd., É.-U., Collins World, 1977.

The advertising world has capitalized on this public appeal of celebrities and has transformed it into market appeal: "In [advertising] trade jargon, celebrities are 'big names'."[3] Product promoters are willing to pay handsomely for the permission to associate a celebrity with their goods, even if only implicitly, in order to profit from the star's public goodwill. The ability of the celebrity's name or likeness to attract attention and evoke a desired response in a particular consumer audience evidences this goodwill, or recognition value, generated by that star. This promotion strategy enables the advertiser to increase the value or the sales of its product by linking the celebrity's identity with that of the product.

The attractiveness of any useful idea often leads to less-than-legitimate attempts to reap its benefits while avoiding its costs. The use of celebrities in advertising is no exception to this phenomenon. In the recent California case of *Bette Midler* v. *Ford Motor Company*[4], the respondent, through the advertising firm hired by it, approached the well-known actress/singer plaintiff with precisely the strategy outlined above. The respondent proposed juxtaposing "The Divine Miss M"'s vocals with visuals of its product, automobiles, in a television commercial. Ms. Midler refused. Undeterred by Ms. Midler's rejection of this offer, the respondent proceeded to enlist the services of an unknown singer. This performer imitated Ms. Midler's singing voice in the advertisement at the request of the respondent. This case exemplifies the underhanded trend of what I designate as "publicity exploitation".

From the perspective of policy, it does not seem desirable to allow advertisers to reap an economic windfall, without fear of penalty, while stripping celebrities of the dividends deserved from the investments they have made in themselves. In addition to this denial of compensation, the celebrity may suffer damages. The provision of publicity to one company may cause other companies to view the celebrity as an insincere, and thus unattractive, spokesperson. Free publicity for one sponsor, moreover, would deprive the celebrity of justification for the substantial fees charged to others ; the price commandable by the celebrity would be diluted due to the increase in supply of his or her advertising services. Exposing the celebrity's interests to such threats of prejudice would discourage potential stars from expending time and resources in developing the skills or achievements prerequisite to public recognition. This disincentive

3. D.J. BOORSTIN, *supra*, note 1, p. 58. This practice has recently been called "character merchandising." See S. RICKETSON, «Crocodiles, Koalas and Athletes: Australia's Contribution to the Theory and Practice of Character Merchandising» (Address to the 9th Commonwealth Law Conference, 1990) [unpublished].

4. *Bette Midler* v. *Ford Motor Company*, (1988), 849 F. 2d 260 (9th Cir.).

would eventually deprive society of the stars' enriching performances and endeavors.

In Quebec law the protection of a celebrity's style has been minimally developed. This issue has generally arisen in cases of photograph use and has traditionally been analyzed under the rubric of the right to one's image. The determination of the legal nature of the right to image, however, remains controversial.

The scope of the definition of "image" is seldom provided in cases and doctrine ; on the rare occasion when direction is given, it is often cryptic[5]. The difficulty in the determination of the field encompassed by "image" probably stems from the differences between the everyday French and English definitions of this word. In the French language the focus of "image" is the picture : "cliché", "gravure", "illustration" and "portrait"[6]. In English, however, "image" is defined more abstractly as :

> [...] the concept of a person held by the general public, often one deliberately created or modified by publicity, advertising, etc.[7]

A change in the terminology of this right would circumvent the semantic confusion caused by this language difference. I propose designating the right as one of "style", a term defined as :

> [...] specific or characteristic manner of expression, execution, construction or design, in any art, period, work, employment, etc. ; distinction, excellence, originality and character in any form of artistic or literary expression.[8]

The word « style », in this way, focuses on the mode of expression. The connection to art drawn in this definition demonstrates the suitability of the term for labelling the celebrity's mode of expression of his or her creative public identity.

In the first part of this paper, I will attempt to distill the most appropriate legal basis in Quebec law for the right to style in the context of use of the celebrity's photograph for publicity exploitation purposes. Once the foundation for the right has been determined, I will explore the scope of style encompassed by this right. I shall examine how far the protection of

5. See *Deschamps* c. *Renault Canada*, C.S. Montréal, 0581014071, 24 février 1972 ; reported at (1977) 18 *C. de D.* 937, in which the right to image is said to encompass "name and likenesses" p. 940, but in which the right is more broadly constituted p. 943 : "names, likenesses *and photographs*" (emphasis added). The inclusion of both the words "likenesses" and "photographs" in the second definition suggests that the right to one's image extends beyond cases of control of photograph reproduction and diffusion.
6. Definitions taken from *Le Petit Robert*, Paris, Société du Nouveau Littré, 1970.
7. *Webster's New 20th Century Dictionnary of the English Language*, *supra*, note 2.
8. *Id.*

style afforded by Quebec law can be extended by focusing on publicity exploitation of voice, typical expressions, look-alikes and sound-alikes.

1. The right to style: photograph publication

1.1. Generally

The right of a person to his or her style has been extensively developed in both civil law and common law jurisprudence and doctrine in the context of publication of photographs. In no jurisdiction, however, has this development culminated in firm agreement on the most appropriate basis for the right. Judges and authors oscillate between the basic categories of civil responsibility and property when classifying the right to one's style. This taxonomy is further confused in Quebec and France where authoritative sources subclassify protection of style either as a patrimonial right[9], as an extra-patrimonial right of personality[10] or, more specifically, as an element of the right to privacy[11]. in Canadian common law jurisdictions, the unauthorized use of one's photograph is sometimes analyzed under the rubric of "passing off"[12], an aspect of unfair competition. In the United States, the development of the "right to publicity"[13] supplements the common law approaches. Finally, references to defamation[14], breach of contract[15] and unjust enrichment[16] appear occasionally in the search for the most suitable basis for describing the mode of reparation for the breach of the right to one's style.

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9. *Deschamps* c. *Renault Canada*, *supra*, note 5 ; B. EDELMAN, « Liberté et création dans la propriété littéraire et artistique : esquisse d'une théorie du sujet » D.1970. Chr. (KLI) 197-200 ; J. STOUFFLET, « Le droit de la personne sur son image (quelques remarques sur la protection de la personnalité) » *J.C.P.* 1957.I.1374.
10. H., L. et J. MAZEAU, *Leçons de droit civil*, t.1, vol.2, 7e éd., par F. CHABAS, Paris, Montchrestiens, 1986; R. NERSON, *Droits extrapatrimoniaux*, Lyon, Bosc Frères M. & L. Riou, 1939.
11. *Cohen* v. *Queenswear International Ltd.*, (1989) R.R.A. 570 (C.S.) ; H.P. GLENN, « Le droit au respect de la vie privée », (1979) 39 *R. du B.* 879 ; H.P. GLENN, « Le secret de la vie privée en droit québécois », (1974) 5 *R.G.D.* 24; H.P. GLENN, « Civil Responsability—Right to Privacy in Quebec—Recent Cases », (1974) 52 *Can. Bar Rev.* 297 ; M. CARON, « Le code civil québécois, instrument de protection des droits et libertés de la personne ? », (1978) 56 *Can. Bar Rev.* 197, p. 206-207 ; E. DELEURY, « Une perspective nouvelle : le sujet reconnu comme objet du droit », (1972) 13 *C. de D.* 529.
12. *Krouse* v. *Chrysler Canada Ltd.*, (1974) 1 O.R. (2d) 225 (Ont. C.A.), rev'g 1972, 2 O.R. (2d) 133 (Ont. H.C.) ; *Athans* v. *Canadian Adventure Camps Ltd*, (1978) 17 O.R. (2d) 425 (Ont. H.C.).
13. *Lugosi* v. *Universal Pictures*, (1979) 160 Cal.Rptr. 323 (Sup.) ; *Haelan Laboratories Inc.*, v. *Topps Chewing Gum Inc.*, (1953) 202 F.2d. 866 (2d. Cir.).
14. *Field* c. *United Amusements Corporation Ltd* (1971) C.S. 283.
15. J. RAVANAS, *La protection des personnes contre la réalisation et la publication de leur image*, Paris, Librairie générale de droit et de jurisprudence, 1978, p. 89 s.
16. *Cohen* v. *Queenswear International Ltd*, *supra*, note 11.

In this part, the applicability of each of these legal foundations to the scenario of the celebrity involved in advertising will be explored. The nature and respective advantages and disadvantages of each category will be canvassed with a view to determining which is the most appropriate means of protecting style in the Quebec civil law system.

Although the categories have been separated for the purposes of analysis, they are by no means watertight compartments. On the contrary, the theoretical nature of each possible basis of the right may overlap with that of another. The categories, furthermore, are not mutually exclusive in practice ; publication of one's photograph, for example, may simultaneously give rise to both a delictual action and an action based on interference with a property right[17]. Instances of possible coincidence are indicated below.

1.2. Defamation/libel

Civil defamation and libel consist, respectively, of verbal and written

> [...] atteinte[s] portée[s] à la réputation ou à l'honneur d'une personne, même morale, de même que toute imputation de nature à l'exposer à la haine, au mépris ou même seulement au ridicule.[18]

If no factual foundation underlies such an imputation, then the speaker or writer may be delictually responsible under art. 1053 C.C.L.C.[19].

In *Field*[20] the defendant produced a documentary, "Woodstock". This film included both footage of the non-celebrity petitioner frolicking unclad at the 1969 rock festival and a scene which suggested that the petitioner had engaged in sexual intercourse with a companion. The petioner requested an interlocutory injunction, enjoining the defendant from screening this film, on the basis of defamation. The court rejected the petition on the facts of the case[21]. In laying out the criteria for defamation, however, the Court implicitly recognized that this type of action could protect against the unauthorized use of a person's photograph in other circumstances.

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17. H.P. GLENN, « Le droit au respect de la vie privée », *supra*, note 11, p. 889.
18. A. NADEAU, *Traité de droit civil du Québec*, t. 8, Montréal, Wilson & Lafleur, 1949, p. 216.
19. *Id.*
20. *Field* v. *United Amusements Corporation Ltd*, *supra*, note 14.
21. *Id.*, p. 286 : « Rien dans la preuve ne suggère la malice de l'opérateur de la camera ni son indiscrétion, dans le contexte de tout le film... qui semble bien d'intérêt public... [Le requérant et sa compagne] nient avoir eu des relations sexuelles : la séquence ne montre rien de tel... La facilité d'identification [du requérant] n'est pas prouvée à la satisfaction du tribunal... S[i le requérant] est vraiment humilié de s'y voir, pourquoi est-il allé voir le film deux fois à quatre jours d'intervalle ? »

This basis for the right protects the celebrity only in very narrow circumstances. A plaintif seeking relief would have to demonstrate "une imputation contraire à la vérité » »[22] and subjection to ridicule. This foundation would not relieve the celebrety whose photograph has been used by an advertiser without authorization unless the celebrity actually disapproves of the product with which he or she is associated and unless this association tarnishes the celebrity's reputation. Such situations would arise infrequently, as it is in the advertiser's business interest to portray the celebrity in a positive light in order for the celebrity's good reputation to be fused with the promoted product.

The right to one's style can be founded on much broader bases which protect the individuality of the person and not merely his reputation[23]. These wider bases will be examined below.

1.3. Contract

Explicit private regulation of the use of one's style is always an option available to the celebrety. In *Deschamps*[24], for example, the film-performance contract of one of the petitioners, Dominique Michel, contained a clause reserving her the right to approve all photographs used in publicity for the movie[25]. Breach of such a provision may give rise to contractual damages[26]. This protection, however, is very limited ; often the person who uses and benefits from the celebrity's photograph is not a party to any such contract. The facts of the *Deschamps* case[27] provide a good example. The defendant, Renault Canada, agreed with Mojac Film Cinema, one of the film's producers, to exchange loaned cars for photographs of the petitioners standing beside Renault autos and for the right to exploit these photos. No contractual relation, however, linked Renault Canada to Ms. Michel. Her action against Renault Canada, therefore, could not have been grounded in contract[28]. Ms. Michel's sole contractual remedy required suing the co-contractor, her employer, Mojac Films Cinema. This

22. *Id.*, p. 285.
23. The distinction between protection of individuality and protection of reputation is drawn in H.P. GLENN, « Civil responsability-Right to Privacy in Quebec-Recent Cases », *supra*, note 11, p. 299.
24. *Deschamps* v. *Renault*, *supra*, note 5.
25. Id., p. 938 : « Article 4.05 — Dominique Michel aura un droit de regard sur toutes les photos utilisées dans la publicité de film et aura un droit de veto sur toutes photos qui la représentent entièrement ou en partie, droit toutefois qu'elle s'engage à exercer raisonnablement. »
26. Art. 1065, C.C.L.C.
27. *Deschamps* v. *Renault Canada*, *supra*, note 5.
28. The *Deschamps* case involved a motion for injunction against Reanult, not damages ; it was not, in fact, grounded in contract.

option was probably unattractive to Ms. Michel due to the ongoing nature of the parties' relationship.

More commonly, there is no explicit contractual provision which allocates the right to use the celebrity's photograph. Even in the absence of such a clause, however, a co-contractor may be able to profit from the use of a photograph. By the very nature of an actor's undertaking to act in a film, an implied incidental term[29], authorizing the producer to use the actor's photograph for purposes of the film's promotion, may be incorporated into the actor's contract of performance. In this way, the celebrity's right to control the publication of his photograph may be implicitly ceded or, at least, implicitly limited.

There is a tendency, furthermore, to imply consent to photograph publication when the subject of the picture is a public person engaged in public activity[30], even in the absence of any contractual link whatsoever between the subject and the publisher:

> Il est constant que la publication de l'image d'une personnalité publique est libre, car la *nature de l'activité* exercé implique, dans une certaine mesure, *renonciation* au secret de l'existence, Il en résulte qu'un consentement spécial, à la diffusion de leur image, n'est pas exigé.[31]

Moreover, an entertainer's past tolerance of the publication of his or her photograph is sometimes viewed as implicit general consent to cede control over his or her style[32].

This tacit consent, in addition to serving as possible exoneration for an invasion of the right to privacy[33], may provide the basis for the finding of a contractual relationship[34]. It is possible to argue the celebrity's act of permitting a photographer to film the celebrity or of tolerating publication in the past may constitute the proof necessary to imply consent to a convention which authorizes the photographer-party to publish the photo.

The exact force of this implied consent is not settled. Some authorities suggest that consent is a necessary implication of the public nature of the

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29. Incorporated into contract pursuant to art. 1024, C.C.L.C.
30. "Public activity" refers to the person's activities outside his or her personal sphere: work, interaction with the media, etc.
31. B. EDELMAN, *supra*, note 9, p. 120.
32. See *Benoit* c. *Société radio-télévision du Québec*, C.S. Rouyn-Noranda, 600-05-00023-83, 10 March 1983, J.E. 83-525 p. 5, in which traditional tolerance was one factor considered in holding that the performer had ceded the right to her style. However, perhaps a higher standard was imposed on the plaintiff due to the exceptional nature of the relief requested, i.e., interlocutory injunction.
33. Discussed *supra*, in section 1.6.
34. Art. 988, C.C.B.C.

person and his activity[35] while others insist that this implication is merely a rebuttable presumption, which reverses the burden of disproving this exonerating factor onto the celebrity[36]. In the *Deschamps* case[37], Rothman J. did not feel compelled to find such tacit consent:

> While it may seem unusual and it does seem insouciant on petitioners' part to have allowed 18 photographs to be taken without a clear understanding of their purpose, the Court cannot conclude that this in itself constituted tacit consent that they be used in a commercial poster.[38]

Some authors stress, however, that even if a person is a public figure and consent to publication is presumed, this does not necessarily entail a presumption of consent with respect to *all possible* uses of the image:

> Utilisée pour illustrer, un fait d'actualité ou un événement public, l'image ne sera soumise à aucun régime de protection, *mais, si elle doit, par exemple, servir à une réclame publicitaire, la situation sera entièrement différente.*[39]

The situations contemplated in this paper fall under this second category, "réclame[s] publicitaires[s]". It is unlikely, therefore, that consent to publication will be presumed. One author, moreover, in rejecting the implication completely, recognized the artificality of this presumption[40]. Furthermore, the traditional tolerance presumption has been rejected in doctrine[41] and in caselaw[42].

A celebrity's cession of control over his or her style by tacit agreement can only affect a small range of practical scenarios. Although express words need not be communicated, *some* kind of relationship must exist between the parties. At the very least, the parties must have had a mini-

35. See, e.g., B. EDELMAN, note 9, p. 120.
36. See, e.g., p. MOLINARI, « Le droit de la personne sur son image en droit québécois et français : rapport générale » (1977) 12 *R.J.T.* 95, p. 100-101 ; H., L. et J. MAZEAUD, *supra*, note 10, p. 931.
37. *Deschamps* c. *Renault Canada*, *supra*, note 5.
38. *Id.*, p. 940.
39. P. MOLINARI, *supra*, note 36, p. 109. (Emphasis added.)
40. J. RAVANAS, *supra*, note 15, 167-169. Ravanas explains that such an implication would be fictitious in that « [elle] conduit à diluer le consentement de la personne représentée 'jusqu'au point où l'on ne prend même plus en considération son élément essentiel : la volonté.' »
41. H.L. et J. *Mazeaud*, *supra*, note 10, p. 932.
42. *Deschamps* v. *Renault Canada*, *supra*, note 5, as interpreted by H.P. GLEEN, « Civil Responsability-Right to Privacy in Quebec-Recent Cases », *supra*, note 11, p. 302.

mum of contact before the photo was used in order to witness the acts which constitute the implicit consent:

> Le consentement est implicite ou tacite quand il s'extériorise par un comportement, une conduite ou l'accomplissement d'un acte qui suppose une volonté de contracter.[43]

The cases examined in this paper involve defendants who have used the celebrity's photo to market their products. Often the plaintiff has never had any previous contact with the defendant, let alone knowledge of the defendant's existence. To suggest, *ex post facto*, that a contract existed between such unfamiliar parties is a tenuous proposition.

The only contractual relief which may protect the celebrity from these unrelated parties is actually a quasi-contractual one: the action *de in rem verso*[44]. Although never explicitly used in the context of the celebrity's right to his style, this concept of unjust enrichment may be accepted by a court in the absence of any other recourse. To succeed, the celebrity would have to demonstrate[45], first, the enrichment of the advertiser-defendant. Money saved by not paying the celebrity for the endorsement and profits gained due to increased sales attributable to the endorsement may qualify as enrichment. Second, the celebrity would be required to demonstrate impoverishment: revenue potentially gained through a promotion contract with the defendant or reduction in his or her commandable fee due to the saturation of his advertising market. Third, the enrichment and the impoverishment must be connected. Finally, to succeed, the enrichment cannot be legally or contractually justified.

In an unjust enrichment action, the absence of contact between the parties would not necessarily preclude recovery. The celebrity could receive compensatory relief equivalent to the lesser of the impoverishment and the enrichment[46]. The development of this ground as a basis for recovery has been stifled, however, due to the availability of other restitutionary bases for image protection[47]. The general notion of unjust enrichment, however, may underlie some of these other legal bases.

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43. M. TANCELIN, *Des obligations : contrat et responsabilité*, 4e éd., Montréal, Wilson & Lafleur, 1988, p. 48.
44. Available in Quebec by virtue of the decision of *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.*, (1977) S.C.R. 67.
45. Conditions as explained in J.L. BAUDOUIN, *Les Obligations*, 3e éd., Montréal, Les Éditions Yvon Blais, 1989, p. 330 et S.
46. *Id.*, p. 336.
47. See *Cohen* v. *Queenswear International Ltd*, *supra*, note 11, p. 579.

1.4. Delict

A more common approach of courts in all jurisdictions is to categorize interference with the right to style as a civil law delict[48] or as a common law tort[49]. In Quebec, the case of *Robbins* v. *Canadian Broadcasting Corporation*[50] introduced this delictual approach, although with little guidance as to the precise nature of the wrong. In that case, a television viewer wrote a letter of criticism to a C.B.C. producer. In retaliation, the host of the criticized programme, on the air, deliberately requested viewers to write or call the critic and provided the plaintiff's address and telephone number. The court held this act "constituted a grievous positive wrongful act against [the plaintiff] making the defendant corporation responsible for the damages flowing from such wrongful act,"[51] based on article 1053 C.C.L.C. Rather than specify the nature of the delict, Scott J. retreated unhelpfully: "There is no need to attempt any precise definition of this fault which defendant's servants committed."[52]

Although *Robbins* is not overly pithy nor do its facts parallel the scenarios contemplated in this paper[53], this case does aid in the determination of the proper legal basis underlying the right to one's style. By judicially recognizing this delict, *Robbins* provided the impetus for recent judicial elaboration in Quebec on the nature of this wrong, primarily in the context of photograph use. The right to privacy[54] and substitution[55] are two areas of such elaboration.

Generally, in order to prevail on the basis of delict, a celebrity would bear the burden of demonstrating fault in the defendant's use of his or her photograph as well as the resulting prejudice suffered[56].

48. See, e.g., *Paradis* c. *Marquis* (1977) R.L. 555 (C.P.).
49. See, e.g., *Bette Midler* v. *Ford Motor Company*, *supra*, note 4.
50. *Robbins* v. *Canadian Broadcasting Corporation*, (1958) C.S. 152.
51. *Id.*, p. 156.
52. *Id.*, p. 157.
53. In *Robbins*: the plaintiff was not a celebrity; the defendant did not gain from the use of the plaintiff's image; and it was not the photograph of the plaintiff thas was used, but rather his name and address.
54. Discussed *supra*, Section F. Some jurists, however, seem to suggest that delictual responsibility may exist for an invasion of privacy absent a subjective right to privacy. See, e.g., J.L. BAUDOUIN, *supra*, note 68.
55. Discussed *supra*, section 1.9.
56. Art. 1053, C.C.L.C.

1.5. Right of personality

Contemporary French law has tended towards characterizing the right to one's style as a right of personality[57]. This subset of extra-patrimonial rights[58] is made up of subjective rights, distinguishable from patrimonial rights in their non-susceptibility to pecuniary evaluation. Kayser defines that which he names the right to one's image in this context as:

> [...] un pouvoir que la jurisprudence consacre au profit des personnes, dans leur intérêt, en leur permettant de s'opposer à la publication de leur image... Au droit de la personnalité de la personne représentée, correspond pour [les autres] une obligation de ne pas publier l'image, ou plus exactement un devoir de ne pas faire de cette publication, une charge extrapatrimoniale.[59]

These rights are said to be "hors commerce" and inseparable from the person from whom they extend[60].

The consequences of being categorized as an extra-patrimonial right, according to one conception of such rights, are threefold. First, fault need not be demonstrated[61] by the celebrity plaintiff in order to obtain relief for interference with the right. Second, neither must prejudice suffered[62] be proved. Third, so classified, style would be inalienable, unseizable, imprescriptable and intransmissible upon death[63]. Logically, the death of the person puts an end to his personality rights as "le droit n'existe que *par rapport* à la personne physique de son titulaire."[64] It does not necessarily follow, however, that protection of his or her personality rights would be completely non-existent after death:

> Les membres de sa famille ont en effet le pouvoir de s'opposer à [la] réalisation et à [la] publication [de son image...] Ce pouvoir n'est pas transmis aux héritiers de la personne décédée, mais acquis à ce moment par son conjoint et ses proches

57. B. EDELMAN, *supra*, note 9; P. KAYSER, « Le droit dit à l'image » in *Mélanges en l'honneur de Paul Roubier*, vol. 2, Paris, Dalloz-Sirey, 1961, p. 73; R. NERSON, *supra*, note 10.
58. J.L. BAUDOUIN, *supra*, note 45, p. 27.
59. P. KAYSER, *supra*, note 57, p.81-82.
60. H., L. et J. MAZEAUD, *supra*, note 10, p. 948.
61. P. KAYSER, *supra*, note 57, p. 81; MOLINARI, *supra*, note 36, p. 104. Other jurists do not accept such a clear distinction between the consequences of characterizing an invasion as a delict and those flowing from a breach-of-right characterization. In their view, fault may be as relevant a criterion in the latter characterization as in the former. See the discussion on the intensity of the obligation to respect the privacy of others in H.P. GLENN, « Le droit au respect de la vie privée », *supra*, note 11, p. 892-894.
62. *Id.*; J. STOUFFLET, *supra*, note 9, par. 20. However, in order to recover for damages suffered, prejudice must be proved. In addition, if injuctive relief is sought, at a minimum, threat of damage must be demonstrated.
63. P. MOLINARI, *supra*, note 36, p. 103; H.L. et J. MAZEAUD, *supra*, note 10, p. 948; H.P. GLENN, « Le droit au respect de la vie privée », *supra*, note 11, p. 890.
64. P. KAYSER, *supra*, note 57, p. 83.

> parents. Ceux-ci agissent en leur nom personnel, à raison de l'atteinte portée à leurs sentiments pour le défunt.[65]

Thus, the close relatives of the celebrity may be able to sue, in a personal capacity, for moral damages caused by the publication of his or her photograph.

The characterization of the right to one's style as an extra-patrimonial right of personality is inappropriate in the context of the celebrity's public persona. The celebrity's external personality is a very important source of his or her commercial gain. The star's style does not lie outside commerce ; rather,

> [...] l'image est un moyen d'identification de la personne [...] Chez les acteurs, dont les traits constituent un élément de la personnalité professionnelle, il prend une ampleur considérable. Souvent d'ailleurs, c'est au prix d'un effort de création que l'artiste parvient à accuser l'originalité de sa physionomie pour en accroître l'efficacité comme source de notoriété et de succès. Nombreux sont les acteurs qui ont réussi à créer un type dont le pouvoir attractif se mesure au nombre des imitateurs. C'est une valeur qui est protégée par la reconnaissance, au profit du créateur, d'un véritable monopole d'exploitation et par l'attribution d'une indemnité réparatrice spéciale en cas de préjudice esthétique.[66]

Allowing no one to control the use of a celebrity's photograph after his or her death, furthermore, seems unjust[67]. Acceptance of this characterization of the right in the context of the celebrity would lead to the following result. If Ford Motor Company has used the photograph of Bette Midler, post-morterm, in its advertisement, then it would not have had to account to anyone for the resulting benefits received or expenses saved. The subject of the right, Ms. Midler, would no longer exist and it is unlikely that her close relatives would be able to prove that they suffered "atteinte portée à leurs sentiments pour le défunt" ; the association drawn between Ms. Midler and a particular automobile would not suggest such a compromise of her principles or reputation so as to personally prejudice her close relatives. Thus, although this categorization of the right to one's style may be appropriate vis à vis ordinary private persons, it is wholly unfitting in the cases of publicity exploitation of celebrities.

1.6. Right to privacy

Clearly the most accepted legal foundaton in Quebec doctrine for the right to personal style, when dealing with non-celebrities, is the right to

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65. *Id.*
66. J. STOUFFLET, *supra*, note 9, par. 26.
67. See discussion, *supra*, section 1.8.

privacy[68]. The French jurist Jean Pradel defined the general right to privacy as :

> Le pouvoir d'interdire à des tiers d'avoir accès à [la] vie personnelle afin d'en préserver l'anonymat [...] Le droit de passer inaperçu.[69]

Before the adoption of the *Charter of Human Rights and Freedoms*[70], the nature of the right to privacy was undecided. J.L. Baudouin considered invasion of privacy a delict[71] while H.P. Glenn predicted acceptance of the right as an extra-patrimonial right of personality[72]. The right to privacy was statutorily crystalized in 1977 in article 5 of the *Charter* and was thereby incorporated into the rights of personality. Using this human rights legislation to shield the right to one's style is advantageous for plaintiffs in its provision for exemplary damages[73].

In *Cohen*[74], the Superior Court accepted that article 5, together with article 4, includes the right to control the publication of one's photographed image. In that recent case the non-celebrity plaintiff, clad in a skimpy bikini, had been photographed. The defendant reproduced these photos on the packaging of its products without first obtaining the consent of the plaintiff for this specific use. In finding for the plaintiff, Bishop J. left no doubt as to the inclusion of control of photograph use, in the circumstances at bar, under the umbrella of the right to privacy :

> The right to [the] safeguard [of] one's dignity and to respect for one's private life must include the right to prevent photos of one's semi-naked body from being displayed to the public for commercial use without one's prior consent.[75]

An issue that is constantly raised in cases of the celebrity's right to style is the apparent contradiction in analyzing situations involving *public* persons acting within the sphere of their *public* lives under the rubric of *privacy* protection. Privacy is hardly the goal of a star. Most celebrities depend upon the diffusion of their photographed images in order to gain public recognition and popularity and the ensuing ability to command a higher price for their services[76].

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68. *Supra*, note 11 ; J.L. BAUDOUIN, « La responsabilité des dommages causés par les moyens d'information de masse », (1973) 8 *R.J.T.* 201.
69. J. PRADEL, « Les dispositions de la loi n° 70-643 du 17 juillet 1970 sur la protection de la vie privée » D. 1971.Chr.111 at 112.
70. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.
71. J.L. BAUDOUIN, *supra*, note 68, p. 207. See *supra*, section 1.4.
72. H.P. GLENN, « Civil Responsability—Right to Privacy in Quebec—Recent cases », *supra*, note 11, p. 301. See *supra*, section 1.5.
73. *Charter of Human Right and Freedoms*, *supra*, note 70, art. 49.
74. *Cohen* v. *Queenswear International Ltd*, *supra*, note 11.
75. *Id.*, p. 578.
76. R. LINDON, « La presse et la vie privée », J.C.P. 1965.I.1887, par. 5.

The civilian approach to this contradiction has been twofold. Some authorities view the public nature of the person and his or her activity as creating a presumption of consent to such privacy invasion[77]. Others view the area invaded when a celebrity's photograph is published as lying outside the celebrities' restricted sphere of privacy[78]. Either approach results in the denial of recovery to the celebrity.

The latter approach is clearly the more appropriate one. "Privacy" is a completely unfitting characterization for the right to one's style in the context of the celebrity engaged in advertising activities. The presumption of consent to privacy invasion in the case of public figures is an artificial technique aimed solely at resolving the semantic contradiction.

In the California Supreme Court case of *Lugosi*[79], four reasons were advanced[80] to demonstrate the inapplicability of the right to privacy in the context of the publicity exploitation cases. These reasons are equally relevant in the Quebec setting.

First, the unauthorized use of a celebrity's style for commercial purposes usually causes economic loss and not mental anguish. The "raison d'être" of the right to privacy, however, is to relieve the latter, not the former.

Second, "substantial linguistic acrobatics"[81] would be needed, in most cases, to argue offensive, and thereby damaging, use of the style, as usually the celebrity is represented in a flattering light. Obviously, it is in the user's interest to portray the celebrity positively in order to benefit from his or her reputation and thereby increase sales of the advertised product.

Third, the presumption of consent approach leads to the following conclusion : the more public the individual, the more the protection of his or her privacy is waived. At the same time, however, the value in the individual's identity often multiplies with increased public exposure. Denial of protection due to the prominence of the individual, therefore, would result in refusal of relief to those to whom the right is most valuable.

Finally, viewed as a right of privacy, whether on a delictual or an extra-patrimonial basis, control of one's style would not be assignable. This consequence would greatly reduce the value of the economic interest and so discourage the cultivation of public personalities.

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77. P. MOLINARI, *supra*, note 36, p. 101. See discussion, *supra*, in section 1.3.
78. R. LINDON, *supra*, note 76 ; J. PRADEL, *supra*, note 69, p. 112.
79. *Lugosi* v. *Universal Pictures*, *supra*, note 13.
80. *Id.*, p. 342.
81. *Id.*

The only possible application of the right to privacy to the celebrity's situation arises when the public figure has a long-standing conviction not to endorse commercial products of any kind. If a photograph is used to associate the celebrity depicted therein with a product, perhaps the celebrity could argue that his or her private decision to remain anonymous vis à vis commercial product endorsements has been invaded. Even if possible, however, this ground of protection is insufficient as it provides no relief for celebrities' styles generally. If style is to be protected, celebrities who welcome the opportunity to endorse products should not be excluded. Economic losses are suffered by the celebrity and benefits are gained by the advertiser, whether or not the star holds such a conviction. Policy considerations dictate against drawing this distinction[82].

The unsuitability of the right to privacy basis for relief in the context of a public person does not preclude recovery on some other basis. First, although an invasion of the right to one's style may coincide with an invasion of the right to privacy, the former does not always result in the latter[83]. This proposition is easier to digest when the two rights are viewed as independant of one another. The *Cohen* case[84] can be explained as an example of coincidence of invasion ; in addition to depriving the plaintiff of control of her photo for its own commercial purposes, the defendant exposed an element of the plaintiff's private life to the world in using a photo depicting the plaintiff in a semi-naked state. This decision must be contrasted with that in *Rebeiro* v. *Shawinigan Chemicals*[85]. In that case, the plaintiff was awarded damages as compensation for the unauthorized use of a photograph of him at his work. In the judgment, no mention of the right to privacy is made. This omission makes sense, as the plaintiff was not engaged in a private activity in the photo[86]. Second, the celebrity's image usually has commercial value. Subsidiary protection might avail[87] in the form of protection of a proprietary right[88].

Article 3 of Bill 125, *Civil Code of Quebec*, 1st Sess., 34th Leg. Que., 1990, categorizes the right to privacy as a personality right. A list of

82. See introduction for discussion of policy considerations.
83. H.L. et J. MAZEAUD, *supra*, note 10, p. 932 : « Le droit au respect de l'image ne se confond pas *toujours* avec le droit au respect de la vie privée. C'est un droit plus vaste par certains côtés. »
84. *Cohen* v. *Queenswear International Ltd*, *supra*, note 11.
85. *Rebeiro* v. *Shawinigan Chemicals*, (1973) C.S. 389.
86. P. MOLINARI, *supra*, note 36, p. 97. But see, « Civil Responsability — Right to Privacy in Quebec — Recent Cases », H.P. GLENN, *supra*, note 11, in which the author suggests that *Rebeiro* was decided on the basis of privacy.
87. H.P. GLENN, *supra*, note 11, p. 889.
88. See *supra*, section 1.7.

instances of privacy invasion is provided in article 36 of the Bill. The particular headings that involve the use of image are:

> 36. The following acts, in particular, may be considered as an invasion of the privacy of a person:
>
> [...]
>
> (3) Appropriating or using his image or voice while he is in private premises;
>
> [...]
>
> (5) Using his name, image, likeness or voice for a purpose other than the legitimate information of the public.

These proposed additions to the codified law of Quebec will not serve as protection of style in the publicity exploitation cases contemplated in this paper. Poorly constructed, sub-article (3) seems to limit protection to a person's image or voice, present in or emitted from a private place. The appropriation of a star's style for advertising purposes, however, as explained above, involves the use of publicly presented facets of the celebrity. Sub-article (5), moreover, although not similarly explicit with regard to a limitation to private situations, will probably result in the exclusion of celebrities from its scope. This latter listing, although articulated broadly, is nevertheless an example of privacy invasion. As such, the public nature of the celebrity's style will be considered either a deemed consent to the invasion or a reason to exclude these situations from the scope of privacy. Whether governed by the present law or by the proposed reformed law, the protection of style must find as its foundation some other legal basis.

1.7. Proprietary right

The professional success of a celebrity depends, to a great extent, on his or her popularity with the general public. This recognition is gained through the cultivation of the celebrity's public personality. The celebrity expends much intellectual and creative energy in achieving this recognition[89]. If successful, the market force of consumer demand will ensure a steady flow of opportunities for the celebrity: lectures, movies, shows and, of course, product endorsements. Prospective employers of the celebrity find themselves quite willing to pay for the use of facets of his or her style. In this way, there is commercial value in the style of the star:

> Il est plus que jamais impossible, à l'heure actuelle, de nier la valeur patrimoniale et professionnelle de l'image d'un individu, qui est d'ailleurs proportionnelle à sa notoriété publique.[90]

89. J. STOUFFLET, *supra*, note 9, par. 26.
90. J. RAVANAS, *supra*, note 15, p. 58.

In *Deschamps*[91], the celebrity's pecuniary worth was readily acknowledged and translated in terms of a right of property :

> [The] likenesses of petitioners involve proprietary rights which they are free to exploit commercially or to refrain from doing so, and equally free to decide the conditions under which such exploitation shall take place.[92]

Rothman J. continued this classification of the right to one's style by applying the proprietary concept of opposability :

> Now, if the right of commercial exploitation of a film star's name and image is a proprietary right, a real right in property which is capable of yielding a financial return, then it cannot be appropriated or used by anyone without the consent of its owner.[93]

Rothman J. found that the use of style, being a "real right in property", is governed by articles 406-408 C.C.L.C.[94].

If correct, the application of the concept of property to the right to style carries with it several consequences which facilitate recovery for a celebrity from an unjustified appropriator. First, the defendant's fault in the appropriation need not be demonstrated[95]. This consequence is doubly advantageous as it expands the scope of image appropriation cases to relieve petitioners, such as Mr. Deschamps and Ms. Michel, who might not have succeeded under a civil responsibility regime[96], while easing the burden of proof on petitioners generally[97].

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91. *Deschamps* v. *Renault Canada*, *supra*, note 5.
92. *Id.*, p. 940.
93. *Id.*, p. 940-941.
94. *Id.*
95. P. MOLINARI, *supra*, note 36, p. 104. Some jurists would argue, however, that despite the subjectivization of style as a right, fault remains relevant. See, *supra*, note 61.
96. In *Deschamps*, the court did not find that Renault Canada had committed a fault in its actions. The court held, nevertheless, in favour of the petitioners.
97. There is some doctrinal policy debate as to whether it is appropriate to require plaintiffs to prove fault in theses cases. Molinari stresses the importance of relieving the plaintiff of this burden :

> Il importe néanmoins de reconnaître à l'image un droit et aussi éviter un système de protection fondé sur la réparation du préjudice moral afin de ne pas soumettre celui qui a subi un outrage à la preuve d'une faute ou à celle du préjudice. (*Supra*, note 36, p. 104.)

Found on the other side of the debate are those who favour the civil responsability basis of liability and its ensuing requirement of demonstating fault. In the cases of the use of celebrity style, the defendants envisoned are advertisers attempting to profit commercially by associating their product with a public personality. The fact that these advertisers do not commit a wrong in so doing, or that one cannot be proven, should not work to the advertisers' benefit in depriving a celebrity who invested in his or her style. By excluding cases where fault is not proved, the defendant would be enriched, at the expense of the celebrity, without juridical cause. As J. Stoufflet argued, the celebrity should have a « monopole d'utilisation professionnelle de son image. » (*Supra*, note 9, par. 28.)

Second, the proper intention of the defendant may be irrelevant[98]. In *Deschamps*, defendant Renault Canada "acted in [nothing] other than good faith throughout the period of its involvement."[99] The petitioners' action, nevertheless, was allowed, as

> [...] when viewed in the context of a right in property or proprietary right [...] it matters little whether the appropriation is innocent or otherwise ; the proprietor of such an asset or right in either case is entitled to say 'Stop, I don't want you to use my property.'[100]

This consequence provides benefits similar to those of the first: more petitions possible and a relaxed burden of proof.

Third, relief for interference with a property right does not require proof of prejudice[101].

Finally, an interesting consequence of the characterization of the right to one's style as a property right is the set of patrimonial effects. These are the right's exposure to seizure and transmissibility upon death[102].

The classification of the celebrity's right to his or her style as a real right of property presents three conceptual difficulties. First, certain authors reject this categorization because of the Christian and Roman jurisconsult tendencies of viewing the ownership and alienation of the inherent characteristics of man as contrary to public order and good morals[103]. This obstacle to the classification should be dismissed in the case of the celebrity. Nerson's difficulty with such ownership lies in the coincidence of the holder of the right and the object of the right:

> Notre corps c'est nous-mêmes et il est contradictoire de prétendre que l'objet du droit de propriété sera, non une chose extérieure, mais, le sujet même du droit, que l'ensemble étant un, le propriétaire sera précisément la chose possédée.[104]

In the case of a celebrity, however, public style is not necessarily the inherent essence of that person. Rather, it is a created and often calculated public guise designed for mass appeal. In this way, the celebrity's public style is not one and the same with the celebrity's private personality. It is, rather, an intellectual creation, which, like a trademark, is susceptible to

98. P. MOLINARI, *supra*, note 36, p. 104.
99. *Deschamps* v. *Renault Canada*, *supra*, note 5, p. 938.
100. *Id.*, p. 941.
101. P. MOLINARI, *supra*, note 36, p. 104.
102. As noted by B. EDELMAN, *supra*, note 9, p. 119: « Il n'est pas inutile de noter que les continuateurs de la personne du défunt possèdent un droit à l'image de leur auteur, qui leur est transmis à l'égal de tout autre bien. » For a discussion of the advantages of transmissibility of the right, see *supra*, section 1.8.
103. See, in particular, R. NERSON, *supra*, note 10, p. 141-142.
104. *Id.*

ownership. Many authors have rejected Nerson's difficulty with the proprietary nature of the right more generally, as well[105].

Second, one author recognized the conceptual difficulty of conflicting rights of property. Professor Patrick Molinari[106] asks whether, if classified as a right of property, the right to one's style trumps another property right, that is, the right in the photograph itself. If not, Molinari explained,

> [...] la personne représentée est propriétaire de son image et l'objet matériel qui la représente est propriété de celui qui la possède mais ce dernier, s'il la possède sans consentement, aura, malgré son titre à objet matériel, violé le droit du premier à la propriété de son image.[107]

Ranking the proprietary right to style as superior to that of the material photograph is a logical resolution to the potential conflict between these two rights. The latter right depends on the former for its value ; in the absence of the commercial value of the celebrity's developed public persona, the photograph is worth no more than the paper upon which it is printed. To benefit from the value of another's public style, portrayed in the photo, the holder of the photograph should be required to obtain prior authorization.

The final conceptual difficulty lies in the traditional civil law discomfort with ownership of incorporeal things. Marler maintains that the notion of ownership is only applicable to corporeal items[108] while the Mazeaud Brothers contend that a real right can bear solely on tangible things[109]. According to these authoritative sources, therefore, Rothman J.'s characterization could only apply to tangible objects. As the performers in *Deschamps* did not own the photographs themselves, these could not have been the corporeal objects of the right. One may find the physical makeup of each of the performers to be tangible. Rothman J. took pains, however, to include the names of the performers, in addition to their likenesses, as objects of the right[110]. Clearly, a name is incorporeal. Since there is no corporeal object upon which the found right could bear, Rothman J. made the common error[111] of designating as "owner" the holder of an incorporeal item.

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105. B. EDELMAN, *supra*, note 9, p. 119-120 (style viewed as a dismemberment of property) ; P. KAYSER, *supra*, note 57, p. 82-93 ; J. STOUFFLET, *supra*, note 9, par. 25 and 31.
106. P. MOLARNI, *supra*, note 36, p. 104.
107. *Id.*
108. G. MARLER, *The Law of Real Property*, Toronto, Carswell, 1932, p. 31.
109. H.L. et J. MAZENAUD, note 10, t. 1, vol. 1, p. 231.
110. E.g., *Deschamps* v. *Renault Canada*, *supra*, note 5, p. 940.
111. The same mistake is often made in the context of a business' clientele. Often the businessman is said to "own" his clientele, but since goodwill is intangible, this is an inexact expression : H.L. et J. MAZEAUD, *supra*, note 10, t. 1, vol. 1, p. 231.

The reasoning of Rothman J. more correctly leads to the identification of the right to style as an intellectual right. Intellectual rights are patrimonial rights whose objects are abstract things[112], products of intelligence and human creation. Most intellectual "property", as it is normally, although perhaps misleadingly, labelled[113], falls under federal legislative jurisdiction[114] and is governed by special statutory regimes. Quebec civil law, nevertheless, continues to have a residuary role in the regulation of intellectual rights[115].

To label style a real right would be inexact. The notion of intellectual rights is a more recent development on the traditional classification of rights as real or personal. Intellectual rights are not easily situated in this civil code dichotomy. On one side, real rights were conceived primarily to deal with corporeal things. On the other, intellectual rights cannot be personal rights as they are not exercised against a debtor. Rather, "ils consistent plutôt en un monopole d'exploitation d'une pensée, d'une œuvre intellectuelle, d'un nom, d'une clientlèle."[116] In this way, intellectual rights resemble real rights: both provide for exclusivity of exploitation[117]. Thus, the right to style is best viewed as an intellectual "property" right, bringing with it at least the first three proprietary consequences listed above, as these flow naturally from the recognition of exclusivity of exploitation. The importation of the fourth consequence, patrimonial effects, is not as obviously entailed. This consequence should be recognized, however, due to the pecuniary value of the intellectual right, as discussed below[118]. The issue that persists is the determination of exactly what is entailed by "exclusivity of exploitation". I suggest that this expression refers to the holder's right to publicity, examined below.

1.8. The right to publicity

In addition to the statutorily-protected right to privacy, courts in American jurisdictions have developed alternative style protection, the "right to publicity," in the course of interpreting New York law and

112. J.L. BAUDOUIN, *supra*, note 45, at 29; S. GINOSSAR, *Droit réel, propriété et créance, élaboration d'un système rationnel des droits partrimoniaux*, Paris, R. Pichon et R. Durand-Auzias, 1960, p. 187.
113. A. WEILL, F. TERRE and P. SIMLER, *Droit civil: Les biens*, 3e éd., Paris, Dalloz, 1985, p. 39.
114. *Canada Act 1982* (U.K.), 1982, c.11 s.91 (22) and (23).
115. *Id.*, s. 92 (13) (under the head of "Property and Civil Rights in the Province").
116. A. WEILL, F. TERRE et P. SIMLER, *supra*, note 113.
117. *Id.*; H.L. et J. MAZEAUD, *supra*, note 10, t. 1, vol. 1, p. 231.
118. *Supra*, section 1.8.

California law. *Haelan*[119] provides the first articulation of this right and its underlying rationale:

> It is common knowledge that many prominent persons (especially actors and [base]ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their picture.[120]

Today, more than ever, a valuable by-product of one's prominence in society is one's advertising potential. In fact, for some would-be celebrities, in particular in the field of sports, the motivating force driving them towards excellence in their field is the possibility of acquiring product promotion contracts. From the advertiser's perspective, this means of product promotion is very effective, as it allows for the "fusion of the celebrity's identity with the product"[121] and the resulting benefit to the advertiser of the star's goodwill:

> The sale of one's persona in connection with the promotion of commercial products has... become *big business*.[122] (emphasis added)

Acquiring goodwill in one's reputation involves a serious investment of money, time and creative energy:

> Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial protection.[123]

If protection of style was limited to invasion of privacy relief, an advertiser would be able to appropriate, without authorization, the benefits of the celebrity's goodwill[124]. At the same time, this appropriation would, first, deprive the celebrity of the payoff due to him from his or her investment. Second, it would disrupt the celebrity's control over the use of his or her style. Third, it might substantially alter his or her style by association with and suggested approval of certain products. Finally, it may arrest his or her original vocation, the celebrity's profession, due to over-exposure. This scenario seemed unjust to American courts and so the "right to publicity" was born.

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119. *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.*, *supra*, note 113.
120. *Id.*, p. 868.
121. *Lugosi* v. *Universal Pictures*, *supra*, note 13, p. 336.
122. *Id.*
123. *Id.*
124. See *supra*, section 1.6., with respect to the absence of protection for celebrities on the basis of privacy.

Although the nature of this right was unclear at first[125], it became accepted that the right of publicity is a property right[126]. In *Lugosi* the California Supreme Court held that the right was assignable and transmissible upon death and the court borrowed from copyright law to hold that the right would be recognized for the subject's lifetime plus 50 years[127]. This span was adopted in order to provide "incentive for the investment of resources in one's profession"[128] by removing the risk of advertisers receiving

> [...] a windfall in the form of freedom to use with impunity the name or likeness of a deceased celebrity who may have worked his or her entire life to attain celebrity status.[129]

On the other hand, perpetual protection was denied for three reasons. First, protection by *immediate* family members was viewed as incentive enough. Second, the celebrity's need to control the commercial use of his or her style was said to cease with his or her death, as such control could no longer further his or her professional activities. Finally, with time, the celebrity identity was said to be "woven into the fabric of history."[130] Eventually, the court said, facets of the star's style become part of the public domain and should not be subject to the perpetual control of the descendants of the celebrity.

This American foundation for the celebrity's right to his or her style provides perfect protection in the scenarios envisioned in this paper. The question then becomes : does the right of publicity fit into the traditions of civil law, and if so, how ?

The only hints of such a right in civil law are found in French lawyer Bernard Edelman's article, « Liberté et création dans la propriété littéraire et artistique. Esquisse d'une théorie du sujet. »[131] In his search for the basis of the right to one's image, Edelman recharacterized the object of the right :

> Le fondement de cette jurisprudence révèle la nature de la patrimonialisation de l'homme [...] En effet, ce que le droit protège, ce n'est point l'image — ou la personnalité — *en tant que telle*, c'est l'utilisation qu'on en peut faire sans le

125. See *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.*, *supra*, note 13, p. 868 : "Whether it be labelled a 'property' right is immaterial ; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."
126. See P. FELCHER and E. RUBIN, « Privacy, Publicity, and the Portrayal of Real People by the Media », (1979) 88 *Yale L.J.* 1577, p. 1593.
127. *Lugosi* v. *Universal Pictures*, *supra*, note 13, p. 342-345.
128. *Id.*, p. 344.
129. *Id.*
130. *Id.*, p. 344.
131. B. EDELMAN, *supra*, note 9.

> consentement de son auteur. Autrement dit, il est admis que l'homme peut 'vendre son âme' sinon au diable, du moins au marchand — ce qui ne présente aucun caractère goethéen, loin s'en faut — *et ce que protège le droit c'est l'utilisation que l'auteur a voulu lui donner* [...] *L'homme est juge de la publicité de lui même* (nemo plus juris [...] pourrait-on dire), et si on lui prend plus qu'il n'a voulu donner, il lui est dû réparation, non point parce que son 'intimité' a été violée, mais bien plutôt parce qu'elle a été utilisée indûment, c'est-à-dire sans son consentement.[132]

Edelman's approach is interesting in that it points to the real interest that a celebrity wishes to shield, that is, the use of his or her style for publicity purposes. It is incorrect, however, to characterize the object of the right in civil law as the *use* of style itself. Rather, the protection of the right to publicity fits into civil law as recognition of the exclusivity of exploitation and the resulting benefits of the intellectual proprietary right held by the celebrity. In this way, the right to publicity *is* protected in Quebec, not as a property right in itself, as is the case in the United States, but rather, by way of protection of the intellectual "property" holder's rights of *usus* and *fructus*.

As a pecuniarily-valuable intellectual proprietary right, the celebrity's right to style should be transmissible perpetually, as are real rights in the civil law. It is true that a celebrity may become part of history. By recognizing style as a perpetual proprietary right, however, the public would not be denied access to the general use of the long-deceased celebrity's style. Rather, only non-authorized publicity exploiters would be precluded from such use. This result can be explained by keeping sight of the basis for the patrimonialization of this right, that is, the commercial value of the style. According to the reasoning in *Lugosi*[133], the use of William Shakespeare's photograph in a commercial, for example, would be less worthy of protection today than it was during the late playwright's life. The historical value of his distinctive style, however, should not justify its commercial exploitation. On the other hand, no one is precluded from using Shakespeare's photograph for purposes that do not involve profitting commercially from his peculiar style. The only problem that arises with perpetual transmissibility of the right to one's style is a logistical one : how does the advertiser determine the appropriate party to contact in order to obtain the necessary authorization for the commercial use of the ancestor's style ? This logistical problem does not warrant denial of the transmissibility of the right.

132. *Id.*, p. 121. (Emphasis added.)

133. *Lugosi* v. *Universal Pictures*, *supra*, note 13.

1.9. Substitution/passing off

In the common law jurisdictions of Canada, one cause of action used in cases of publicity exploitation of celebrity photographs is "passing off". This tort was originally relied upon to preclude manufacturers from representing their goods as those of another in order to capitalize on the goodwill acquired by the other manufacturer and thereby increase their own products' sales. The cases of *Krouse*[134] and *Athans*[135] are two examples of the acceptance by courts of this basis for recovery[136].

The application of the traditional "passing off" cause of action to right to style cases is not a perfect one. In the style cases, it is nonsensical to say that the defendants are representing their goods as being the celebrity's style[137]. Rather, they are misrepresenting their goods as being endorsed by the celebrity. At trial in *Krouse*, this conceptual misfit was brushed aside :

> I do not see any difference between A passing off B's endorsement as being C's and A either fabricating C's endorsement or using C's picture without permission. In either situation, C suffers the very injury which passing off is intended to remedy.[138]

On appeal to the Ontario Court of Appeal the applicability of "passing off" to style cases was not challenged by the parties.

The only way to reconcile this incongruence is to characterize the likely confusion as being between the celebrity's and the defendant's respective abilities to promote. So characterized, the analysis enters the realm of the celebrity's right to publicity[139].

Broadly speaking, the action in "passing off" is founded upon unjust enrichment[140]. In order to succeed, a plaintiff must first demonstrate that the photograph used identifies the celebrity. In other words, the celebrity's features depicted in the photo must be distinctive of that celebrity. In *Krouse*, the defendant Chrysler Canada distributed a spotter[141] on which was printed a photo of the plaintiff football star. Although the action photo did not clearly show the face of Krouse, the fact that he was photographed

134. *Krouse* v. *Chrysler Canada Ltd.*, *supra*, note 12.
135. *Athans* v. *Canadian Adventures Clamp Ltd*, *supra*, note 12.
136. Although in both cases the celebrity plaintiffs failed on this basis on the facts.
137. Although this may be the correct articulation in the case of look-alikes and sound-alikes. See *supra*, section 2.4.
138. *Krouse* v. *Chrysler Canada Ltd*, (1972) 2 O.R. (2d) 133, p. 152.
139. Canvassed, *supra*, section 1.8.
140. *Krouse* v. *Chrysler Canada Ltd*, *supra*, note 138, p. 134.
141. *Id.*, p. 136-137. A spotter is a device which identifies the line-up of the teams playing in football games.

in his number 14 sweater led the Ontario High Court to conclude that the identification requirement was fulfilled[142].

Second, the celebrity must prove that the defendant's use of the photo will likely cause the relevant public to " 'confuse the profession, business or goods of the plaintiff with the profession, business or goods of the defendant.' "[143] In *Athans*[144], the photograph of a celebrity water-skier was used by the defendant summer camp operator on the cover of a promotional brochure. The plaintiff's inability to meet the condition of likelihood of confusion led to failure in his action:

> The decisive point, however, is that, as I hold, it is improbable that the relevant segments of the public who would read the advertisement and the brochure would associate the business of C.A.C. with the athlete, George Athans.[145]

The brochure was designed to attract parents, unknowledgeable in the sport of waterskiing and unable to identify the drawing with Athans, who wished to send their children to a summer camp; the relevant public, parents, would not likely have been confused.

The final criterion in a "passing off" action is a field of activity common to both the plaintiff and the defendant. In *Krouse*[146], a football player and a car manufacturer were held not to be engaged in a common field of activity. There seems to have been a relaxation of this requirement recently, however, as is demonstrated by the *Athans* case:

> The problem for the plaintiff lies not with the 'common field' element because the plaintiff and the defendant are both to a greater or lesser degree engaged in the business of exploiting the sport of water-skiing commercially.[147]

It seems clear that Henry J. was influenced in this regard by the extensive personal commercial promotion undertaken by Mr. Athans.

If accepted as applicable to the style cases, the "passing off" basis could be used for recovery in Quebec. "Passing off", a subset of "la concurrence déloyale", was first held to be an available civil law delictual cause of action in *Republique Française* v. *Hyman*[148]. Nadeau recognized the existence of this delict, as well, calling it "la substitution de produits":

> [Elle] consiste à offrir en vente au public et a lui vendre des marchandises en lui faisant croire qu'elles sont manufacturées par un autre, soit par l'usage d'étiquet-

142. *Id.*, p. 145.
143. *Id.*, p. 150, quoting *McCulloch* v. *Lewis A. May (Produce Distributors), Ltd*, (1947) 2 All E.R. 845.
144. *Athans* v. *Canadian Adventures Camps Ltd*, *supra*, note 12.
145. *Id.*, p. 433.
146. *Krouse* v. *Chrysler Canada Ltd*, *supra*, note 12, p. 236.
147. *Athans* v. *Canadian Adventures Camps Ltd*, *supra*, note 12, p. 433.
148. *République Française* c. *Hyman*, (1972) 31 B.R. 22.

> tes semblables, même s'il peut y avoir des points de dissemblance entre les deux, soit par l'usage d'un nom commercial semblable, soit par contrefaçon, bref par tous moyens frauduleux ou dolosifs ou même encore par toutes représentations fausses, de nature à nuire.[149]

In *Deschamps*[150], Rothman J. indicated his acceptance of the Ontario High Court's reasoning in *Krouse*[151] with respect to "passing off" and cryptically imported this reasoning into Quebec law : "Moreover, the action for 'passing-off' has long been recognized in Quebec."[152]

In a more recent case, the Quebec Superior Court hinted in its reasoning that it would accept the substitution foundation for the right to one's style. In *Thériault* c. *Association-montréalaise d'action récréative et culturelle*[153], two comedians, Ding and Dong, requested an interlocutory injunction to preclude the respondent from broadcasting a radio advertisement in which the petitioners' characteristic expressions were used without authorization. Although the injunction was not granted, the Court's analysis included consideration of: the distinctiveness of these expressions to the petitioners[154]; the common nature of the parties' fields of activity in terms of similarity of audience[155]; and the likelihood of confusion, that is, the likelihood of the public's association of the expressions, as used by the respondent, with the petitioners[156].

If this basis is considered appropriate in the photograph cases in other jurisdictions, then there is no reason why the right to one's style in Quebec law could not be so founded. In fact, as seen above, substitution has already been applied, although not in so many words. This basis, however, is most fitting in the context of look-alikes and sound-alikes[157].

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149. A. NADEAU, *supra*, note 18, p. 224.
150. *Deschamps* v. *Renault Canada*, *supra*, note 5, p. 942-943.
151. *Krouse* v. *Chrysler Canada Ltd*, *supra*, note 12.
152. *Deschamps* v. *Renault Canada*, *supra*, note 5, p. 943.
153. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), (1984) C.S. 946. For a more expansive discussion of this case, see *supra*, section 2.3.
154. *Id.*, p. 953 : « ... ces expressions ont-elles acquis un sens secondaire lorsque prononcées et utilisées par les requérants point que leur utilisation par d'autres *suivant le style des requérants* risque de causer de la confusion dans le public et peut laisser croire qu'il y a association entre les requérants et ceux qui utilisent ainsi ces expressions ? » (emphasis added.)
155. *Id.*, p. 949 : « [Les requérants] prétendent que le public auquel s'adresse cette publicité est identique à celui auquel eux-mêmes s'adressent. »
156. *Supra*, note 154.
157. See section 2.4.

1.10. Conclusion

In summary, the right to style in the context of the celebrity is best protected in Quebec as an intellectual "property" right, with control of the right to publicity resulting from that right. Defamation and contract are possible foundations but both are too narrow. Courts are reluctant to rely on unjust enrichment when other remedies are available. The right to personality, whether inclusive of or independent of the right to privacy, is an inappropriate basis. The right to personality basis seems to ignore the pecuniary value of the celebrity's style, while the right to privacy basis seems to have no application to public individuals engaged in public activities. Finally, substitution does not fit the photograph scenario easily, but may be applicable in the case of look-alikes and sound-alikes.

2. The scope of style: extensions of photograph publication control to other expressions of style

2.1. Generally

> Celebrities are differentiated mainly by trivia of personality. To be known for your personality actually proves you a celebrity [...] [Celebrities] succeed by skillfully distinguishing themselves from others essentially like them. They do this by *minutiae of grimace, gesture, language and voice*. We identify Jimmy ("Schnozzola") Durante by his nose, Bob Hope by his fixed smile, Jack Benny by his stinginess, Jack Paar by his rudeness, Jackie Gleason by his waddle, Imogene Coca by her bangs.
>
> Daniel J. Boorstin
> in *The Image*, 1964[158]

The very limited body of Quebec right-to-style jurisprudence involving photograph use seems rich and varied when compared to the near nonexistence of cases involving other aspects of a celebrity's style. As Boorstin indicated in the somewhat dated examples above, identifying aspects of a celebrity's personality include voice, characteristic use of language, mannerisms, attitude and general disposition in addition to photographed physical appearance. An advertiser's plan to appropriate a star's goodwill would not be hindered if the right to style was limited to the protection of photographs. Simply by using another of the celebrity's distinguishing characteristics in its advertisement, a promoting company

158. D.J. BOORSTIN, *supra*, note 1, p. 65.

could replicate any association that may have been drawn by the public between a photograph of the public personality and its product.

Clearly, policy considerations identical to those underlying photograph control warrant protection for these other facets of style. The development of a distinctive voice, typical mannerisms and usual expressions, all catering to the public's tastes, requires investments of time, money and creative input. The investments' dividends are no less deserved by the celebrity in the cases of these caracteristics than in the case of photographs merely because the members of the former group are generally thought to be less obvious indicators of identity. If elements of a person's style have pecuniary value in that they can captivate the attention of and elicit a desired response from the consuming public, then they should be protected by law, regardless of type.

The absence of judicial elaboration on the right to style beyond photograph cases may be attributable to either of two factors. First, such disputes may just not arise. If this is the proper explanation, then it must be realized that this lack of controversy cannot be attributed to the scarcity of such activity on the part of advertisers. One need only look to the precedents of our geographical and cultural neighbours, common law Canada and the United States, to witness the prevalence of celebrity style appropriate in advertising. Thus, the absence of such litigation can only be due to plaintiffs' ignorance of their rights.

A more likely cause of this jurisprudential lacuna, however, may be the terminological confusion surrounding the word "image", used in designating the right. As already canvassed above[159], the French usage of "image" conveys the notion of physical depiction of an object. In English, on the other hand, this word communicates a more comprehensive idea: the concept of a person held by the public. This discrepancy has lead to ambiguity in jurisprudential and doctrinal analysis of the right. Professor Molinari limits the ways "l'image" can be represented to photographs, caricatures and paintings[160]. However in *Deschamps*[161], a judgment written in English, "likeness" was listed as an object of the right, in addition to "photograph", suggesting a possible broader scope for "image". The judicial reluctance to acknowledge other aspects of a person's style as protected may result, in this way, from an unwarranted adherence to the more limited French definition. When analyzed in terms of its appropriate legal foundation, an intellectual right, it becomes clear that the right to style

159. See introduction.

160. P. MOLINARI, *supra*, note 36, p. 99.

161. *Deschamps* v. *Renault Canada*, *supra*, note 5.

shields a broader array of emanations of one's style than that suggested by "l'image". I will demonstrate, in this part, that the appropriation of voice or characteristic sayings is as worthy of condemnation as the appropriation of photographs.

Once accepted that the reproduction of other aspects of a person's style may be actionable, the issue of whether near reproductions of style are also actionable arises. The case envisioned are those involving celebrity look-alikes and sound-alikes. *Midler*[162] exemplifies the latter scenario. The advertisement in that case did not feature Ms. Midler's voice; it featured, rather, that of another singer who distilled the distinctive elements of Ms. Midler's singing and replicated them as closely as possible. These situations will be explored and analyzed both as instances of intellectual right appropriation and as instances of substitution, i.e., unfair competition.

2.2. Voice

In France voice is characterized as a right of personality, distinct from image:

> La jurisprudence décide que la voix est un attribut de la personnalité, ce qui donne à l'individu le droit de s'opposer à son imitation lorsque celle-ci, *surtout utilisée à fins de publicité commerciale*, créerait une confusion ou tout autre préjudice.[163]

The acceptance of this extension of extra-patrimonial rights is eased in jurisprudence and doctrine by drawing an analogy to visual appearance; voice, a less tangible personal attribute, is redesignated "l'image sonore."[164]

This parallel between a person's facial and bodily construction and his or her voice is properly drawn by French jurists. Voice can be characterized by the pitch and intensity of the sounds emitted, as well as by their frequency and syllabic rhythm. Often people are as immediately identifiable by their utterances as they are by their physical appearance. Some authors have gone so far so as to note that this oral personal stamp " 'est aussi caractéristique que ses empreintes digitales.' "[165]

Although correct in its analogy of voice to physical appearance, the French approach should not be followed, when dealing with celebrities, in its ultimate classification of voice as an extra-patrimonial right of person-

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162. *Bette Midler* v. *Ford Motor Company*, *supra*, note 4.
163. H.L. et J. MAZEAUD, *supra*, note 10, p. 933 (Emphasis added.)
164. *Dames Dimitriadou et Calagerpoulos* c. *Radio France*, Trib. gr. inst. Paris, 19 mai 1982, D.1983.147; J.C.P. 1978,II.19002, par. 1, note D. BÉCOURT.
165. Quoted in D. BÉCOURT, *id.*, par. 3.

ality. The susceptibility of a celebrity's voice to pecuniary evaluation suggests that this categorization is unfitting.

Made up of distinguishing elements, as is visual appearance, voice is a personal trait which a celebrity can develop to satisfy public tastes and thereby increase his or her popularity :

> L'identification renvoie également aux aspects d'ordre *subjectif* inhérents cette fois à la *personnalité* À plus forte raison lorsque la voix représente l'instrument de travaille [e.g.] d'un comédien réputé, au débit singulier et aux inflexions aisément reconnaissables, qui ont contribué à sa notoriété auprès du grand public.[166]

Examples of identifiable voices abound. Bette Midler trained her singing voice to the point of popular appreciation and identification. Comedians Emo Phillips and Bobcat Goldthwait each cultivated a public personality, identifiable, *inter alia*, by their respective stage voices : the former speaks in a whining, childish manner while the latter gasps his jokes in a frightened, wheezing way.

Once developed, the voice can be an important source of a star's commercial gain, as can his or her physical appearance. Audiences willingly pay to hear comedians deliver witticisms, actors interpret dialogue and vocalists sing, each with his or her trademark style. Advertisers may be willing to compensate celebrities for the use of their voices in radio and television advertisements. The association between celebrity and product, evident in the photograph cases, can likewise be thrust upon the consuming public, thereby enabling the product to benefit from the celebrity's goodwill.

Having a commercial value, the star's voice should be categorized as a subset of the intellectual right to style. The object of this right, in the case of voice, is not the material audio recording itself, nor the particular words spoken[167] ; nor is the object the human vocal cords, as the star's creative energy is exerted to develop the style of expression and not to alter the physical voice box itself. The object of the right is, rather, the incorporeal pattern of oral expression adopted by a particular individual. As in the case of photographs, granting precedence to this intellectual right over the corporeal property interest held in the tape is not problematic. A recording of Bette Midler's singing derives the bulk of its commercial value from Ms. Midler's investment in the style of her singing. Limiting the employment of the tape to the uses authorized by Ms. Midler merely impedes the tape owner's acquisition of an unwarranted windfall while preventing any impoverishment of Ms. Midler.

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166. *Id.*, par. 3.

167. Typical expressions as an element of style will be canvassed *supra*, section 2.3.

Extending the right to style from visual appearance to oral expression does not require a large conceptual leap. Both are instruments of the expression of style ; both may contain significant commercial value. Difficulties arise, however, when the extension of the right is pressed further.

2.3. Typical expressions

An interesting attempt at widening the right to style was undertaken in *Thériault*[168]. The petitioners in that case were Ding and Dong, two well-known Montreal comedians. They sought an interlocutory injunction to stop the broadcast, by the respondent, of a radio advertisement for La Ronde, a Montreal amusement park. As in *Midler*[169], the advertising agency hired by the respondent approached the petitioners, requesting their participation in the commercial. Ding and Dong, however, refused this offer. Unwilling to abandon its publicity brainstorm, the agency produced the ad employing other performers and a script which included Ding and Dong's typical expressions, "Est bonne ! Est bonne ! Est bonne !" and "Est effrayante". The court reviewed testimonial and survey evidence and found that these phrases

> [...] aient été développées, popularisées, lors de spectacles présentés par les requérants, au point que ceux qui les ont vus associent ces expressions à la personnalité des requérants.[170]

Despite this finding, however, the court refused to grant the injunction. It doubted, on the particular facts of the case, that the rights invoked by the petitioners had been invaded and found the balance of conveniences to weigh in favour of the respondent[171].

The utility of this case in terms of the development of the right to style depends upon the characterization of this right adopted by the court. The decision typifies, unfortunately, the category-overlap confusion encountered in Part I of this paper. The court asked first, "les requérants ont-ils des droits de *propriété* reconnus par la loi à l'égard de ces expressions ?"[172] Desjardins J. proceeded to recognize "en droit civil ce droit qui n'est qu'une des nombreuses facettes du droit à l'étanchéité et à la protection de la *personnalité*."[173] The court finally settled on a "passing off" analysis but

168. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153.
169. *Bette Midler* v. *Ford Motor Company*, *supra*, note 4.
170. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153, p. 953.
171. *Id.*, p. 957.
172. *Id.*, p. 951.
173. *Id.*, p. 951-952.

erroneously labelled this approach misappraprіation of personality, "un *délit* reconnu parle *common law* dans *Krouse* v. *Chrysler Canada Ltd.*"[174] (all emphases added). Further confusing the designation of the appropriate nature of the right, the petitioners employed innovative terminology in arguing that the right invaded was one "de l'entertainer."[175]

The respondent's utilization of the phrases in question constitutes an invasion of Ding and Dong's intellectual rights to style just as would have the use of either photos depicting them or recordings of their voices.

At first sight, control of typical expressions does not seem as obviously worthy of protection as does physical appearance or voice. Three reasons underlie this misleading appearance. First, one may instinctively, but erroneously, assume that the verbal expression of ideas is already protected by federal copyright laws. The *Copyright Act*[176] merely accords protection to the *material* representations of original ideas : written words, recorded sounds and photographed pictures[177]. Although particular typical expressions may convey novel ideas, federal intellectual property law does not protect characteristic phrases until they are embodied in some sort of physical representation.

Second, as intangible as visual appearance and voice might seem, a person's usual method of juxtaposing certain words seems that much more abstract. The traditional civilian aversion to protection of any but corporeal objects may account for the attitude that shielding typical expressions exceeds the limits that will be tolerated. This approach, however, is outdated in today's world in which much wealth is found in incorporeal corporate rights. In modern times there is no justification for denying the value of something, and consequently refusing to protect it, merely because it cannot be seen or touched.

Finally, perhaps the notion of protection of typical expressions causes discomfort when viewed as the granting of a monopoly over the use of words in popular language. Desjardins J. rejected the availability of this possibility : "Pouvoir s'approprier un usage exclusif de ces expressions est contraire à la jurisprudence."[178] This formulation of the right's power,

174. *Id.*, p. 952. At trial in *Krouse* v. *Chrysler Canada Ltd*, *suppra*, note 12, two separate bases for the right were held to be available. One was the tort of "passing off", i.e., a misrepresentation of the defendant's goods as those of the plaintiff (p. 152) while the other was misappropriation of personality, the property right of a person to the elements of his or her identity *(id.)*.

175. *Id.*, p. 951.

176. *Copyright Act*, R.S.C. (1985), c. C-41.

177. *Id.*, s.5, as read with s.2.

178. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153, p. 953.

however, is incorrect. Just as the worth of visual appearance and voice is not derived from the photo and the recording, respectively, the value of typical expressions does not arise from the words themselves. The words, the photo and the recording are merely the instruments by which the conveyance of the celebrity's appearance, voice and expressions is facilitated. The former group consists of the tools of expression and are not the objects protected by the right to style. The value of the latter group, which consists of three facts of the celebrity's public personality, is derived from the celebrity's use of these attributes to convey his or her style which has been developed over time.

In the case of characteristic sayings, the combination of the rhythm and pronunciation of the words, the cynical effect and the context of the phrases, the facial expression of the speaker and the background, all convey the celebrity's style. The development of these features, however, requires investments of time, money and creative energy, as does the cultivation of a public appearance and voice, in order to distill and respond to popular public tastes. A successful blending of these elements increases the speaker's notoriety and adds to his celebrity. As explained above, value is directly proportional to fame. The star who is known for certain expressions is able to demand significant sums for the oral delivery of these characteristic phrases. As in the case of photo or voice exploitation in advertising, the advertiser who uses these expressions without the consent of their author would reap the benefit of the celebrity's goodwill[179]. The use of these sayings causes identification with the star. When juxtaposed with a product, the phrases suggest endorsement by the celebrity, thereby fusing the latter's goodwill with that of the former. The intellectual right analysis, in this way, applies to typical expressions as well as to photos and voice.

The Court in *Thériault*[180], however, did not adopt this analysis. Desjardins J. based her reasoning, instead, on substitution. Her Ladyship focussed on the "get-up"[181] of the expressions:

179. From a practical point of view, cases of typical expressions often involve sound-alikes, as well. This double style-appropriation situation would occur when, in addition to the same expressions being spoken, the voice used is intended to sound as near as possible to that of the author of the phrases. These two aspects of style, typical expressions and sound-alikes, will be analyzed separately, however, as they are theoretically different in nature. See *supra*, section 2.4.

180. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153.

181. Defined in H.G. Fox, *The Canadian Law of Trademarks and Unfair Competition*, 3d ed., Toronto, Carswell, 1972, p. 553 as: "The shape, size, colour, wrappers and adornment and, possibly, appearance, with which the producer or trader endows them, as well as the lettering and arrangement of the label. It is, in other words, the dress in which the goods are presented to the purchasing public."

> Les requérants ont-ils cependant acquis un droit à l'égard de l'arrangement, du style de l'habillage... utilisé dans la prononciation de ces mots ? En d'autres termes, ces expressions ont-elles acquis un sens secondaire lorsque prononcées et utilisées par les requérants, au point que leur utilisation par d'autres *suivant le style des requérants* risque de causer de la confusion dans le public et peut laisser croire qu'il y a association entre les requérants et ceux qui utilisent ces expressions ?[182]

The Court found that the parties were, in fact, engaged in a common activity ; although not engaged in an identical profession, both parties were found to "tente[r] d'exercer un attrait auprès d'un public-cible à peu près identique."[183] Despite this holding, relief was refused as confusion was unlikely ; the expressions had been sung in the commercial, whereas Ding and Dong did not present themselves to the public as singers[184].

The application of the passing off approach in this case was inappropriate. Desjardins J. never articulated the items which were being passed off for each other. Clearly, La Ronde, the object of the advertisement, was not being passed off as the comedians. This interpretation is nonsensical. The only possible explanations is either that the respondent was attempting to suggest that Ding and Dong are part of La Ronde's attractions or that the petitioners' ability to promote their show was being passed off as that of the respondent. Both of these suggestions are farfetched. A more realistic articulation of the respondent's motive is to benefit from the use of Ding and Dong's cultivated notoriety, identifiable by their favorite expressions, in order to attract attention and evoke a favourable reponse from the consuming public. The ability of these expressions to accomplish this task is a valuable asset worthy of recognition as an intellectual right.

The substitution analysis of the right to style, although unsuitable in the *Thériault*-type case, can be appropriate in other circumstances. These situations will be explored in the next section.

2.4. Look-alikes and sound-alikes

Midler[185], an American case, exemplifies the sound-alike situation. In this case Bette Midler's vocal style was appropriated by an advertiser, not by using a recording of Ms. Midler's distinctive voice, but rather, by backing up the visuals of a television commercial with an imitation of her singing. Although the United States Court of Appeals for the Ninth Circuit

182. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153, p. 953.
183. *Id.*, p. 955.
184. *Id.*, 956.
185. *Bette Midler* v. *Ford Motor Company*, *supra*, note 4.

found in favour of Ms. Midler, it unfortunately provided little precedential guidance in its holding. Noonan J. felt that a general finding of tort sufficed :

> We need not and do not go so far as to hold that every imitation of a voice to advertise merchandises is actionable. We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort.[186]

Despite this absence of judicial elaboration, *Midler* represents a potential triumph in the expansion of celebrity right to style. As is the case with typical modes of expression, situations involving sound-alikes and their visual counterparts, look-alikes, require grappling with aspects of style more intangible than those encountered in the photograph and voice-recording cases. Although in all of these cases the value of the celebrity's identifying feature is found in his or her particular style and not in its medium of expression, style assumes a more material existence when embodied in photographs and voice-recordings. When dealing with sound-alikes and look-alikes, however, it is not possible to say that the advertiser has appropriated the copied celebrity's physical appearance or voice, as the imitator's physical face or voice is being used. A celebrity can only claim, rather, that his or her manner of vocal or visual expression has been used.

There is no less reason to hold the unauthorized advertiser who uses a celebrity sound- or look-alike acountable to the star than the unauthorized advertiser who uses that celebrity's actual photo or voice, despite the reduced palpabibility of some facets of style. As already explained, a star's public personality consists of mannerisms and other elements of behaviour which facilitate popular identification of the celebrity. The power of these elements to elicit public identification and positive popular reaction is valuable. The celebrities themselves are best able to reproduce the constitutive elements of their respective style, of course, as they are the original developers of these traits. Others, however, may be capable, as well, of duplicating the formative facets of a star's style and thereby of reconstructing the star's public personality. Viewed in this light, the sound-alike and look-alike cases are, in reality, no different from the voice and photograph cases. The object of the right is identical in all instances, i.e., the celebrity's incorporeal, intellectual "proprietary" right of style.

A wrinkle appears, however, in the sound- and look-alike cases. If style is an intellectual "proprietary" right, then any use of that style, at least for commercial purposes, would be a compensable invasion of the

186. *Id.*, p. 463.

right. This being so, theatrical impersonators[187] wouls be unable to engage in their professional activities without fear of civil prosecution. This potential consequence is undesirable from the perspective of policy. Robert Judge, in his analysis of celebrity look-alikes and sound-alikes[188], suggests that impersonators "should not be deprived of earning a living[189] and notes that the American approach has been to examine the

> [...] context and purposes of the particular look-alike or sound-alike in question [...] to determine if such use predominantly serves a social function valued by the protection of free speech [...] If the portrayal mainly serves the purpose of [...] providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, on the other hand, the portrayal functions primarily as a means of commercial exploitation the such immunity will not be granted.[190]

Precluding this entertainer from using his talent would be socially disadvantageous as it would deprive the public of this appreciated art form. Imposing a requirement upon the impersonator to collect authorizations from each star imitated would make his or her performance practically unfeasible.

In addition to policy reasons, an appreciation of the rationale underlying the right to style dictates against subjecting impersonators to liability. Talent is required in order to impersonate another successfully. This skill is not appropriated from the mimicked celebrity, but rather, emanates from the impersonator himself or herself. When a theatrical impersonator imitates a famous person, moreover, he or she does not seek to reap the value of that star's style. André-Philippe Gagnon, for example, does not attempt to fuse his identity with that of the celebrities he mimics in order to benefit from their popular reputations. When Mr. Gagnon copies Bruce Springsteen's demeanor and style of singing, he attracts public attention in his own right and not because the audience is fooled into believing that "The Boss" stands before it. Examined in the light of policy and legal rationale, the case of the theatrical impersonator must be excluded from the protected right to style.

An exception need not be made to acommodate the impersonator as his or her act does not even fall within the realm of invaded right to style in the first place. Admittedly, the impersonator does employ elements of a

187. The term "theatrical impersonators" refers to professional performers for whom audiences specifically pay to watch imitations of celebrities ; for example, Rich Little or André-Philippe Gagnon.

188. R. JUDGE, « Celebrity Look-Alikes and Sound-Alikes or Imitation is not the Highest Form of Flattery », (1988) 20 C.P.R. (3d) 97.

189. *Id.*, p. 98.

190. *Id.*, p. 124.

star's style. This use of style, however, does not implicate an appropriation of the pecuniarily valuable aspects of this style. Although the intention and the motive of the appropriator are not relevant considerations when style is classified as an intellectual right[191], this analysis of the "context and purposes" of the use is not undertaken to determine *why* the style was copied, but rather, to decipher *what*, in fact, has been appropriated. The basis for categorizing a celebrity's style as an intellectual "proprietary" right is the style's pecuniary value[192]. If no value is gained by the impersonation, then to say that the impersonator has invaded the intellectual right does not seem appropriate[193].

In contrast to the photograph cases[194], the sound-alike and look-alike instances are also susceptible to an unfair competition analysis. The proposition that the advertiser is passing off its spokesperson as another in requiring that spokesperson to adopt the other's style is not as artificially stretched as is the application of substitution to the photograph cases.

The prerequisite conditions for an action in substitution are designed to limit condemnation to defendants deserving of this fate. First, the copied trait must be distinctive of that particular celebrity. In requiring the particular manifestation of the star's style to identify that celebrity, the "passing off" basis pinpoints the source of the commercial value of style.

Second, the substitution must cause the likelihood of confusion. This requirement ensures the exclusion of advertisements in which no association is made between the celebrity and the imitator. In particular, this condition excludes the theatrical impersonator as long as his or celebrity look-alike status is revealed to the public, for in that case the public will not be confused with respect to the performer's identity. No matter how exact Rich Little's impersonation is, for example, the exposition of his physical appearance renders unlikely the confusion between his identity and that of the mimicked star. The facts in *Thériault*[195] reveal that Ding and Dong's style had been imitated, not only by the defendants, but by André-Philippe Gagnon and by Dominique Michel[196], as well. The petitioners did not

191. See *supra*, section 1.7.

192. *Id.*

193. Of course, it is possible that the celebrity is entitled to relief on some other basis, e.g., right to privacy or defamation.

194. *Krouse* v. *Chrysler Canada Ltd*, and *Athans Canadian Adventures Camps Ltd*, *supra*, note 12.

195. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153.

196. It is interesting to see the shift in the position of this comedienne. In *Deschamps* v. *Renault Canada*, *supra*, note 5, her style was used by another. The tables turn in *Thériault*, however, in which she is now the user of another's style!

pursue these two performers, however, because the performances of these two comedians were presented so as to indicate clearly to the audience that they were, in fact, impersonators. Cases of theatrical impersonators on radio advertisements may present situation in which confusion is more likely, as the visuals which usually indicate to the public a distinction between the impersonator and the imitated star are absent. Advertisers who use impersonators in these circumstances and who do not give notice to the audience of such, however, are probably trying to benefit, not from the impersonator's talent, but from the star's publicity value and should not be excluded from liability.

Finally, the parties must be engaged in a common field of activity. This requirement may present difficulties of application, as usually the defendant-advertiser's business has little to do with the petitioner's field, performance. In *Midler* no common activity was found:

> One minute commercials of the sort the defendants put on would not have saturated Midler's audience and curtailed her market. Midler did not do television commercials. The defendants were not in competition with her.[197]

Despite this ultimate finding, these words suggest a liberal view of common fields: had Ms. Midler not objected to endorsing products generally, the parties would have both been partaking in the field of advertising. The Quebec trend, furthermore, seems to be even more generous, as demonstrated by the *Thériault* case[198] in which the similarity of the public targeted is sufficient to meet this criterion.

If these four conditions are met, a celebrity can take action on the basis of unjust enrichment when a look-alike and sound-alike is used.

2.5. Conclusion

The recognition of the right to style as an intellectual right has far-reaching protective implications. Although difficult to break style down into its constituent parts, once done, these elements appear in forms more subtely recognized than the use of photographs. The use of pre-recorded voice, typical expressions, sound-alikes and look-alikes are four possibilities. The limits of the possible applications of the right to style remain to be seen.

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197. *Bette Midler* v. *Ford Motor Company*, *supra*, note 4, p. 462.
198. *Thériault* c. *Association montréalaise d'action récréative et culturelle* (1983), *supra*, note 153.

Conclusion

Achieving celebrity status is a goal of many actors, singers, comedians and athletes. Fame, contrary to the well-known saying, is usually not achieved overnight. On the contrary ; in order to meet this end, a performer must invest time, energy and money in himself or herself to cultivate a public personality. Part of this required effort involves the pursuit of exposure, which serves to reinforce the public's ability to identify that star. Unauthorized exposure in commercial advertisements, once fame has been attained, is, however, unnecessary from a timing point of view. This type of exposure, moreover, deprives the celebrity of the dividends deserved from the investment made in his or her goodwill, while saving the advertiser performer's fees.

Quebec courts have toyed with the idea of protecting the celebrity's public style. The legal approaches undertaken, however, have not been consistent.

The proper legal foundation for the recognition of style is as an intellectual proprietary right. This classification covers the broadest array of scenarios, takes account of the pecuniary value of the celebrity's style and avoids resorting to fictitious presumptions and a dismantling of historical civilian traditions.

Once the legal basis for style is settled, the reach of this right can be pre-determined to a certain extent. The use of a celebrity's photograph, voice or typical expressions, or the imitation of these facets of style by another, would fall under the protective umbrella of the right to style. Future advances in the technological reproduction of human traits may provide presently unforeseen cases of style appropriation to which the intellectual right analysis of style may be applied.