Intercontinental Identity: The Right to the Identity in the Louisiana Civil Code

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INTRODUCTION

If Boudreaux, an energetic entrepreneur, snapped a picture of Thibodeaux, a renowned shrimper, and put Thibodeaux’s picture on a billboard advertising Boudreaux’s shrimp boil, could Thibodeaux recover against Boudreaux for the commercial value of his visage? If this were to have occurred in California, where right of publicity cases appear commonplace, the answer is a resounding “yes.” Of course, one might be hard pressed to locate a single Boudreaux or Thibodeaux living in sunny California.\(^1\) In Louisiana, however, where both surnames fill the telephone directories,\(^2\) our legal question enjoys particular significance. But when Louisiana becomes the situs of the misdeed, the seemingly facile common law answer becomes muddied by a cloud of civilian theory and court silence on the issue.

To a common law scholar, the question of whether Louisiana would recognize a right of publicity would, in fact, appear easy; after all, at least twenty-eight states currently honor, via statute, common law, or both, a person’s right to recover pecuniary damages for the unwanted commercial use of his identity.\(^3\) If so many other states recognize the right of publicity, then why would not Louisiana? Indeed, with the question posed in this fashion, the answer could prove just as trite: a Louisiana judge simply could hitch a ride on the coattails of common law jurisprudence and create an analogical commercial right to one’s identity.

Fortunately, no Louisiana judge has yet to borrow the sister states’ right of publicity, for to employ only the rough-fitting instrument of common law analogy to fashion so peculiar and intricate a right would be to cruelly circumvent Louisiana’s civilian legal tradition. But then again, to approach the question of whether Louisiana law recognizes a right of publicity from within the civil law presents much more difficulty than does simply borrowing the right from the common law. Thus, what seemingly would have been a simple

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1. According to a Yahoo! People Search, there are eight Boudreauxs and six Thibodeauxs currently residing in Los Angeles, a city of nearly 3.7 million people according to the 2000 census. See Yahoo People Search, at http://phone.people.yahoo.com; United States Census Bureau, American FactFinder, at http://factfinder.census.gov.

2. A Yahoo! People Search located 200 Boudreauxs and 118 Thibodeauxs in Houma, Louisiana, a city of 32,393, according to the 2000 census. See Yahoo People Search, supra note 1; United States Census Bureau, supra note 1.

answer of common law analogy now demands a daunting journey into civilian juridical relations, French legal tradition, and the jurisprudence of the Continental right of privacy.4

Without doubt, Louisiana’s legal system supports identity rights of some sort. The right of appropriation privacy, the personal, extrapatrimonial counterpart to the commercial right of publicity, has been recognized by Louisiana courts (albeit in common law fashion), and more significantly, such a right finds support both in Louisiana’s civilian legal tradition5 and even the Louisiana Constitution of 1974.6 The question, then, is not simply whether identity rights have a place in Louisiana law, but rather what is the nature of Louisiana identity rights. Specifically, this paper attempts to tackle this difficult question: does Louisiana law support a patrimonial right to the identity, that right commonly referred to as the right of publicity?

Part I of this paper provides the reader with an understanding of what many states commonly refer to as the right of publicity, and how this right complements the personal right of appropriation privacy. This section discusses the tumultuous history of identity rights as they have come to be in the United States, first as a right of privacy and then later as both appropriation privacy and the right of publicity,7 and provides a brief exemplar of current American identity rights jurisprudence.

Part II turns to civilian France, where courts have faced their own plight with patrimonial and extrapatrimonial identity rights. Examining the evolution of identity rights in French law and jurisprudence demonstrates the perplexing theoretical difficulties of what some courts have hinted to be a seemingly dual extrapatrimonial and patrimonial identity. Indeed, while a patrimonial right to the identity has been accepted in civilian France, the reasons for doing so, while always grounded in law, appear based more in rough practicality than in finely woven legal theory, thereby revealing the tension between traditional civilian taxonomy and common commercial practice.

4. Much of this paper’s discussion of the Continental right of privacy occurs in the context of France. The reasons for this are two-fold: first, Louisiana law owes much of its content to France’s Civil Code and the doctrinal works of French jurists; secondly, the French right of privacy is a near verbatim reproduction of the European Union’s right of privacy. Compare C. civ. art. 9 (France) with European Convention on Human Rights and Fundamental Freedoms art. 8 (1950).


Part III turns to identity rights as they exist under the European Union through article 8 of the European Convention on Human Rights and Fundamental Freedoms, the very article that gave rise to France's modern right to respect for private life. While the identity rights jurisprudence in the European Court of Justice and the European Court of Human Rights is far from prevalent, there nevertheless exists a strong argument that such courts would award both non-pecuniary and pecuniary damages for the misappropriation of one's identity.

Part IV closes with the right to the identity under Louisiana law. The same theoretical difficulties that have plagued the Continental commercial right in the image loom over a Louisiana right to the commercial value of one's identity, for Louisiana's legal tradition, like that of civilian France, long has viewed one's personal connection with the identity as an extrapatrimonial "personality right" incapable of pecuniary valuation. However, also like France, Louisiana has a codified right of privacy and a general tort provision, each of which, at least in theory, could supply an independent legal basis for recovering both non-pecuniary, moral damages, and pecuniary commercial damages for a violation of one's right to be secure in his image. A few cases involving a personal, private right in one's image have passed through Louisiana courts, though not one Louisiana appellate court has seen a plaintiff assert a right to the commercial value of his identity.

Nevertheless, Louisiana law indeed does support a patrimonial right to the identity. Though understanding the right requires a rethinking of real right taxonomy, the right nevertheless exists rather neatly within the traditional civilian classification system, living in harmony not only with Louisiana's legal tradition, but with the body of Louisiana's Civil Code.

I. THE DIVERGENCE OF PRIVACY AND PUBLICITY IN THE UNITED STATES

A. Early Developments and the Initial Separation of the Rights

The American notion of protecting an interest in one's identity first arose in the pivotal article penned by Samuel Warren and Louis Brandeis

10. See La. Const. art. 1, § 5.
12. See infra Part IV(A).
in the winter of 1890, entitled, "The Right to Privacy." While the authors were primarily concerned with preventing the public disclosure of embarrassing private facts, the carefully crafted language of the authors nevertheless extended the canopy of privacy over one's image. Twelve years later, the New York Court of Appeals in Robertson v. Rochester Folding Box Co. quelled any initial hopes in a common law privacy right. The ensuing public outrage in the decision prompted the New York legislature to enact the following year laws imposing criminal and civil liability for the unauthorized use of a person's identity for "advertising purposes or for the purposes of trade." These early statutes remain largely unchanged and serve as fitting examples of the then current perception of identity as a fundamental aspect of privacy. Three years after the 1902 New York Court of Appeals rejected a common law right to privacy, the Georgia Supreme Court in Pavesich v. New England Life Insurance Co. welcomed the right in what scholars have lauded as "the leading case" embracing the right of privacy. Like Roberson, Pavesich also dealt with a claim of the unauthorized appropriation of the plaintiff's image, only this time the defendant used the plaintiff's likeness in conjunction with a falsified quote of endorsement. In a thorough opinion, Judge Cobb came to

14. See McCarthy, supra note 3, § 1:11.
15. See Warren & Brandeis, supra note 13, at 213 ("The principle which protects personal writings and any other productions of the intellect... is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance... "). But see William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 401 (1960) ("There is little indication that Warren and Brandeis intended to direct their article at... the exploitation of attributes of the plaintiff's identity.").
16. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902). The case actually dealt with a plaintiff complaining of the misappropriation of her photograph in flour advertisements, though it was the broad notion of a common law privacy right that vexed the court.
17. McCarthy, supra note 3, § 1:16.
19. Id. § 51.
20. McCarthy, supra note 3, at § 1:16.
23. Pavesich, 50 S.E. at 81. The advertisement contained photographs of two
recognize the right of privacy as a natural law derivative whose tortious violation affords general damages for one’s “wounded feelings.”

For the next half century, courts couched identity rights in terms of “privacy.” But this blind adherence to only a private, personal perspective of image left those with particularly recognizable identities without remedy. Celebrities whose images had been wrongly appropriated for marketing purposes usually would sue under their rights of privacy. But judges were unable to comprehend how public figures who normally seek the limelight could have their feelings hurt by additional publicity, especially when the publicity was favorable. O’Brien v. Pabst Sales Co., exemplifies this conundrum. The plaintiff in O’Brien was a famous football player whose picture appeared in a football calendar produced by Pabst Blue Ribbon Beer. He sued the beer distributor under his right of privacy, but the majority rejected this claim because the plaintiff was a celebrity. The publicity he had received from the calendar was “only that which he had been constantly seeking and receiving.” Because O’Brien did not sue for the market value of his image, the majority refused to reward such damages. In short, the courts simply could not look past the “privacy” label of the right. Then in 1953, two companies went to court to settle, of all things, a contract dispute—and the right of publicity was born.

The contract in Haelan Labs, Inc. v. Topps Chewing Gum, Inc. licensed to the plaintiff the exclusive right to use a certain baseball men, the plaintiff and another, to illustrate the “have and have not” effects of purchasing life insurance. Pavesich’s image was the happy man who evidently had made the wise purchase, as his headline read, “Do it now. The man who did.” Below the plaintiff’s picture was a lengthy testimonial highlighting his delight in defendant’s insurance. Pavesich, of course, had no life insurance with the defendant, and never made the statements quoted in the ad. McCarthy, supra note 3, § 1:17.

24. Pavesich, 50 S.E. at 73.
26. 124 F.2d 167 (5th Cir. 1941).
27. Id. at 170.
28. Id. There was, however, a strong and perceptive dissent. Judge Holmes viewed the plaintiff’s right to use his image for advertising purposes as a property right, and pointed to the current market practice of advertisers paying for the right to use a celebrity’s image as proof. Holmes noted that the plaintiff should not have been required to plead the correct law. Id. Rather, because the plaintiff alleged facts that constituted a misappropriation of his image, the dissent wisely concluded that he should have been entitled to collect the fair market value of the use of his image. Id. at 171. The dissent was concerned that the majority’s decision posed the danger of leaving celebrity plaintiffs without a remedy for non-libelous, marketing uses of their images. Id.
player’s photograph on a trading card to aid in the sale of the company’s gum. The defendant, Topps Chewing Gum, knew of the contract but concluded that it served only as a release of the plaintiff’s liability for using the baseball player’s image in violation of his statutory right of privacy. Subsequently, Topps approached the baseball player and convinced him to sign a similar contract with them.

Judge Frank disagreed with Topps’s interpretation of the contract. Viewing the player’s image from a market perspective, Judge Frank concluded that player’s photograph had actual “publicity value,” especially when combined with an exclusive grant of use. He found the assignment of the player’s right to market his image to be a valid transaction, and further opined that “[t]his right might be called a ‘right of publicity.’” With those few words arose another right to the identity, only this time the right appeared rooted in commerce and sounding in property rather than personality. This was, and in essence remains, the right of publicity.

1. The Right of Publicity Versus Appropriation Privacy

If Haelan Labs provided the spark for the right of publicity, then Melville Nimmer fanned the fire. Only one year after Judge Jerome Frank coined the phrase “right of publicity,” Nimmer wrote his article calling for a separate property right in the image. Nimmer focused in large part on the right of privacy’s inability to protect against the pecuniary value of the identity. Cases such as O’Brien v. Pabst Sales Co. exemplified the seeming oxymoron of the privacy-seeking celebrity. More importantly, because the right of privacy was a personal right that protected against offense to the psyche, the action appeared incapable of securing damages for the commercial value of one’s image. Nimmer argued that the inadequacies of privacy and other rights such as unfair competition dictated the very essence of the right of publicity. In short, the right of publicity was to be the antithesis of privacy. Whereas the right of privacy was a personal right that guarded against hurt feelings, the right of privacy was a property right that measured damages according to the value of the publicity appropriated by the defendant. However, only six years after Nimmer

30. Id. at 867.
31. Id. at 868.
33. Id. at 205, 220–21.
34. Id. at 208.
35. Id. at 216.
36. Id.
called for a separate right of publicity, William Prosser sought to unite identity rights under the label of privacy.

In 1960, Dean William Prosser of the University of California School of Law, Berkeley, wrote one of the most influential works in American law, an article rather unassumingly entitled “Privacy.”37 In it, Prosser divided invasion of privacy into four separate torts: (1) physical intrusion upon the plaintiff’s seclusion or solitude; (2) public disclosure of embarrassing private facts about the plaintiff; (3) presenting the plaintiff in a “false light;” and (4) appropriation of some identifiable aspect of the plaintiff’s identity for the defendant’s advantage.38 The last of these torts was destined for trouble. Up to this point, sixty years of case law and commentary had agreed that the right to privacy was inherently personal and protected only one’s emotional well-being. But Prosser felt that the market value of one’s identity could enjoy like protection under his last privacy tort.39 Even though he recognized both the personal and the market perspective of image, Prosser nevertheless chose to protect both interests under the rubric of “privacy.” Thus, according to Prosser and the Restatements soon to follow, plaintiffs seeking commercial damages for the appropriation of their images would be wise to proceed under the “appropriation privacy” label.40 However, many courts simply could not see past privacy as the protectorate of the personality. As a result, when any publically-renowned plaintiff asserting a commercial interest in her identity mentioned the word “privacy,” many courts continued to balk at the idea despite Prosser’s urging.41 As for the courts that, unlike Prosser, differentiated appropriation privacy from the right of publicity according to possible damages, seeking proprietary damages under the right of privacy proved to have most unfavorable consequences.42

37. Prosser, supra note 15.
38. See generally Prosser, supra note 15. Prosser’s four privacy torts were subsequently incorporated into the 1977 Second Restatement of Torts and have been universally accepted by American courts. McCarthy, supra note 3, § 1:24.
39. Prosser was aware of the proprietary nature of the image, he accepted its assignability, and moreover, he agreed with Judge Frank’s decision in Haelan Labs. See Prosser, supra note 15, at 406–07.
41. Id. § 1:26.
42. See, e.g., Cabaniss v. Hipsley, 151 S.E.2d 496, 503–09 (Ga. App. 1966). The plaintiff in Cabaniss, an exotic dancer alleging a violation of her right of privacy, sought damages for her mental anguish and her tainted name and reputation caused by the wrongful appropriation of her photograph. The court found, however, that while the plaintiff alleged a right of privacy violation, she actually was suing for the commercial appropriation of her image, which allows for special, proprietary damages only upon a showing of the commercial value of the appropriated image. Because the plaintiff failed to make such a showing, the lower court’s favorable ruling was reversed. Id.
2. The Current State of American Identity Rights

After Prosser's article, American law was poised to make a choice. It could either protect both personal and commercial interests under Prosserian "appropriation privacy" or assign to the personal and commercial perspectives of identity totally separate rights with distinct "privacy" and "publicity" labels, as was proposed by Haelan Labs and Nimmer. Not without problems, the separatist view has

43. See, e.g., PETA v. Berosini, 895 P.2d 1269 (Nev. 1995). Bobby Berosini, an orangutan trainer, was repeatedly and unknowingly filmed by People for the Ethical Treatment of Animals, or PETA, as he prepared his animals for their performance. The resultant video showed Berosini "slapping, punching and shaking" the apes while assistants held them down, and it also showed Berosini beating the animals with a baton. Id. at 1272–73. The graphic nature of the video made for a powerful marketing tool, so PETA used the film to promote general publicity and fund-raising campaigns. Id. at 1284. Berosini sought damages for libel and appropriation privacy and was awarded $4.2 million by the trial court. The Nevada Supreme Court reversed. The libel claims were correctly dismissed because the events shown on the film were true. The court's dismissal of the identity appropriation claim, however, hinged on Berosini's pleading. Id.

In his brief, Berosini had grounded his claim "within the common law tort of misappropriation of one's name or likeness." Id. The court concluded that Berosini meant by this phrase to assert his right of appropriation privacy in his image. Then it distinguished appropriation privacy from the right of publicity as follows:

The distinction between these two torts is the interest each seeks to protect. The appropriation tort seeks to protect an individual's personal interest in privacy; the personal injury is measured in terms of the mental anguish that results from the appropriation of an ordinary individual's identity. The right to publicity seeks to protect the property interest that a celebrity has in his or her name; the injury is not to personal privacy, it is the economic loss a celebrity suffers when someone else interferes with the property interest that he or she has in his or her name. We consider it critical in deciding this case that recognition be given to the difference between the personal, injured-feelings quality involved in the appropriation privacy tort and the property, commercial value quality involved in the right of publicity tort.

Id. at 1283 (emphasis added).

The court found the distinction critical and called for a full reversal. Berosini sought and proved damages for PETA's substantial pecuniary gain attributable to the use of his image—damages that flow from the right of publicity. But Berosini asserted an action for appropriation privacy, which only allows recovery for hurt feelings, and the case was dismissed. Id. at 1284–85. However, the court ignored one crucial fact: on a basic level, Berosini simply complained that PETA had misappropriated his image for commercial gain, a wrongdoing that gives rise to personal and proprietary damages. But by pedantically equating "the common law tort of misappropriation of one's name or likeness" with appropriation privacy, a claim that permits only personal damages, the court was able to ignore Berosini's clear request in his brief for the recovery of "the pecuniary gain sought by PETA through the use of [his] name and likeness." Id. at 1284.
prevailed. As a result of the slow-moving, seemingly uncontrollable legal evolution from Pavesich through Haelan Labs and beyond, both "privacy" and "publicity" labels have become ingrained in the common law of the states that lay witness to this evolution. Today, a majority of courts see appropriation privacy and the right of publicity as divergent rights protecting different interests in the image. According to this majority separatist view, appropriation privacy is invaded by an injury to the psyche, whereas the right of publicity is invaded by an injury to the pocketbook.

Perhaps not surprisingly, the overwhelming majority of case law addressing the right of publicity concerns the appropriated identity of a celebrity. Because celebrities’ identities typically carry significant commercial value, the appropriation of a celebrity’s identity oftentimes will result in substantial lost profits and/or property damage suffered by the owner of the identity. But the fact that celebrities assert their right to publicity more often than the average person does not mean that only celebrities possess the right. Rather,

45. See, e.g., Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995) (“[T]he right of publicity differs substantially from the right to privacy. The policy underlying . . . invasion of privacy is the protection . . . of private personae from the mental distress that accompanies undesired publicity. . . . The right to publicity protects pecuniary, not emotional interests.”); KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 (Cal. Ct. App. 2d Dist. 2000) (addressing the difference between the right of privacy and the right of publicity, the court stated: “What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one’s name, voice, signature, photograph, or likeness”); Doe v. TCI Cablevision, No. ED 78785, 2002 WL 1610972, *6 (Mo. Ct. App. E.D.) (concluding that appropriation privacy and the right of publicity differ “only in their justifications and the types of damages awarded”); see also McCarthy, supra note 3, § 5.61 (“While much judicial confusion has been expressed over the years as to the difference between the right of publicity and the appropriation form of the right of privacy, the dimensions of the difference are today fairly well spelled out by many courts and commentators.”).
47. See, e.g., Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001) (actor Dustin Hoffman sued under his right of publicity for the use of his face as it appeared in the movie Tootsie); Wendt v. Host Int’l, Inc., 125 F.3d 806 (9th Cir. 1997) (actors George Wendt and John Ratzenberger, “Norm” and “Cliff” of Cheers sit-com fame, sued the defendant restaurant owner’s use of animatronic robots resembling the Cheers characters); Henley v. Dillard Dep’t Stores, 46 F. Supp. 2d 587 (N.D. Tex. 1999) (Don Henley, the celebrated drummer for the Eagles, sued defendant for the use of the phrase “This is Don’s henley” in print advertisements promoting henley shirts); Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 6th Dist. 1995) (Joe Montana, former superstar quarterback for the San Francisco 49ers, sued the defendant newspaper for the use of his photograph in a promotional poster); see McCarthy, supra note 3, § 4:2.
the right is available to all, as it is the "inherent right of every human being to control the commercial use of his or her identity." Indeed, every person's image has the potential for commercial value regardless of the uses to which the person puts the image. The potential is realized once the identity is used in commerce. Every person's image gains some market value from the moment it is appropriated, for if the user of the image had not taken the identity, he would have had to bargain for it. In short, every commercially used image has, at the very least, a replacement value.


50. Indeed, celebrity status often is a chance occurrence befallen to the average person. Monica Lewinsky led a very uncelebrated life prior to her relationship with President Clinton. Now she is a household name with an autobiography and a clothing line.

51. See KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 717 (Cal. Ct. App. 2d Dist. 2000) (noting that even though the appropriated images did not belong to celebrities, the plaintiff nevertheless had a cause of action because California Civil Code section 3344, California's appropriation statute, did not limit itself to celebrity plaintiffs and allowed for minimum damages for this very reason); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.11 (9th Cir. 1974) (emphasis added):

Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental distress, while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless.

52. A similar view was adopted by the court in Ainsworth v. Century Supply Co., 693 N.E.2d 510, 514–15 (Ill. App. Ct. 1998). Stock photography companies exemplify this notion. The people portrayed in the photos often are no more famous than you or me. Nevertheless, the unique qualities of these images convey some sort of message, be it as trite as happiness. An advertiser selecting a photo from the image bank seeks out the identity that best embodies the message it wishes to convey. In such instances, the message, and not celebrity status, attributes value to the image. A stock photo costs anywhere from $50 for a royalty-free image up to thousands for a licensed image. See, e.g., Getty Images, at http://creative.gettyimages.com/ (last visited May 1, 2005). Thus, the appropriated image of the average person, at the very least, would carry a comparable price tag.
Thus, the American identity right has two faces: the Jekyllian right of appropriation privacy and the Hydian commercial, seemingly proprietary right of publicity. Exactly what form the commercial right takes ultimately varies from state to state and jurisdiction to jurisdiction. Some states such as New York\(^\text{53}\) award commercial damages for the appropriation of one’s identity\(^\text{54}\) but do not recognize the transferability or heritability of the right.\(^\text{55}\) At the other end of the spectrum are states like California which view the right of publicity much like any other property right, fully transferable, assignable, and heritable.

Perhaps in the common law, the creation of such a sui generis right is as easy as enacting a law. But in the civil law, where the identity and the extrapatrimonial rights attached to it traditionally have been kept wholly separate from patrimonial real rights and credit rights,\(^\text{56}\) the ideas of recognizing an aspect of the identity worthy of pecuniary valuation and perhaps even subject to transfer seems, at first glance, wholly violative of the very fabric of the civilian classification system. Nevertheless, such a right has emerged on the European continent.

II. IDENTITY RIGHTS IN CIVILIAN FRANCE

A. The Civilian Understanding of Personality Rights

The modern French droit à l’image (the right on the image), what has become a complex, sui generis right with patrimonial and extrapatrimonial aspects, finds its roots deeply embedded in personality rights, and in particular, the right of privacy.\(^\text{57}\) But before any discussion can be had of civilian identity rights, the reader first must have an understanding of the civil law’s taxonomy of rights (those “interests secured and protected by law”).\(^\text{58}\) Private, substantive rights first are divided into patrimonial and extrapatrimonial rights. This initial division primarily looks at the purpose served by the particular right and indirectly refers to the


\(^{56}\) See generally Yiannopoulos, supra note 5, §§ 17, 201.

\(^{57}\) See Hauch, supra note 9, at 1228–29 (1993); Logeais & Schroeder, supra note 9, at 513.

\(^{58}\) See A. N. Yiannopoulos, Civil Law System: Louisiana and Comparative Law § 228 (2d ed. 1999).
object the right seeks to protect. Patrimonial rights generally attach to things (here, "things" are broadly defined as material objects or intangibles that generally are subject to appropriation) and, consequently, are subject to pecuniary evaluation and form part of a person's patrimony. Also, patrimonial rights ordinarily are transferable and heritable. Patrimonial rights are further divided into real rights and personal rights, a dividing line that falls between the laws of property and obligation. Thus, a real right is a right that a person has directly over a thing, while a personal right is a right that a person has over some performance or duty owed by another.

Extrapatrimonial rights, by contrast, form a residual category of rights incapable of pecuniary valuation or appropriation by another. Such rights do not attach to "things," since "things" in the traditional civilian model are subject to appropriation. In essence, these rights are moral in character, and commonly involve rights of the family (such as the right of a child to receive support and education from the parents, or the mutual duty of fidelity, support, and assistance owed by each spouse to the other) or rights of the personality. Within this latter category of extrapatrimonial lies the initial focus of this paper.

According to traditional civilian doctrine, "personality rights" seek to protect those aspects of the person inseparable from the personality. Because of their essential connection to the human psyche, such personality rights do not attach to "things" and, consequently, are neither subject to appropriation nor pecuniary evaluation, thus placing them wholly outside of commerce. One's name, likeness, liberty, personal integrity, status, and honor are examples of such rights of the personality. Indeed, each takes part

59. Id.
60. See Yiannopoulos, supra note 5, § 12. Apparently, included within Yiannopoulos' broad definition of things are the objects of obligations.
61. See Yiannopoulos, supra note 58, §§ 164–65 ("Under Louisiana and French law, a patrimony is a coherent mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. Every person has a patrimony. . . . [I]n principle, the patrimony is nontransferable by inter vivos act.")
62. See id. § 229.
63. See Yiannopoulis, supra note 60 at § 201.
64. Id.
65. See Yiannopoulis, supra note 58 at § 229.
66. See id. § 12.
68. See id. art. 98.
69. See Yiannopoulos, supra note 5, § 17.
70. See id. §§ 12, 201.
71. See Yiannopoulos, supra note 58, §§ 229; Yiannopoulos, supra note 5, §§ 12, 201; Marcel Planiol, 1 Traité Élémentaire de Droit Civil, nos. 433–46, 278–80
in forming the very fabric of the identity. Thus, according to the traditional civilian classification scheme, the identity—as incidents of the collective personality—is an inherently extrapatrimonial object giving rise to various personality rights. Once such personality right is the right to privacy, which eventually emerged from French jurisprudence as the primary protectorate of the identity. But with the rise of commercial advertising, French courts have had to rethink their understanding of the extrapatrimonial identity and its guardian privacy.

B. Sources of Law for French Identity Rights

To be sure, French citizens enjoy certain rights over their identities. As already discussed, such rights exist in their fundamental form within the basic understanding of extrapatrimonial personality rights. However, while the classification system of juridical relations forms the framework of the civil law, it is not law in and of itself. In civil law jurisdictions, the authoritative sources of law are legislation and custom. French courts principally have looked to two Civil Code articles as the source of identity rights: Code Civil articles 1382 and 9. Article 1382 states: "Any act whatever of man, which causes damage to another, obliges the one by

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(Yiannopolous also places "products of the intellect" under the protection of the rights of personality, though such protection is vastly different from intellectual property rights such as trademark and copyright. Yiannopolous is referring to the moral rights an author has in the integrity of her work, as such rights are extrapatrimonial and incapable of alienation. See Eric Lauvaux, France: Moral Rights as Obstacles to the Exploitation of Musical Works, in Moral Rights: Reports presented at the meeting of the International Association of Entertainment Lawyers MIDEM 1995 Cannes 72 (Cees van Rij, ed., Chris Wilde, trans., 1995); Laurence Goldgrab, France, in Moral Rights: Reports presented at the meeting of the International Association of Entertainment Lawyers MIDEM 1995 Cannes 82 (Cees van Rij, ed. and trans., 1995).

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whose fault it occurred, to compensate it." Article 9, enacted in 1970, provides:

Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order.

Of course, other less prevalent statutes also touch on the identity, but articles 1382 and 9 of the French Civil Code have proven to be the primary sources of law for French identity rights.

C. The Origin of Identity Rights: The Right of Privacy in The Rachel Affaire

Many scholars suggest that the French right of privacy originated as a jurisprudential creation, but such a sweeping statement is misleading. In the sense that no such code article explicitly

75. C. civ. art. 1382 (France) (as translated by France’s official legal web site, Legifrance, at http://www.legifrance.gouv.fr).
76. French Civil Code article 9 was passed in Act no. 70–643 of July 17, 1970 and reiterates the substance of article 8 of the European Convention on Human Rights of 1950, which was already directly applicable in France in 1970. See de Haas, supra note 8, “France” § 11.06. The article came in response to a decision by the Cour de Cassation in the Gerard Philippe affair to uphold a preliminary injunction ordering the removal of all pictures of the plaintiff’s ill son in seeming defiance of article 51 of the Press Law, which limited seizures for defamation to all but four copies of the defamatory article. Hauch, supra note 9, at 1239–42.
77. C. civ. art. 9 (France) (as translated by France’s official legal web site, Legifrance, at http://www.legifrance.gouv.fr).
79. Article 8 of the European Convention on Human Rights and Fundamental Freedoms, the precursor to French Civil Code article 9, also protects a right to the identity. See infra note 91; European Convention on Human Rights and Fundamental Freedoms art. 8 (1950):
(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
80. See, e.g., Bell, Boyron, & Whittaker, supra note 73, at 367. Scholars often refer to the French right of privacy as a purely court-made rule. See, e.g., Hauch, supra note 9, at 1231 (“The development of privacy rights in France was a
provided for protection of privacy 100 years ago, the courts indeed were responsible for finding a way to protect one's private life. But even then, courts based their protection of privacy upon an application of existing law. Thus, while a sense of the French "right of privacy" may have found its name in the jurisprudence, the early French identity right, insofar as it stemmed from Code Civil article 1382, existed a priori. Such was the case in The Rachel Affaire, \textsuperscript{81} which marks France's earliest protection of the right of privacy.

The Rachel Affaire involved the unauthorized use of a person's identity. Rachel, a famous early nineteenth century actress, was photographed on her deathbed with the permission of her sister, who wanted the photographs to serve as a remembrance. The photographer was directed to not disclose the pictures to the public. Nevertheless, shortly after Rachel's death, sketches of the actress's deathbed scene began to appear for sale in local shops. The sister subsequently sued the photographer and the artist. The court found for the plaintiff under Code Civil article 1382 but curiously called the plaintiff's right to oppose such actions "absolute," which seemed to shirk any requirement of proving the defendant's fault. \textsuperscript{82} Perhaps even more astounding was the court's order for the seizure and destruction of the sketches and the photographs upon which they were based. \textsuperscript{83} Nevertheless, the application of article 1382 and the remarkably 'uncivil' process in the sense that, without benefit of any legislative guidance on the subject, French judges essentially created the right to oppose the publication of private facts."). However, this label is exaggerated, for the early courts nevertheless found privacy protection within the tort principles of article 1382 of the Code Civil, the continental counterpart to Louisiana's Civil Code article 2315. While the early courts' application of article 1382 arguably may have been over-extended, the civilian tradition nevertheless allows judges to interpret and apply legislation.

\textsuperscript{81} T.P.I. de la Seine, June 16, 1858, D.P. III 1858, 62.
\textsuperscript{82} Id.; see also Hauch, supra note 9, at 1233–34; Logeais & Schroeder, supra note 9, at 514. This type of strict liability application of article 1382 to a violation of one's right on the image has drawn criticism from scholars. A French commentator describes the problem as twofold:

\begin{itemize}
  \item[a)] Simple reproduction without authorization sufficed to found the action for reparation, even if the victim did not prove the "fault" of the author of the "delict." In fact, when one invokes article 1382 it is generally necessary to prove fault. Here, this fault is constituted by the objective fact of the violation of the right of the person on his image; there is no need to prove the bad faith of the photographer . . . .
  \item[b)] When one founds one's action on article 1382 of the Civil Code, one is required to prove the prejudice for which one demands reparation. Here, it suffices to prove the assault on the right of personality: this moral damage is thought to be realized \textit{ipso facto} by this assault, so that the victim does not need to prove it . . . .
\end{itemize}


\textsuperscript{83} Hauch, supra note 9, at 1233.
preference for specific relief over money damages would come to establish a trend in courts’s dealing with privacy rights for the next century.\textsuperscript{84}

D. From Privacy to Patrimony: The Droit à L’Image

For the 100 years following \textit{Rachel}, French courts looked to article 1382 as the protectorate of the private identity, though courts often invoked the article without questioning the reasonableness of the defendant’s conduct or whether the conduct was objectively offensive.\textsuperscript{85} This movement toward an apparently “absolute” right of privacy came to a head in a decision by the Cour de Cassation in the \textit{Gerard Philippe Affaire},\textsuperscript{86} where the Court permitted the right of privacy to preempt other, more specific legislation. In seeming defiance of article 51 of the Press Law, France’s high court upheld a preliminary injunction ordering the removal of all pictures of the plaintiff’s ill son, even though Article 51 limited seizures for defamation to just four copies of the defamatory article.\textsuperscript{87} Shortly after the decision in the \textit{Gerard Philippe Affaire}, France’s legislature enacted article 9\textsuperscript{88} of the French Civil Code, which in effect created a broad-based, near-absolute right of privacy.\textsuperscript{89} Though couched in terms of “privacy,” article 9, together with article 1382, would rise to the forefront as guardians of both extrapatrimonial and patrimonial interests in the identity.\textsuperscript{90}

\begin{itemize}
  \item \textsuperscript{84} Id. at 1233–34.
  \item \textsuperscript{85} Id. at 1234–35. \textit{See generally} de Haas, supra note 8, \S\ 11.05.
  \item \textsuperscript{86} Judgment of July 12, 1966, Cass. civ. 2e, 1967 D.S. Jur. 181 (Fr.).
  \item \textsuperscript{87} Id.; \textit{see also} Hauch, supra note 9, at 1239–42.
  \item \textsuperscript{88} \textit{See supra note} 76.
  \item \textsuperscript{89} Hauch, supra note 9, at 1243–44. The right cannot be said to be wholly absolute. While the plaintiff need not prove the fault of the defendant under article 9, the defendant is not without a defense. Consent, and more importantly, article 10 of the European Convention on Human Rights, which establishes a freedom of speech and information, may justify the defendant’s dissemination of private information about the plaintiff. \textit{See Logeais & Schroeder, supra note} 9, at 521–31.
  \item \textsuperscript{90} As is discussed more fully in Part III, the law of the European Union likewise recognizes a right of identity through article 6 of the Treaty on European Union (“TEU”), which incorporates article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms (“ECHR”):

  Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 [of the ECHR]. \textit{The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature}.\textsuperscript{90}
\end{itemize}
Of course, Civil Code article 1382 asserts no limits as to the type of injury, or the extent of damages, it protects, and while the language of Civil Code article 9 certainly recognizes the need for compensating one's injuries,91 the article nevertheless speaks only of protecting one's "private life," a historically personal and extrapatrimonial right. In this sense, article 9 reaffirms what was always protected by article 1382—a right to one's identity—without having imposed any additional, more stringent extrapatrimonial limitations to the right. Indeed, any argument that the identity should remain solely as an extrapatrimonial aspect of the personality does not find support in the language of articles 1382 and 9, but from tradition's understanding of the right. Thus, if a patrimonial right to the identity is to flourish in the civil law, it is not the law, but the civilian taxonomic system, and the notion of the identity, that requires some rethinking. As will be seen, the strict, historical understanding of the identity is not incorrect; rather, it is incomplete.

In the later half of the twentieth century, French courts began compensating plaintiffs not only for the emotional harm suffered by the defendant's affront to the plaintiff's private life, but for any resultant economic damage as well. In doing so, the courts relied upon article 1382 and article 9. Some scholars refer to this jurisprudential shift from recognizing the identity as a pure personality right to the acceptance of some sort of patrimonial aspect in the image as the move from a "right to one's image" to a "right on one's image."92 Regardless of the label one assigns to the phenomenon, the recognition of a pecuniary interest in the identity marks only a theoretical shift, for the codal provisions applied by the courts—articles 1382 and 9—remained unchanged during this renaissance. Still, what might appear at first glance to have been the fabrication by the courts of an entirely new right, this author suggests it was nothing more than a jurisprudential epiphany to an a priori right always protected by article 1382, a right which, until the age of commercialization and advertising, simply was not known.

Perhaps the earliest jurisprudential recognition of the patrimonial identity came in 1955. The plaintiff, Marlene Dietrich, sued a weekly

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91. Article 9 permits courts to issue injunctions "[w]ithout prejudice to compensation for injury suffered." C. civ. art. 9 (France).
92. See Logeais & Schroeder, supra note 9, at 516–17.

Peck v. United Kingdom, 36 Eur. H.R. Rep. 41 (2003). Unfortunately, right of identity jurisprudence under either article 6 of the TEU or article 8 of the ECHR is not nearly as prevalent as is that of the French courts applying article 9 and article 1382 of the French Civil Code, though there is a strong argument for extending the rationale of the French droit à l'image to article 8 of the ECHR.

See infra Part IV.A.
tabloid magazine for publishing a series of articles containing certain sentences set out in quotation marks which gave readers the false impression that Dietrich actually had stated these private details regarding her sexual and family life. 93 When the case came to the Cour d'appel de Paris, Dietrich sought additional damages beyond what the lower court had given for her emotional suffering. The Cour d'appel agreed with the plaintiff and awarded her 1.2 million francs in pecuniary damages, evidently compensating Dietrich for her lost business opportunity to publish memoirs she was in the process of preparing when the defendant's articles were published. 94

Certainly the violation in *Dietrich* is distinguishable from the American right of publicity; after all, *Dietrich* dealt with the dissemination of facts, rather than the commercial appropriation of one's name or likeness. The significance of *Dietrich* lies in the scope of the compensation awarded by the court. Rather than having viewed the plaintiff's unwritten stories as a purely extrapatrimonial aspect of the personality, the court in *Dietrich* recognized that the plaintiff's past life occurrences, even in an unpublished, incorporeal form, had commercial value. In the sense that one's past makes up the individual, Dietrich's unwritten life story indeed was nothing more than a collective embodiment of her identity. Nevertheless, in the face of civilian legal tradition and the extrapatrimonial identity, the court found Dietrich's life story—her identity—to be capable of pecuniary valuation.

Similarly, in a 1970 case, author Henri Charrière sued a publisher for producing a book about his life and for using his photograph on the cover. 95 The plaintiff sought damages for the violation of his right of privacy and for the unauthorized use of his photograph. The court rejected Charrière's privacy argument, as the book made use only of public documents and the photograph was taken in a public place.

93. Judgment of Mar. 16, 1955, Cour d'appel de Paris, 1955 D.S. Jur. 295 (Fr.). See also Hauch, supra note 9, at 1237–38. In fact, the details contained in the articles were true, but the court stressed the fact that the details were published without the consent of the plaintiff. *Id.* This approach by the court has led scholars to attribute to this opinion a finding of an absolute right of privacy despite the general tort principles of Civil Code article 1382. *Id.* While this may be true, the importance of *Dietrich* for this paper is the court's awarding of both non-pecuniary and pecuniary damages for the defendant's dissemination of private facts about the plaintiff.


Nevertheless, the court recognized that the author's photograph had commercial value when used in such an instance.96

Also of significance is the 1987 case of actor Alain Delon.97 Delon sued a tabloid magazine for publishing a story containing a photograph of him after he had undergone surgery in a Cuban hospital. Delon based his claim upon article 1382 and his article 9 right of privacy, yet he sought both moral damages and damages for the unauthorized use of his image for commercial purposes. The lower court rejected Delon's claim for commercial damages, reasoning that the nature of his claim did not permit such damages. The Cour de Cassation reversed, holding that article 9 alone permits courts to repair the entirety of the plaintiff's damage suffered as a result of an affront to his private life.98 The significance of this case is two-fold. First, the Court reiterated earlier jurisprudence recognizing a pecuniary interest in one's image. Second, and perhaps more significant, France's highest court seemed to have acknowledged the possibility of collecting pecuniary damages within the rubric of article 9 privacy. Still even more significant developments in the droit à l'image were soon to follow.

A year after Delon was decided, a court of first instance was faced with a rather unique claim in Mme. Brun v. SA Expobat.99 The widow of the famous French actor Raimu brought suit against an advertising company that had used a caricature of her late husband to aid in the sale of real estate.100 While the court rejected the wife's claim for moral damages for invasion of privacy, the court awarded the widow damages for a share of the profits enjoyed by the defendant from the use of her late husband's image. As was correctly summarized in the reports:

_The right to one's image has a moral and patrimonial character; the patrimonial right which allows the contracting of the commercial exploitation of the image for monetary compensation, is not purely personal and passes on to heirs._

For a great actor to achieve celebrity, far from allowing the free use of his image for commercial purposes, makes it more necessary on the contrary to obtain his consent which he may deny for dignity reasons or grant subject to payment. In the

100. Id. See also Logeais & Schroeder, supra note 9, at 537–38.
present case, the use of an actor's image for advertising purpose is not offensive; yet it was subject to his heirs' authorization for she could have derived profit from such use according to the law of demand on the advertising market.\(^{101}\)

Thus, not only did the court outrightly recognize a patrimonial aspect of the identity, the court made the quantum leap towards acknowledging the heritability of the right to the identity. In doing so, the court seemed to suggest that flowing from the extrapatrimonial identity insusceptible of appropriation and outside of commerce is a pecuniary, commercial right to the identity which is subject to inheritance and, perhaps, appropriation and transfer.

Eight years later, the 1996 Cour d'appel case of *Les Editions Sand & M. Pascuito v. M. Kantor, Mme. Coluccii*\(^{102}\) added to the Brun understanding of the droit à l'image. *Les Editions Sand* involved the publication of photographs of a widow's late husband, the famous French comedic actor, "Coluche." In upholding the decision of the lower court finding for the widow, the Cour d'appel made this statement regarding the droit à l'image:

> The right of image is a personality right which entitles anyone to oppose the dissemination and use of his or her image without prior consent . . . [T]he violation of this right may cause to its holder moral damage and, as the case may be, economic damage whenever the holder conferred a commercial value to his or her image due to his or her activities or notoriety . . . .

> Whereas heirs may seek relief for the moral harm caused by such violation only if the selection and display of the image is likely to impair the perception that the public may have of the deceased artist, they are entitled to full compensation of the economic damage stemming from said violation.\(^{103}\)

At first glance, the language from the Cour d'appel appears paradoxical. The court outrightly called the right of image a personality right, but nevertheless attributed to it the heritability characteristics of a patrimonial real right. However, by reading Brun and *Les Editions Sand* together, one realizes the soundness of the


courts' logic: the abstract identity, while insusceptible to appropriation, nevertheless has very real patrimonial consequences, and certain pecuniary rights may flow from what remains an extrapatrimonial identity. Such a theory not only remains true to the basic civilian notion of the extrapatrimonial identity, but finds support in other areas of the civil law as well. But absent from Brun and Les Editions Sand was an explanation of how such a pecuniary, patrimonial right to the identity comports within the civilian classification of rights. Only by understanding the classification of this right can one fully comprehend how the right to the identity functions within the civil law, and in particular, the law of Louisiana. But before turning to Louisiana law, the state of identity rights in the European Union deserves a visit.

III. IDENTITY RIGHTS IN THE EUROPEAN UNION

With the 1992 Maastricht Treaty, or Treaty on European Union, the European Union was born. Article F of the Maastricht Treaty mandated as follows:

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions of Member States.

104. See infra Part V(D).
105. Id.
106. While the Maastricht Treaty marked a further step towards the unification of Europe, the creation of the EU certainly was not the first step. Prior to the creation of the EU, three European organizations had already begun the process towards a unified Europe: the European Coal and Steel Community, the European Atomic Energy Community and the European Community. In effect, the EU embraces, rather than replaces, these three European communities. An often used analogy of the EU structure is that of a roof with three pillars: the EU being the roof, the European communities (the ECSC, the EAEC, and the EC) forming the first pillar, common foreign and security policy as the second pillar, and cooperation in justice and home affairs being the third pillar. See Klaus-Dieter Borchardt, The ABC of Community Law available at http://europa.eu.int/eur-lex/en/about/abc/index.html. By ratifying the Maastricht Treaty, "Member States [ceded] some of their sovereign rights to the EC . . . and have conferred on it powers to act independently. [Thus,] in exercising these powers, the EC is able to issue sovereign acts which have the same force as laws in individual States." Id.
common to the Member States, as general principles of Community law.

(3) The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.\textsuperscript{107} This sweeping call for a respect for fundamental rights has been criticized for its failure to define the contents of these fundamental rights, and their remedies, with more specificity.\textsuperscript{108} Article F was amended, however, by the 1997 Treaty of Amsterdam to become Article 6 of the current Treaty on European Union ("TEU"). Though the amendment did not provide a list of enumerated rights as some commentators might have hoped, the Amsterdam Treaty did lend more credence to Maastricht's original guarantee of fundamental freedoms. As amended by Amsterdam, Article 6 of the Treaty on European Union now reads as follows:

(1) \textit{The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.}

(2) The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(3) The Union shall respect the national identities of its Member States.

(4) The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.\textsuperscript{109}


Thus, with the Amsterdam amendment, article 6(1) of the TEU formally embraced human rights and fundamental freedoms as founding principles of the European Union, principles "which are common to the Member States." Though these fundamental rights remain as general principles of law, they are law nonetheless. Of singular import to this paper is, of course, the right to one's identity. While no such right is outrightly specified in either the TEU or the European Convention on Human Rights ("ECHR"), the right nevertheless exists, much as in France, as a jurisprudential blossom of the statutory right of privacy.

A. The Fundamental Right to Privacy and the Identity

One of the "fundamental rights" guaranteed by the TEU lies in article 8 of the ECHR, labeled "Right to respect for family and private life." In particular, article 8 of the ECHR provides in pertinent part that "[e]veryone has the right to respect for his family and private life, his home and his correspondence." While the article makes no mention of the identity, the European Court of Human Rights has interpreted this article as a protectorate of the identity. Insofar as the European Court of Justice, when faced with an issue of fundamental rights, must turn to the ECHR as directed by article 6(2) of the TEU, the jurisprudence of the European Court of Human Rights often becomes very persuasive authority in the application of the ECHR. Thus, for purposes of examining the possible scope of the right of privacy under EU law, the findings of the European Court of Human Rights prove essential.

Perhaps the best recent example of ECHR jurisprudence finding a right to the identity is Peck v. United Kingdom, as the facts of the case likely would give rise to a cause of action under the United States right of publicity. In August of 1995, Geoffrey Peck was suffering from a particularly severe bout of depression. Late in the
evening, Peck walked to the central junction in his town and cut his wrists with a kitchen knife. Afterwards, he leaned over a railing, watched the traffic pass before him, and waited to die. However, Peck survived because the operator of a closed-circuit television ("CCTV") system installed by the city observed Peck wielding a knife and dispatched emergency personnel to the scene.\textsuperscript{114}

During the months following the incident, video footage of Peck's suicide attempt circulated from news stations to television programs, and still images of the incident appeared in newspapers and other publications. Peck filed suit in the European Court of Human Rights against the various media commissions of the United Kingdom for authorizing the release of the CCTV video. Peck's cause of action was grounded in article 8 of the ECHR, the right to respect for his private life.\textsuperscript{115}

In its assessment of the right to private life guaranteed by article 8 ECHR, the European Court of Human Rights noted the expanse of the right, a right that included the right to the identity:

Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Art. 8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life."\textsuperscript{116}

However, the court also considered that there are occasions when people engage in activities which they reasonably should know may be recorded or reported in a public manner. The question, then, becomes whether the person's expectation of privacy is reasonable.\textsuperscript{117} In the eyes of the court, the claimant's expectation of privacy was just that—reasonable. While Peck was on a public street, the fact that he was there late at night, and that he was not there to participate in a public event, was enough for the court to find that Peck enjoyed a

\begin{itemize}
  \item \textsuperscript{114} Id. ¶ 10–11.
  \item \textsuperscript{115} Id. ¶ 48–52.
  \item \textsuperscript{116} Id. ¶ 57 (citing P.G. & J.H. v. United Kingdom, app. no. 44787/98, Eur. Ct. H.R. ¶ 56 (2001)) (emphasis added).
  \item \textsuperscript{117} Id. ¶ 58 (quoting P.G. & J.H. v. United Kingdom, app. no. 44787/98, Eur. Ct. H.R. ¶ 56 (2001)).
\end{itemize}
privacy interest in his public suicide attempt. Moreover, the court rejected the government's defense that the city council's interference with Peck's right by releasing the video footage was justified, as the council neither sought Peck's consent nor took reasonable steps to ensure that Peck's identity would be masked. As compensation for his non-pecuniary emotional distress, the court awarded Peck 11,800 euros; however, the court rejected the claimant's request for pecuniary damages to reimburse his costs incurred in trying to stop the display of the video.

In looking at the court's reasoning in Peck, it reads much like a typical United States claim for appropriation privacy. Still, Peck is significant for acknowledging and protecting the link between the claimant and his identity. Though the court only compensated the non-pecuniary, emotional harm that flowed from the misappropriation of Peck's suicide attempt, the court nevertheless unquestionably recognized that the protection afforded by article 8 ECHR reached to the identity. Notably absent from the court's opinion was an award for the commercial value of Mr. Peck's image. Peck made no such request. Ironically, however, the court's denial of Peck's claim for pecuniary damages for his expenses actually suggests that the court was willing to recognize a pecuniary aspect to the identity. The court denied Peck's pecuniary claim because the plaintiff simply failed to prove the amount of his expenses. The court simply pointed out that in circumstances where the claimant has not provided sufficient proof of his damages, the court does not award pecuniary damages. A contrario, where the claimant does prove pecuniary damages for an affront to his identity, such damages are permitted.

Certainly a case like Peck does not provide the level of insight into the patrimonial identity like the French jurisprudence applying French Civil Code article 9. Still, it must be remembered that the same article 8 of the ECHR applied in Peck was the very article that gave rise to France's article 9. Peck did not reject the plaintiff's claim for commercial damages for the use of his identity, since no claim was made. But Peck also did not reject the notion of a

118. Id. ¶ 62.
119. Id. ¶¶ 85–86.
120. Id. ¶¶ 117–122.
121. In this regard, the plaintiff missed a potentially valuable opportunity. His video was shown on the BBC series "Crime Beat," a program with an average of 9.2 million viewers. Moreover, footage of the video was shown in the weeks prior to the airing to advertise the episode. Id. at ¶¶ 20–21. No doubt, the BBC likely made a substantial profit from the use of Mr. Peck's image. Peck may not have been a celebrity, but sensational, gruesome footage of a dying, knife-wielding man carries significant commercial value no matter the person in the picture.
122. Id.
123. See supra note 79.
pecuniary aspect of the identity. Without doubt, some aspect of the right to the identity exists in article 8 of the ECHR. Given France's interpretation of the scope of the right of privacy, it is not difficult to foresee a future ECHR or ECJ court following France's lead and finding within article 8 of the ECHR, and article 6 of the TEU, a pecuniary, patrimonial right to the identity. In the meantime, the question of whether the EU recognizes any sort of right in the identity, at least, appears to have been answered.

IV. THE LOUISIANA RIGHT TO THE IDENTITY

Protecting the personality is a familiar concept in the civil law, and specifically, in Louisiana.124 As used in this sense, however, personality denotes a purely extrapatrimonial concept incapable of alienation or appropriation.125 A person's pecuniary interest in identity, on the other hand, has never been acknowledged by a Louisiana court.126 One federal court applying Louisiana law hinted at Louisiana's possible acceptance of such an idea,127 while most recently, the Federal Eastern District of Louisiana accepted the premise that if proved, the plaintiffs would be able to recover under Louisiana law the reasonable market value of the use of the plaintiffs' identities.128 Inexperience, however, is not synonymous with rejection, and Louisiana's unfamiliarity with a pecuniary notion of identity cannot be equated with a wholesale dismissal of the right.

Given the growth of the pecuniary right of publicity in neighboring common law jurisdictions, it is not difficult to foresee Louisiana acknowledging a like right. However, as a matter of scholarly prudence, the adoption of any new right should not occur without first understanding how the right works within the framework of Louisiana law and the civilian taxonomy of rights. Courts in civilian France have come to protect the pecuniary notion of identity, though many commentators still cannot comfortably resolve the conflicting patrimonial and extrapatrimonial perspectives of the identity.129 This paper hopes to dispel some of this confusion. A pecuniary interest in identity does fit within the rigid taxonomy of civilian juridical relations, and more importantly, with the workings of Louisiana law. But no such right has been acknowledged by

124. See Yiannopoulos, supra note 5, §§ 17, 201, 203.
125. Id.
126. See infra Part V.A.
129. See supra note 57.
Louisiana courts. Before the right to the identity is to be explored, a survey of the Louisiana jurisprudence is needed to aid in explaining why the question of a pecuniary interest in the identity—the question of this paper—has not already been answered.

A. Louisiana’s Limited Experience with Identity Rights

Over the past 100 years, Louisiana has seen very few cases involving the appropriation of a person’s identity, and while the Louisiana Supreme Court has adopted Prosser’s four privacy torts, not one Louisiana state court has had the opportunity to address the commercial aspect of identity. Like jurisdictions elsewhere in the United States, Louisiana’s protection of identity arose out of a broader notion of privacy, which surfaced as early as 1811 in Denis v. Leclerc. The defendant in Denis acquired a private letter written by the plaintiff and subsequently ran an advertisement in the local paper inviting the general public to the defendant’s house to view the

130. See Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979) (citations in original):

The right of privacy embraces four different interests, each of which may be invaded in a distinct fashion; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); Prosser, Law of Torts, 4th ed. (1971); Prosser, Privacy, 48 Calif.L.Rev. 383 (1960); Restatement Second of the Law of Torts (1959). One type of invasion takes the form of the appropriation of an individual’s name or likeness, for the use or benefit of the defendant. While it is not necessary that the use or benefit be commercial or pecuniary in nature, the mere fact that a newspaper is published for sale does not constitute such use or benefit on the part of the publisher. Another type of invasion occurs when the defendant unreasonably intrudes upon the plaintiff’s physical solitude or seclusion. Because the situation or activity which is intruded upon must be private, an invasion does not occur when an individual makes a photograph of a public sight which any one is free to see; Prosser, Law of Torts, 809. A third type of invasion consists of publicity which unreasonably places the plaintiff in a false light before the public. While the publicity need not be defamatory in nature, but only objectionable to a reasonable person under the circumstances, it must contain either falsity or fiction. A fourth type of invasion is represented by unreasonable public disclosure of embarrassing private facts. With reference to this category, Prosser states that “[i]t seems to be generally agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see.” Law of Torts, 811. Similarly, the Restatement Second of the Law of Torts indicates that “there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.”

Jaubert found the right of privacy to be protected by Louisiana Civil Code article 2315. Id. at 1388–89.

131. Denis v. Leclerc, 1 Mart. (o.s.) 297 (La. 1811).
letter. True to his word, the defendant shared the contents of the letter with inquirers.\textsuperscript{132} Though the court based its decision for the plaintiff upon one’s property right in a letter,\textsuperscript{133} the strong, protective language of the opinion is saturated with the underpinnings of privacy.\textsuperscript{134}

Louisiana courts and commentators ascribe the first outright jurisprudential reference to a “right of privacy” to the 1905 case of \textit{Itzkovitch v. Whitaker}.\textsuperscript{135} Curiously enough, the case involved the unwanted display of the plaintiff’s image. The defendant, inspector of police, exhibited the plaintiff’s photograph in the rogues’ gallery as a testament to his “notoriously bad” character.\textsuperscript{136} In response to the plaintiff’s request to enjoin the publication of his photograph, the court stated:

\begin{quote}
We think that the publication of an innocent man’s photograph in the rogues’ gallery gives rise to sufficient grounds to sustain an injunction. There is a right in equity to protect a person from such an invasion of private rights. Every one who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute.\textsuperscript{137}
\end{quote}

The court’s description of privacy as an absolute right in equity falls in line with the traditional civilian understanding of personality

\begin{footnotes}
\item[132.] \textit{Id.} at 318.
\item[133.] In answering whether the letter was property, the court replied, “There is nothing that a man may so emphatically call his own, or more incapable of being mistaken, than his ideas thrown upon paper, his literary works.” \textit{Id.} at 299.
\item[134.] Concerning the contents of the letter, the court remarked:
  The letter, it is insinuated, is not written on a scientific subject: it was prepared for a lady to whom the plaintiff was paying his addresses and relates only to the object he had in view. Be it so: we are then fairly to presume it written in “mystery and confidence.” Then the defendant could not produce it to light WITHOUT CRIME.
  HE has not alleged [sic], surely he has not enabled us to believe, that he had any other view than to vex the plaintiff. Then his “CRIME IS STILL GREATER: for he seeks to unveil the secret of a letter, with the only design of doing an INJURY TO THE WRITER, who thought he might open his heart, without apprehension of that being revealed, which he was writing for a friend only, and which he wished to remain “concealed from the rest of the world.”
  \textit{Id.} at 312 (emphasis in original).
\item[136.] \textit{Id.} at 500.
\item[137.] \textit{Id.}
\end{footnotes}
rights; however, this may have been coincidental. Though the court does not cite a source for this passage, the absolutist language also closely resembles that of the court's common law contemporaries.\textsuperscript{138} Regardless of the source of the court's reasoning, the November, 1905, decision enjoys particular significance, as it marks one of the earliest jurisprudential acceptances of a right of privacy in the United States.\textsuperscript{139}

While the identity has enjoyed increasing protection since \textit{Itzkovitch}, the protection has been limited to the extrapatrimonial personality. This limited protection, however, cannot be attributed to the discretion of the courts; rather, plaintiffs seem reluctant to assert a pecuniary interest in their identities.\textsuperscript{140} In the 1968 decision of \textit{Lambert v. Dow Chem. Co.}, the plaintiff sued his employer for displaying graphic photographs of his work-related injury in plant safety seminars.\textsuperscript{141} Even though such photographs carry commercial value,\textsuperscript{142} the plaintiff only claimed embarrassment and humiliation for the violation of his right of privacy.\textsuperscript{143} A more recent example of a potential pecuniary interest in identity came in \textit{Slocum v. Sears Roebuck & Co.}\textsuperscript{144} The plaintiff took her three and a half month old daughter to Sears to have her photograph taken. Evidently impressed by the child's photogenic attributes, Sears displayed the pictures in sundry locations throughout two of its stores.\textsuperscript{145} The plaintiff sued under Prosser's four privacy torts as had been adopted by the Louisiana Supreme Court in \textit{Jaubert v. Crowley Post-Signal, Inc.}\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{138} See, e.g., Pavesich v. New England Life Ins. Co., 50 S.E. 68, 78 (Ga. 1905).
\item \textsuperscript{139} Courts and scholars typically view Pavesich as the case that lead the development of the right of privacy. See McCarthy, supra note 3, § 1:17.
\item \textsuperscript{140} See McAndrews v. Roy, 131 So. 2d 256 (La. App. 1st Cir. 1961) (plaintiff recovered for an invasion of his right of privacy for the defendant's use of "before and after" photos of the plaintiff to promote the defendant's health club); Easter Seal Soc'y v. Playboy Enters., Inc., 530 So. 2d 643 (La. App. 4th Cir. 1988) (plaintiffs unsuccessfully sued for false light invasion of privacy and defamation for the use in an adult film of unremarkable footage of them at a street parade); Sharrif v. ABC, 613 So. 2d 768 (La. App. 4th Cir. 1993) (plaintiffs asserted without avail Jaubert's four privacy torts for the use of a video played on "America's Funniest Home Videos" that depicted plaintiffs's band performing while the stage suddenly collapsed).
\item \textsuperscript{141} Lambert v. Dow Chem. Co., 215 So. 2d 673–74 (La. App. 1st Cir. 1968).
\item \textsuperscript{142} The commercial value of the images lies in the price a company would have to pay to obtain and use such photographs. Barring misappropriation of the images or the obtaining of a waiver by the person whose identity is represented in the photographs, the company would be forced to pay for the photographs.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Slocum v. Sears Roebuck & Co., 542 So. 2d 777 (La. App. 3d Cir. 1989).
\item \textsuperscript{145} Id. at 778.
\item \textsuperscript{146} Id. (citing Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La.)
\end{itemize}
The Court agreed that the actions of the defendant constituted a technical interference with the child's privacy right, but found that given the young age of the child, she was incapable of sustaining actual damage. By focusing only on privacy, the plaintiffs missed a golden opportunity. While the value of the photographs might not have been that of a celebrity endorsement, the commercial worth of the photographs nevertheless was made manifest by their use throughout the stores. In short, the photographs of the child carried a price because Sears chose to use them. Save for a waiver issued by the parents of the child, Sears would have had to pay for the use of these particular photographs. Moreover, the photographs may have generated increased business for Sears, which in turn translates to increased profits. As administrators of the child's estate, the parents should have been able to recover either the usage price of the photographs or a portion of Sears' profits generated by the photographs. But the parents made no such claim.

B. Prudhomme v. Procter & Gamble Co.: An Unremarkable Prediction

In 1992, a Louisiana federal district court was called upon by defendant Procter & Gamble to address a motion to dismiss the plaintiff's suit. The plaintiff, world-renowned chef Paul Prudhomme, sued P & G on multiple counts for the defendant's use of a Paul Prudhomme look-alike in a Folgers Coffee commercial. One of the claims Prudhomme asserted was an infringement of his "common law" right of publicity. P & G contended that Louisiana had not recognized such a right and invoked Jaubert v. Crowley Post-Signal, Inc. as proof that Louisiana identity rights were limited to Prosser's four privacy torts. In response, Prudhomme pointed to common law courts and the Restatement (Second) of Torts as proof that Louisiana would recognize an analogous right of publicity. In response to both parties' arguments, the court issued this plain statement:

While Louisiana courts have not explicitly adopted this right [of publicity], they have not specifically precluded it, either. Plaintiffs have made a good faith argument for extension of the law in Louisiana on this topic, and should not be
prevented from presenting an argument on this issue at this early stage in the proceedings.\footnote{151}

In short, the court merely recognized the silence of Louisiana courts on the possibility of a pecuniary interest in the identity, though over a decade later, Louisiana courts have yet to proceed any closer to—or farther away from—recognizing such a right. Nevertheless, the existence of such a right need not come from an extension by analogy to the common law, which is exactly what the same federal court did twelve years later.

\textbf{C. The Latest Word on a Louisiana Right to the Identity: Capdeboscq v. Francis}\footnote{152}

In June of 2004, shortly before the printing of this paper, the Federal Eastern District of Louisiana addressed plaintiffs’ claims for economic damages stemming from the use of their faces on the cover of a video without their consent.\footnote{153} The plaintiffs did not outrightly plead a violation of their right of publicity, but instead sought economic damages for their misappropriation claim.\footnote{154} The court in \textit{Capdeboscq} followed the lead of \textit{Jaubert v. Crowley Post-Signal, Inc.}\footnote{155} and turned to the Restatement (Second) of Torts to aid in its analysis of whether Louisiana would permit commercial damages for the misappropriation of the identity. Unmoved by the fact that the plaintiffs sought such economic loss for what was traditionally a privacy-based tort, the Eastern District adopted the approach of the Restatement\footnote{156} which allows for both emotional and commercial damages for the violation of the right to the identity: “The court concludes that \textit{if the Plaintiffs prove that Defendants misappropriated their likeness}, they would be entitled to emotional damages, as well as reasonable market value of the use of the Plaintiffs’ identity . . . .”\footnote{157} Though the plaintiffs were not celebrities, the court was at least willing to entertain the idea of awarding the plaintiffs a “reasonable royalty.”\footnote{158} However, no such award was issued, as the plaintiffs evidently failed to meet their burden of proving the value of such a royalty.\footnote{159}

\footnote{151. \textit{Id.} at 396.} \footnote{152. 2004 WL 1418392 (E.D. La. 2004).} \footnote{153. \textit{Id.} at \#2.} \footnote{154. \textit{Id.} at \#1 & n. 2.} \footnote{155. 375 So. 2d 1386 (La. 1979).} \footnote{156. \textit{See} Restatement (Second) of Torts §§ 652C, 652H (1977).} \footnote{157. \textit{Capdeboscq}, 2004 WL 1418392, \#2 (footnote omitted) (emphasis in original).} \footnote{158. \textit{Id.} at \#3. \textit{See also infra} Part I.C.} \footnote{159. \textit{Capdeboscq}, 2004 WL 1418392, \#3.}
Without question, *Capdebosq* comes closest to tackling the question asked by this paper: does Louisiana law recognize a pecuniary right in the identity? The court concluded that it did, though the court rested its decision in right of privacy jurisprudence, common law analogy, and the Restatement (Second) of Torts. This author does not criticize the Eastern District in its analysis; the opinion would have been dreadfully incomplete without such reasoning. However, *Capdebosq* did not address the more difficult and fundamental (and admittedly academic) question of just how such a right exists within the structure of the civil law. *Capdebosq* was correct in its holding. Louisiana law does recognize a pecuniary right to the identity. But only by examining just how the right to the identity exists within the civilian system may one fully understand how the right functions under Louisiana law.

1. The Louisiana Right to the Identity

a. Sources of Law

Like France’s article 1382, Louisiana too has an all-encompassing tort provision embodied in Civil Code article 2315, which states in part: “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” Also as with France, Louisiana courts have applied article 2315 as the source of law for the Louisiana right of privacy. Curiously absent from Louisiana’s right of privacy jurisprudence, however, is Article 1, § 5 of the Louisiana Constitution of 1974, entitled “Right to Privacy.” The article provides as follows:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

161. La. Const. art. 1, § 5.
The Louisiana Supreme Court in *Jaubert v. Crowley Post-Signal, Inc.*[^162^] distinguished this constitutional right of privacy from the individual’s private tort cause of action for an invasion of privacy:

> The right to privacy under discussion here is one which protects the individual against private action and is grounded in tort. It should be distinguished from the constitutional right to privacy which the United States Supreme Court, in a line of cases, has found to emanate from certain provisions of the Bill of Rights and to protect, from governmental invasion only, those personal rights which are deemed fundamental or implicit in the concept of ordered liberty.[^163^]

However, the Louisiana Supreme Court went on to note that the Constitutional Convention transcripts made no mention of limiting the article to governmental intrusion.[^164^] Moreover, in his article entitled, “The Declaration of Rights of the Louisiana Constitution of 1974,” Professor Hargrave concluded that the notable absence of the phrase “no law shall . . .” coupled with the placement of article 1, section 5 outside of the sections dealing with procedural rights in criminal cases meant that Louisiana’s constitutional right of privacy would protect a person both from state action and private action.[^165^]

Unfortunately, Professor Hargrave’s vision of Louisiana’s constitutional right of privacy has not come to fruition, as nearly every case citing section 5 begins with “*State v. . . .*” However, Hargrave’s right of privacy has not been totally lost. At least one of Prosser’s four privacy torts has surfaced from time to time amid the sea of “unreasonable search and seizure” defenses so common to article 1, section 5. The right to be free from unwanted public disclosure of private facts has found a place in Louisiana’s constitutional right of privacy, but even here, the claim usually arises out of a government agency’s refusal to disclose facts about individuals.[^166^] Still, this does not mean that the right to the identity cannot arise out of Louisiana’s constitutional right of privacy. The legal world’s complacency in viewing section 5 as a right against governmental intrusion alone does not dictate the scope of the right. As has already been seen, the right of appropriation privacy has been

[^162^]: 375 So. 2d 1386 (La. 1979).
[^163^]: *Id.* at 1387 n.1 (emphasis added).
[^164^]: *Id.*
[^166^]: See, e.g., Local 100, Serv. Employees’ Intern. Union v. Forrest, 95–1954 (La. App. 1st Cir. 1996), 675 So.2d 1153 (union successfully sued the Louisiana Department of Health and Hospitals for DHH’s refusal to disclose a list of all state-employed nurses’ aids).
recognized by Louisiana courts, albeit under Civil Code article 2315. To recognize a right in the identity under the more specific Louisiana Constitution article 1, section 5 would not be to fashion a new right, but rather simply would be to acknowledge that the "right to be secure in [one's] person" encompasses the civilian notion of the person and the rights that flow from the person: the extrapatrimonial right to privacy and the patrimonial right to the identity.

Lastly, Civil Code article 2298 on enrichment without cause appears peculiarly suited for situations when a claimant seeks commercial damages for the defendant's use of the plaintiff's image. Article 2298 provides as follows:

A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.\(^\text{167}\)

Louisiana Civil Code article 2298, upon a first reading, seems a natural fit for the right to the identity, since it allows for the plaintiff's recovery of either the defendant's profits from using the plaintiff's image, or the cost that the defendant would have incurred in contracting for the use of the plaintiff's image, whichever is less. However, as it has been applied by Louisiana courts, article 2298 carries five requirements: (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of justification or cause for the enrichment and impoverishment, and (5) there must be no other remedy at law available to plaintiff.\(^\text{168}\) This last factor appears to conflict with article 2315. As has already been discussed, article 2315 is the vehicle by which Louisiana plaintiffs have recovered for violations of


their right of appropriation privacy.\textsuperscript{169} However, since no Louisiana cases have visited the pecuniary right to the identity, article 2315 has not yet earned the role as the codal backer of the right to the identity. Unless and until 2315 becomes the vehicle for recovery for the right to the identity, article 2298 appears to be a strong contender for Protectorate of the right, since at the time of the claim, there still will have been “no other remedy at law available for the plaintiff.”

\textit{b. Understanding the Right to the Identity Under Louisiana Law}

So what if Boudreaux puts a picture of the famous shrimper Thibodeaux on a billboard endorsing Boudreaux’s Shrimp Boil? Earlier jurisprudence has already settled whether Thibodeaux can recover for his emotional distress at having the driving world see his picture on the side of the road. He can. The trouble is, a jury might see such a thing as flattering, maybe even good for Thibodeaux’s business—and what if Boudreaux’s new product is actually as good as Boudreaux thinks it is? Thibodeaux would be even harder pressed to prove that Boudreaux’s misappropriation of his image actually caused damage to his reputation and psyche. Indeed, some commercial shrimpers might claw at the chance to get their name and face in the public eye. If Thibodeaux ever wants to have a chance at a substantial recovery, he needs to seek more than just damage to his personality. He needs to recover for the commercial value of his image. He needs to assert his pecuniary, patrimonial right in his identity. But does such a right exist in Louisiana? It does.

In the very least, the patrimonial right to the identity exists under Civil Code article 2315. Looking back to France, such a right has found its place both in the general tort provision of French Civil Code article 1382 and the more specific article 9 right to respect for private life. Much the same, Louisiana has a general tort provision in Civil Code article 2315 and a more specific right to be secure in one’s person in Louisiana Constitution article 1, section 5. Although article 1, section 5 is the more specific provision, and arguably the better protectorate of the identity, the constitutional section’s long-time link to governmental intrusions makes 2315 the safer vehicle of the two for seeking pecuniary damages for the misappropriation of the identity. Of course, merely assigning a code article to the right to the identity does not overcome the theoretical difficulties that come with recognizing a patrimonial aspect of the traditionally extrapatrimonial identity. Thus, the more difficult question in need of answering is not whether such a right exists, but how such a right exists.

\textsuperscript{169} See infra Part V.A.
c. The Identity as Property? No.

An immediately alluring answer is to classify the right to the identity as a real right (or a property right), where the object of the right is the identity itself. After all, if the identity is property, then its misappropriation necessarily would give rise to damages. Moreover, all the difficulties surrounding the transferability and heritability of the right to the identity would vanish. In other words, this theory would classify the identity as a thing, just like a car or a cat. Such a theory indeed is attractive in its simplicity, and some common law jurisdictions have adopted this approach. But it cannot work in the civilian system.

Classifying the identity as property cannot work, if for no other reason, than because the identity is, and always has been, regarded as an aspect of the personality incapable of alienation or appropriation. Of course, some might suggest that this classification was wrong in the beginning; certainly, eighteenth century jurists could not foresee Michael Jordan’s face in a Nike ad. The jurists, however, were correct: there is only one identity, and it cannot be alienated. Indeed, the very thought of selling one’s identity conjures visions of Mississippi Delta bluesmen peddling souls at the Crossroads. But the identity cannot be sold—not simply because it would be wrong to do so, but because it is impossible to do so. One of the obligations of the seller in a sale is to deliver the thing sold. The identity, as it is understood to be an inseparable aspect of the person, is incapable of being delivered. Thus, in the sense that a "thing" is an object over which may be conferred real rights, the identity is no such thing. Like it or not, the identity forever remains attached to the individual.

d. The Solution: The Extrapatrimonial Identity and the Patrimonial Right of the Identity

There is perhaps no better analogue to the identity than the civilian notion of status, as it too is an extrapatrimonial, inalienable aspect of the person. Traditionally thought to comprise this right

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170. See supra note 49.
171. A possible end run around this problem would be to recognize two identities: the extrapatrimonial identity and the patrimonial identity, where only the latter is subject to appropriation. However, this still does not solve the fundamental requirement that a thing sold must be delivered. See infra note 163. The approach, however, nears the solution. See infra Part V.D.2.
173. See generally Yiannopoulos, supra note 5, § 12.
is the *nomen*, "the fact of bearing the name which designates this status;" the *tractatus*, "the fact of having always been treated as such by all persons with whom family or business took place;" and the *fama*, "the fact of having always been recognized as such by the public."\(^{175}\) Not surprisingly, status bears directly upon filiation,\(^{176}\) but "status," as it is commonly understood by the public, goes well beyond bearing the family name. Planiol writes that the "indications [of status] given inferentially [in Code Civil article 321] should . . . be extended to all kinds of statuses,"\(^{177}\) and he goes on to describe the tripartite elements of "*nomen, tractatus, and fama*" as "nothing but a mnemonic formula."\(^{178}\) Indeed, status, when defined as the public's view of oneself, is nothing more than another term for the identity, one's external self. Viewed in this light, the identity, like status, is not subject to commerce.\(^{179}\) But most interestingly, Planiol rightly recognizes that a sharp distinction must be drawn between one's extrapatrimonial, inalienable status and the pecuniary, patrimonial consequences that may flow from it.\(^{180}\) Thus, while one's status as a Jones is inalienable and extrapatrimonial, the right to succeed to the fortunes of Granddaddy Jones is no doubt a pecuniary, patrimonial right.

Extending Planiol's analysis of status *a pari* to the modern notion of the identity is both sound in theory and comfortable in application. Few, if any, would disagree that one cannot outrightly sell his identity, nor can one lose it by prescription. It is, indeed, an inseparable part of the self. But then again, no person having ever fallen prey to television, radio, print, or outdoor advertising can deny that certain identities enjoy rather lucrative pecuniary rights flowing from them. In this sense, what common law scholars refer to as the right of publicity is nothing more than a patrimonial right of commercial exploitation flowing from the extrapatrimonial self.

The idea of having a patrimonial, pecuniary right to the identity is in no way contrary to traditional civilian doctrine. True, scholars historically have labeled the identity as an aspect of the personality, but the identity gives rise to more than just a personality right. On the one hand there is the absolute, extrapatrimonial right to protect one's identity from moral damage, and on the other, there exists the pecuniary right to use one's identity for economic gain. In short, each right protects different aspects of a singular identity. The extrapatrimonial right protects the psychological union between the

\(^{175}\) Id. no. 434.  
\(^{176}\) Id.  
\(^{177}\) Id.  
\(^{178}\) Id.  
\(^{179}\) See id. no. 436.  
\(^{180}\) Id. no. 437.
individual and his identity, the individual’s internal perspective of the self, whereas the patrimonial right protects the commercial value of the identity generated by a collective third-person, market perspective of the individual’s identity. Nevertheless, on a larger scale, both rights arise out of one identity.

e. Classification of the Right to the Identity in Civilian Taxonomy

Once the right to the identity is seen for what it is—a patrimonial right to exploit one’s identity for commercial gain—classification of the right within the civilian taxonomy begins to take form. The right to the identity is a real right insofar as (1) it entails ownership (the right to use, enjoy, and dispose)\(^{181}\) of a “thing,” (2) it enables the owner to draw from the thing all or part of its economic advantages,\(^{182}\) and (3) the right is opposable against the world.\(^{183}\) But what is the thing of the right to the identity? As has already been determined, the object of the right cannot be the identity, since it is incapable of appropriation. This is where the right to the identity earns its sui generis badge. The object of the right to the identity is not the identity, but rather the economic potential that stems from the identity.\(^{184}\)

This unique understanding of a real right conferring ownership over the commercial value of the identity is entirely sui generis, and though the right to the identity bears resemblance to the right of usufruct, unfortunately, the differences between the two rights are significant enough to necessitate analogy beyond the law.\(^{185}\) Imagine,

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181. See Yiannopoulos, supra note 5, § 203.
182. See Yiannopoulos, supra note 58, § 232.
183. See Yiannopoulos, supra note 5, § 203.
184. Indeed, the notion that the value of a thing can serve as the object of a real right is not completely foreign to the civil law. The accessory real right attaches to the value of a thing, the value having been reserved to satisfy the claim of the creditor. See Yiannopoulos, supra note 58, § 232. The most common example of such a right is the mortgage, an accessory real right to the principle obligation to pay the lender. Of course, the right to the identity is very different from an accessory real right. There is no principle obligation, and more importantly, the “thing” in which the creditor has a value interest itself is an object of ownership. In other words, the object of the accessory real right (the value of the thing) is wholly different from the object subject to ownership (the thing). But in the right to the identity, the object subject to ownership is the value of the identity.
185. Perhaps the closest civilian concept to this notion of a right over the “potential” of the identity is the right of usufruct over nonconsumables, a limited real right conferring only the right of use and enjoyment over the thing. See La. Civ., Code arts. 539, 550 (2004). Like the holder of the right to the identity, the usufructuary may use and enjoy the object of the usufruct, and also like the
for a moment, the identity as a battery casing. Contained within the battery casing is electricity, potential energy capable of powering an array of items. In this sense, the commercial value of the identity can be likened to the electricity contained within, but wholly separate from, the battery casing. The economic value of the electricity of course depends upon the size and charge the battery, much in the same way that the economic value of one's identity depends upon celebrity status and marketability. Thus, an exhausted battery is nothing more than an empty shell, an identity without viable market potential. But where the battery holds a charge, the owner of the battery can sell to multiple parties varying amounts of electricity, and he may do so without having alienated the battery.

In the same way, when an advertising agency contracts for the limited right to use Michael Jordan's face on a billboard, the agency has purchased only a small portion of the total market potential of Jordan. Jordan retains the bulk of his identity's market value, and more importantly, he retains his identity. Thus, the potential of the identity, like the electricity within a battery, enjoys an existence and significance separate from the identity itself. While the value of the identity may be an object of commerce, the identity remains attached to the person. When the value of the identity is exhausted, the identity nevertheless remains.

Given this analogy, it is immediately apparent that the commercial value of one's identity is an incorporeal movable: incorporeal because it is intangible, \(^{186}\) and movable because it is not immovable. \(^{187}\) The right to the identity, then, is a patrimonial, pecuniary right over the commercial value of one's image (an incorporeal movable) that flows from the extrapatrimonial identity. The right to the identity may be bought and sold in whole or in part, leased, assigned, and encumbered just like any other object of a real right. The right is governed by Books II and III of the Louisiana

inalienable identity, the object of the usufruct may not be alienated by the usufructuary. The right of usufruct, on the other hand, is alienable much in the same way that the right to the identity is alienable. \(^{186}\) See id. art. 567. In these regards, the right to the identity bears notable similarities to the usufruct.

However, much of the laws of usufruct address the relationship between the usufructuary, the thing, and the naked owner, and the notion of the naked owner, insofar as it places a limit on the rights of the usufructuary, simply does not comport with the right to the identity. Perhaps the most significant outcome of the existence of the naked owner on the usufruct (as it relates to the right to the identity) is that the usufruct is not heritable and terminates upon the death of the usufructuary, \(^{187}\) see id. art. 607, whereas the right to the identity is heritable and, to an extent, perpetual. \(^{186}\) See infra Part IV.C.4.

186. See id. art. 461.

187. See id. art. 475; see also id. art. 473.
Civil Code to the extent that their provisions apply. In short, the commercial potential of the identity is a thing.

\[f. \text{ Transferability and Heritability of the Right to the Identity}\]

Even after recognizing that the economic potential of the identity is a thing separate from the extrapatrimonial identity, the thought of a person selling to another his right to his identity, thereby losing the right to decide when, where, and in what manner his image will be used in advertising, still might seem a bit odd to some. Nevertheless, it is a reality of the functioning market. Advertisers routinely obtain exclusive rights to market an individual. Of course, these rights are almost always limited in duration and narrow in scope, but this is owed to wise contracting, not to the confines of the law. Whether the transfer is for a limited portion or for the whole of the value in the identity, nothing in the law prohibits such a transfer.

The heritability of the right to the identity presents a different, but related, difficulty. Nevertheless, public policy and legal theory both counsel in favor of the heritability of the right. The difficulty, of course, lies in the understanding of the attachment of the commercial potential in the identity to the identity itself. Thus, the question arises: if an individual dies and the extrapatrimonial identity ceases to be, what becomes of the patrimonial value of the identity? If one believes that the two can only co-exist, then the pecuniary right in the identity necessarily would vanish upon death. One word dispels this theory: Elvis. The reality of the market is that some people are worth more dead than alive, and rather than disappear, the market value of a deceased person's identity may actually increase. This reality demonstrates that while the market value of the identity initially relies upon the identity for genesis, once created, the former can survive long after the latter.

Thus, the post-mortem existence of the marketable identity presents two options: either the right, not being heritable, falls into the public domain for all advertisers to feast upon; or the right, being heritable, is passed either testate or intestate to persons close to the decedent, people who, presumably, will show greater care and concern in the manner in which they manage the market value of the decedent's identity. Public policy suggests the latter option, as does legal theory, for if the value of the identity, once owned by the decedent, remains in existence after the death of the decedent, then the law requires that the value of the identity pass to the heirs or legatees.
In today’s world, advertising truly is everywhere. Television, magazines, billboards, these have always been the traditional medium. But now, as marketers continue to compete with their creativity, it appears no surface is safe from the advertisement. The backstop behind home plate at Wrigley Field, people’s cars, even the fold-down tray on an airplane all have been reduced to an advertising medium. Advertising, like the mosquito, is a fact of life. It may be ignored, but it cannot be denied.

Of course, behind all this advertising is money, a lot of money. And when advertisers use human props for their ads, be they celebrities endorsing a product or actors playing the role of consumer, money moves from advertiser to individual. The advertiser has paid for something. Services? Not really, since the true value of the individual’s work manifests itself over the life of the advertisement. Rather, the reason the advertiser pays the price is so that it may use the image of the individual. Most likely the use is for a limited duration with very strict terms, thus creating a lease. The object of this lease is the individual’s commercial potential in his identity.

Thus, with the reality of the advertising modus operandi comes the reality of the right to the identity. In a sense, the right has been born of necessity, as appeared to be the case in Haelan Labs, Inc. v. Topps Chewing Gum, Inc.188 when Judge Frank posited that the celebrity suing for the misuse of his image cared not a bit about an affront to his feelings—the celebrity plaintiff wanted money for the marketer’s use of his image. While common law jurisdictions have reacted rather disparately in their treatment of this “right of publicity,” they at least have reacted by affording some level of protection to plaintiff’s seeking commercial compensation for the misappropriation of their identities. Now it is Louisiana’s turn.

True, existence of a civilian right to the identity requires some rethinking of traditional civilian taxonomy. Namely, one must accept that the commercial value of the extrapatrimonial identity can be the object of ownership. But having made this hop, one acquires a complete understanding of just how such a right is to function within the civil law, and more importantly, within Louisiana’s Civil Code. Indeed, this is the beauty of the civil law. Simply by understanding the classification of the right to the identity as a real right over an incorporeal movable, the remainder of the Civil Code takes over and breathes life into the right. The

188. 202 F.2d 866 (2d Cir. 1953).
laws of delicts, obligations, matrimonial regimes, sales, successions—all are fully equipped to handle the right in fair fashion. Louisiana does have a right to the identity. The right has always been under our noses, within the civil law and our Civil Code, ready for action.

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