# Street Photography in New York and Paris: A Comparative Legal Analysis

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## 1. Introduction

The genesis of this paper was the author's first visit to the *Paris Photo* fine art photography fair at the Grand Palais in November 2018. At Booth C38, Copenhagen's *V1 Gallery* was showing a selection of images from a recent series by Danish photographer Peter Funch called *42nd and Vanderbilt.*[1] Named after the street intersection outside New York's Grand Central Station from which he worked on summer mornings between 8:30 and 9:30 am over a nine-year period,[2] Funch's presentation paired images of the same members of public – taken weeks, months and even years apart – revealing remarkable similarities[3] and identifying each image with the date and time it was taken.

*2012.07.03 09:09:07*


*© Peter Funch* *2012.07.17 09:09:43*


*2012.05.3 09:27:44*

*© Peter Funch* *2012.07.11 09:21:54*

1 See: <https://www.peterfunch.com/portfolio/42nd-and-vanderbilt/>.
2 2007 to 2016.
3 Teju Cole, 'Peter Funch Sees the Patterns in the People on the Street' *New York Times Magazine* 20 March 2018. <https://www.nytimes.com/2018/03/20/magazine/peter-funch-sees-the-patterns-in-the-people-on-the-street.html>.

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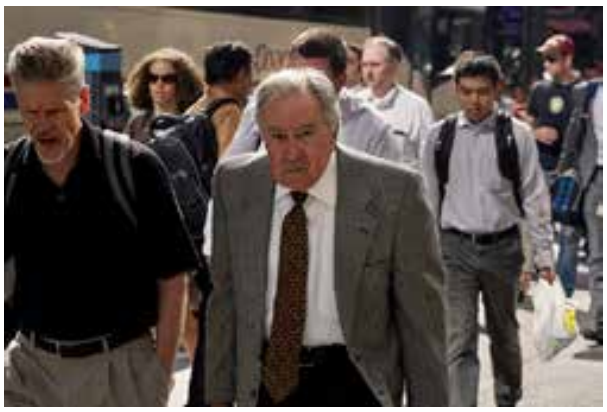
*2012.06.22 08:53:02* *© Peter Funch* *2012.06.27 09:00:23*




*2012.07.10 09:21:20* *© Peter Funch* *2012.06.27 09:16:42*

The series is a delightful *tour de force* of memory, patience and skill and offers a remarkable insight into human nature, routine and ritual: was the first pair of images really taken on Tuesday mornings, two weeks apart, in the same place and at exactly 9:09 am? And is it really possible to smoke a cigarette in exactly the same way? Alongside admiration for the work, the author observed the same enquiry from members of the Parisian public: what about the subjects' privacy? Had Funch obtained consent from each subject to use the images? Did the images belong to Funch or to the individuals photographed? Responding to similar questions during a public interview, Funch expressed his understanding of the law as it relates to artistic street photography in New York (where much of the most highly-prized street photography has historically been shot[4]) and France as follows:

> Well, we see in this country [France] there's a different understanding of it… in America it's completely different… the law in New York is that you can photograph people in a public space if it's not for a 'commercial use'… in France it would never have been possible… to do a project like this.[5]

Reflecting Funch's broad understanding, Magnum photographer Peter Van Agtmael[6] has said:

4 See, for example, the work of Garry Winogrand, Diane Arbus, Helen Levitt and Bruce Gilden.

5 Recorded interview with Peter Funch at Paris Photo on 11 Nov. 2018: <https://programme.parisphoto.com/programme-2018/artists-by-the-eyes/dimanche-11-novembre/15h-a-15h45.htm> (last viewed: 24 Oct. 2019).

6 <http://www.petervanagtmael.net/bio/>.

> It's always important to know what the laws are in the place you're working. In a place like New York, if you're working on the street, in public, more or less anything goes… in places like France, there are many more restrictions to how you are photographing people on the street and then taking that photograph into the public eye in some form through publication.[7]

These comments suggest that, from a legal perspective, both Funch and Van Agtmael feel more comfortable working on the streets of New York than on the streets of Paris. It is certainly understandable that today's leading artists working with the medium of photography will gravitate towards jurisdictions where their freedom of artistic expression is protected by the law when choosing where to invest their limited time and resources. The author was unfamiliar with the legal regimes governing street photography in New York and Paris but, as a hobbyist street photographer, was curious to explore how the law in each of these major cities might be influencing – and indeed, inhibiting – creative output.

This paper will accordingly explore the law governing the art of street photography in New York and Paris in 2019. Part 2 considers the position in New York, charting the evolution over the past century of a limited statutory right to privacy together with broad exceptions developed by the courts on account of freedom of expression and the press enshrined in the First Amendment of the US Constitution. Part 3 then charts the emergence over a similar timeframe of the entrenched rights to private life and one's image under French law. Both Parts 2 and 3 end with an analysis of recent caselaw filed by members of the public before the courts of New York and Paris against leading photographers (Philip-Lorca DiCorcia and Arne Svenson in New York; and Luc Delahaye and François-Marie Banier in Paris). The claimants in each case sought judicial redress after discovering that their images had been taken in public places without their consent and published as art. Promisingly, for the art of street photography, the courts in both New York and Paris dismissed all claims in the interests of freedom of expression.

## 2. United States: New York State

### a) The Emerging Right to Privacy

In their seminal 1890 article 'The Right to Privacy'[8] – considered by many to be a foundation of privacy law in the United States[9] – Professor Samuel Warren and Supreme Court Justice Louis Brandeis advocated the development of a new tort for invasion of the right to privacy. Responding in part to technological advancements which had dramatically increased access to photographic technology,[10] and anticipating the risk that

7 Peter Van Agtmael on Magnum Photos' The Art of Street Photography Online Course, 'Video Lesson 02: Hitting the Street' (at 01:50): <https://learn.magnumphotos.com/course/the-art-of-street-photography/>.

8 Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy', (1890) 4(5) *Harvard Law Review*, pp. 193-220. <http://links.jstor.org/sici?sici=0017-811X%2818901215%294%3A5%3C193%3ATRTP%3E2.0.CO%3B2-C>.

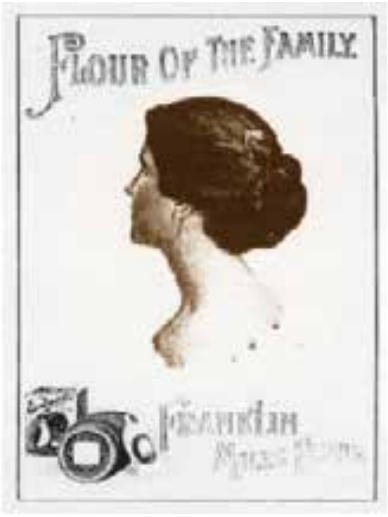
9 Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age*, (NYU Press, 2004), p. 57. Available at SSRN: <https://ssrn.com/abstract=2899131>.

10 The Eastman Kodak Company had introduced its cheap hand-held 'snap camera' in 1884, allowing people to take candid photographs in public places for the first time. Nancy D. Zeronda, 'Street Shootings: Covert Photography and Public Privacy', (2010) 63 *Vanderbilt Law Review* 1131, p. 1135. Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol63/iss4/6>.

the new hand-held technology would be seized-upon by the growing and increasingly sensationalist press,[11] Warren and Brandeis highlighted the threat posed by "recent inventions and business methods" and made the case for legal protection not only of privacy in its traditional sense but what they termed the more general right of the individual "to be let alone".[12]

**b) Responding to *Roberson***

Relying in part on the Warren and Brandeis article, Abigail Marie Roberson filed civil suit before the New York courts in 1902 against a flour company which had reproduced her image, without consent, to advertise sacks of flour:[13]




The claimant was recognisable in the image, which was printed and circulated around 25,000 times on lithographic prints, photographs and bags of flour. The claimant alleged being:

> greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked, causing her great distress and suffering both in body and mind.[14]

Noting that the plaintiff's request to prevent further circulation of an image which was acknowledged to be a flattering likeness was unprecedented ("she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes"[15]), the Court of Appeals expressed concern that an equitable right to privacy may generate a "vast amount of litigation"[16] and constitute an "undue restriction of liberty of speech and freedom of the

11 Fuelled in part by 'yellow' journalism which focused on scandal, newspaper readership in the US grew dramatically in the late nineteenth century from around 800,000 in 1850 to 8 million in 1890. Solove (2004), above, note 9, p. 57.

12 Warren and Brandeis (1890), above, note 8, p. 195.

13 *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

14 *Ibid*. at 542/3.

15 *Ibid*. at 543.

16 Perhaps cognisant of the position in France (discussed below in Part 3), the Court of Appeals considered that: "the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or

press".[17] In rejecting Roberson's claim in a four : three decision, the Court of Appeals denied the existence of a right to privacy under New York common law but sought to insulate itself from criticism by reminding the New York legislature that it:

> could very well… provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent.[18]

**c) New York's Statutory Right of Privacy**

Intense debate following the Warren and Brandeis article of 1890 persuaded most US commentators of the need for a common law right of privacy.[19] Georgia became the first state to recognise this in 1905 when its Supreme Court ruled in *Pavesich v. New England Life Insurance Co.* that the unauthorised publication of the plaintiff's photograph in an advertisement to promote the publisher's business – "essentially the same question" as *Roberson*[20] – did indeed violate the plaintiff's right of privacy.[21] By the time William Prosser wrote his renowned 1960 article giving further shape to the law of privacy,[22] most US states had recognised a common law right to privacy in some form.[23] Canvassing the 70 years of caselaw since 1890,[24] Prosser's 1960 article identified four torts:

> which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff… to be let alone.[25]

The four categories of interference identified by Prosser – intrusion upon seclusion; public disclosure of private facts; false light; and appropriation of name or likeness – are now listed collectively as '*Invasion of Privacy*' at section 652A of the American Law Institute's authoritative Restatement (Second) of Torts (1977), and each is developed individually from sections 652-B through 652-E. Most US states have made one or more of these remedies available to claimants at common law since the 1960s.[26] Notwithstanding this trend, New York continues to deny the existence of any common law right of privacy. New York did, however, enact the first *statutory* right to privacy in the United States in 1903 – a direct response to the storm of public disapproval following *Roberson*.[27]

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habits". *Ibid*. at 545.

17 William L. Prosser, *Handbook on the Law of Torts* (4th edn, West Pub. Co., 1971), p. 803.

18 *Roberson v. Rochester*, above, note 13, 545.

19 Fredrick R. Kessler, 'A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute', (1987) 15 *Fordham Urb. L.J.* 951, p. 959. Available at: <https://ir.lawnet.fordham.edu/ulj/vol15/iss4/3>.

20 Prosser (1971), above, note 17, p. 804.

21 *Pavesich v. New England Life Ins. Co*., 122 Ga. 190, 50 S.E. 68 (1905). Prosser, above, note 17 at p. 804.

22 William L. Prosser, 'Privacy', (1960) 48 *Cal. L. Rev*. 383. <https://doi.org/10.15779/Z383J3C>.

23 Prosser (1971), above, note 17, p. 804.

24 Laura A. Heymann, 'How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide', (2009) 51 *Wm. & Mary L. Rev*. 825, p. 837. <https://scholarship.law.wm.edu/wmlr/vol51/iss2/14>.

25 Prosser (1960), above, note 22, p. 336.

26 *Ibid*. at p. 336.

27 This included a highly critical *New York Times* editorial on 23 Aug. 1902 which one of the

New York's statutory privacy right is contained at sections 50 and 51 of the state's Civil Rights Law (NY CVR). Section 50,[28] entitled 'Right of Privacy', makes it a misdemeanour (that is, a minor criminal offence subject to criminal penalties including imprisonment and fines) for a person, firm or corporation to use the name, portrait or picture of any living person without their advance written consent "for advertising purposes, or for the purposes of trade". Section 51,[29] entitled 'Action for Injunction and for Damages', makes the equitable remedies of injunction and damages[30] available to an individual whose name, portrait, picture or voice is used without consent in the state of New York "*for advertising purposes or for the purposes of trade*". Section 51 also sets out a number of notable exceptions.

New York's courts have consistently held that the rights contained in sections 50 and 51 of NY CVR "are the exclusive remedies allowed in New York State for an unauthorised use of one's likeness."[31] Accordingly, a photographer working in New York will have no exposure to a breach of privacy claim unless the subject can establish all four elements, namely:

(1) use of their portrait or picture;
(2) for advertising purposes or for the purposes of trade;
(3) without consent;
(4) within the State of New York.[32]

Since elements 1, 3 and 4 will typically be conceded, element 2 – that is, whether the use is for 'advertising' or 'trade' purposes – will be determinative.

**d) First Amendment Free Speech and the 'Newsworthy' Exception**

The First Amendment to the US Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances [emphasis added].

The definition of 'Congress' has been progressively expanded by the US Supreme Court such that the First Amendment now constrains the ability of US government agencies and officials – including the legislature and judiciary – to restrict freedom of speech, freedom of the press or the free exercise of religion.[33] Against this Constitutional background, New York's Legislature and judiciary reveal a strong bias in favour of freedom of speech at the expense of the individual's right to privacy.[34] On the one hand, New York's judiciary robustly adheres to the position that "there exists no so-called common-law right to

concurring judges took the unprecedented step of responding to in a law review article: O'Brien, 'The Right of Privacy', (1902) 2 *Colum. L.* Rev. 437. Prosser (1971), above, note 17, p. 803; Kessler (1987), above, note 19, p. 959.

28 <https://www.nysenate.gov/legislation/laws/CVR/50>.

29 <https://www.nysenate.gov/legislation/laws/CVR/51>.

30 The jury may award uplifted exemplary damages where the use is deemed a misdemeanour under s. 50 NY CVR.

31 *Nussenzweig v. DiCorcia* 2006 NY Slip Op 50171 (U), *5.

32 *Hoepker v. Kruger*, 200 F Supp 2d 340 (SDNY 2002).

33 <https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/the-freedom-of-speech-and-of-the-press-clause/interp/33>.

34 The UK Supreme Court has observed this American bias – see footnote 59 below.

privacy".[35] Accordingly, if an aggrieved individual cannot frame their claim within the narrow scope of sections 50/51 of NY CVR, they will be left without a remedy. On the other hand, New York's Legislature is aware of the judiciary's position but has consistently declined to expand the scope of the statute beyond the narrow commercial *Roberson*-type situation which it was designed to address. In accordance with *Roberson*, New York's highest court regularly states that it is for the legislature, not the judiciary, to make the law:

> Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature, which in fact has rejected proposed bills to expand New York law to cover all four categories [identified by Prosser in 1960] of privacy protection.[36]

In addition, the courts have developed a number of exceptions or '*protected uses*' on account of freedom of speech and the press to defeat otherwise valid claims under sections 50/51 of NY CVR. Under the 'newsworthy' exception:

> A picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute * * * unless it has no real relationship to the article * * * or unless the article is an advertisement in disguise.[37]

The fact that a publication uses a person's image "solely or primarily to increase the circulation" of a newsworthy article – and, therefore, to increase profits – does not constitute for 'trade purposes' within the meaning of the statute: "Indeed, most publications seek to increase their circulation and also their profits."[38]

**e) Silver Bullet: The 'Newsworthy' Exception in Practice**

This section considers the factual matrix and decisions in four leading right of privacy claims filed between 1982 and 2000 against the press pursuant to sections 50/51 of NY CVR. The caselaw demonstrates the courts' broad and liberal application of the 'newsworthy' exception and invites those of a cynical disposition to question to what extent New York's statutory 'right of privacy' protects its citizens in any meaningful way.

*i. Arrington v. New York Times*

In *Arrington v. The New York Times Company* (1982),[39] the defendant newspaper published a photograph of the claimant – a well-dressed young African-American financial analyst – to illustrate its feature article entitled 'The Black Middle Class: Making It'. The photograph was taken without the claimant's knowledge or consent on a street in New York City. In describing "the role of the expanding black middle/professional class in today's society", one of the article's conclusions was that "this group has been growing more removed from its less fortunate brethren". The claimant alleged that the article subjected him to scorn and ridicule by wrongly implying that he shared its views, but New York's highest court held that social mobility was a matter of 'public interest'

35 *Arrington v. New York Times Company* 449 N.Y.S.2d 941 (1982), *943 citing *Cohen v. Hallmark Cards* 45 N.Y.2d 493 (1978), *497.
36 *Howell v. New York Post Co* 81 N.Y.2d 115 (1993).
37 *Murray v. New York Mag. Co.* 27 N.Y.2d 406 (1971), 409.
38 *Stephano v. News Group Publications* 64 N.Y.2d 174 (1984), 184-185.
39 Above, note 35.

and – accordingly – 'newsworthy'. The fact that the dissemination of news and opinions is carried on for profit – or that the photograph was added to encourage sales – did not undermine the 'newsworthy' exception to the statutory right. The Court rejected the claimant's argument that the photograph bore 'no real relationship' to the article since, race aside, it held that the image portrayed what a middle- to upper-class man of good taste and attire might look like.

While acknowledging the claimant's "perfectly understandable preference that his photograph not have been employed in this manner and in this connection"[40], the Court delimited the narrow ambit of New York's statutory 'right of privacy' thus:

> … other than in the purely commercial setting covered by sections 50 and 51, an inability to vindicate a personal predilection for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely.[41]

*ii. Finger v. Omni Publications*

In *Finger v. Omni Publications* (1990),[42] the defendant published without consent a photograph of the claimants (depicting two adults surrounded by six attractive and seemingly healthy children) to illustrate an article entitled 'Caffeine and Fast Sperm'. The article discussed research that in-vitro fertilisation (IVF) success rates may be enhanced by exposing sperm to high concentrations of caffeine. Whilst the article did not identify the claimants by name or say that the adults had used caffeine or that the children were produced through IVF, the reader was clearly invited – as in *Arrington* – to make a connection. New York's highest court dismissed the appeal, reiterating that the prohibitions in sections 50/51 of NY CVR are to be "strictly limited to non-consensual commercial appropriations"[43] and that the terms 'purposes of trade' or 'advertising' – although not defined by the statute – are not construed as "encompassing publications concerning newsworthy events or matters of public interest."[44] Conceding that IVF and enhanced success rates were indeed newsworthy topics, the claimants nevertheless argued that their photograph bore "no real relationship" to the article since none of their children was conceived by IVF or participated in the research project.[45] Demonstrating the Court's wide application of the 'newsworthy exception' – and a preference to leave "questions of 'newsworthiness'… to reasonable editorial judgement and discretion"[46] – the Court held that "Plaintiffs misperceive the 'newsworthy' theme of the article"[47] which was not IVF or caffeine research specifically, but increased fertility in general.[48] Publication did not therefore violate sections 50/51 of NY CVR.

*Arrington* and *Finger* thus demonstrate the courts' deference to First Amendment freedom of speech and information: provided the subject matter of an article is deemed 'newsworthy' by the court, and some minimal connection with the published photograph

40 *Ibid*. at 945.
41 *Ibid*. at 945.
42 *Finger v. Omni Publications* 564 N.Y.S.2d 1014 (1990).
43 *Ibid*. at 1016.
44 *Ibid*. at 1016..
45 *Ibid*. at 1017
46 *Ibid*. at 1017.
47 *Ibid*. at 1017.
48 *Ibid*. at 1017.

can be established, the publication will avoid liability for breach of privacy claims under sections 50/51 of NY CVR; and the unfortunate claimant whose image has been published without consent will be left without a remedy.

*iii. Messenger v. Gruner*

In *Messenger v. Gruner* (2000),[49] New York's highest court affirmed that the newsworthy exception will override claims under sections 50/51 of NY CVR notwithstanding a false impression that the plaintiff endorsed or was connected to the article's newsworthy subject matter. The Court explained its rationale as follows:

> … if the newsworthy exception is forfeited solely because the juxtaposition of a plaintiff's photograph to a newsworthy article creates a false impression about the plaintiff, liability under Civil Rights Law s.51 becomes indistinguishable from the common-law tort of false light invasion of privacy.[50] One form in which the false light invasion of privacy tort "frequently appears is in the use of the plaintiff's picture to illustrate a book or article with which he has no reasonable connection, with the *implication that such a connection exists*" (Prosser and Keeton, The Law of Torts § 117, at 864 [5th ed] [emphasis added by Court]). New York does not recognise such a common-law tort.[51]

Like *Arrington* and *Finger*, *Messenger* involved the publication of the plaintiff's photograph alongside a 'newsworthy' article with unfortunate consequences for the plaintiff. The defendant published a teenage girls' magazine with a 'Love Crisis' advice column. The publisher illustrated the column with photographs of the plaintiff, an aspiring fourteen-year old female model, who consented to the shoot but was unaware of the subject-matter. The column reproduced a letter from a fourteen-year old girl – identified only as 'Mortified' – who got drunk at a party before having sex with her eighteen-year old boyfriend and two of his friends. One of the three published photographs of the plaintiff showed her hiding her face, with three young men gloating in the background, beneath the bold-type caption: "I got trashed and had sex with three guys". The editor advised 'Mortified' to have a pregnancy test. Since the column addressed matters of public concern (alcohol abuse, teenage sex and pregnancy), and the photographs bore a 'real relationship' to the article, New York's highest court followed its decisions in *Finger*, *Arrington* and *Murray* and affirmed that the claimant had no cause of action under the Civil Rights Law, reiterating that no alternative tortious action was available (see above). The claimant was, presumably, mortified.

*iv. Howell v. New York Post Co.*

*Arrington, Finger* and *Messenger* are leading cases demonstrating the wide application of the newsworthy exception and the reluctance of New York's highest court to interfere with 'reasonable editorial judgment' given the freedoms of the press and information enshrined in the First Amendment. Whilst each case placed the claimants in a false light, none invaded their privacy in the more conventional sense of disclosing intimate details about their private lives. In this respect, the case of *Howell v. New York Post Co.*

49 *Messenger v. Gruner* 94 NY2d 436 (2000).
50 See s.652E of the American Law Institute's *Restatement (Second) of Torts* (1977).
51 *Messenger v. Gruner*, above, note 49, 448.

– which reached New York's highest instance, the Court of Appeals, in 1993[52] – goes further by demonstrating that the newsworthy exception will even shield the press from liability under sections 50/51 of NY CVR for egregious invasions of privacy which have potentially devastating consequences on an individual's physical and emotional well-being.

The claimant was a patient at a private psychiatric facility in Upstate New York. A fellow patient at the time, named Nussbaum, had been involved in a child abuse death which had generated significant public interest. A photographer employed by the defendant newspaper trespassed onto the facility's secluded grounds with a telephoto lens and took pictures of the claimant walking outdoors with Nussbaum. Despite the facility medical director telephoning an editor of the defendant and expressly requesting that no photographs of any patients be published, the newspaper nevertheless published a photograph of Nussbaum walking with the claimant on the next day's front page. Responding to the claimant's principal grievance that publication of the undercover photographs revealed to friends, family and work colleagues that she was undergoing psychiatric treatment, a fact she had endeavoured to keep confidential, the Court stated:

> There is, of course, no cause of action in this State for publication of truthful but embarrassing facts. Thus, a claim grounded in the right to privacy must fall within Civil Rights Law Sections 50 and 51.[53]

Turning to the statute, the Court noted that use of the photograph was not for 'trade' or 'advertising' purposes since it accompanied an article on a matter of acknowledged public interest; and reiterated its reluctance, in accordance with *Finger*, to intrude upon "reasonable editorial judgements in determining whether there is a real relationship between an article and photograph".[54] The Court even defended the editorial judgment, stating: "The visual impact would not have been the same had the Post cropped the plaintiff out of the photograph, as she suggests was required".[55] As one commentator has observed, the Court arguably expanded the ambit of 'real relationship' to catch anyone whose exclusion or pixelation might affect the 'visual impact' of a photograph: "'real relationship' may now depend on nothing more than an editor's subjective opinion".[56] As to whether the press conduct was sufficiently "atrocious, indecent and utterly despicable" to constitute the tort of intentional infliction of emotional distress (which could overcome the newsworthy exception thereby providing the claimant with a remedy), the Court of Appeals dismissed this as:

> an end run around a failed right to privacy claim… The conduct alleged here… – a trespass onto [facility] grounds – does not remotely approach the required standard. That plaintiff was photographed outdoors and from a distance diminishes her claim even further.[57]

It is noteworthy from *Arrington, Finger, Messenger* and *Howell* that New York's courts

52 *Howell v. New York Post Co.* 81 N.Y.2d 115 (1993).
53 *Ibid*. at 124.
54 *Ibid*. at 124.
55 *Ibid*. at 125.
56 Padraic D. Lee, '*Howell v. New York Post*: Patient Rights versus the Press', (1995) 15 *Pace L. Rev*. 459, p.489. <http://digitalcommons.pace.edu/plr/vol15/iss2/3>.
57 *Howell v. New York Post Co*., above, note 52, *126.

liberally apply the 'newsworthy' exception – which provides the defendant publication with a silver-bullet defence and the plaintiff with an insurmountable hurdle – without weighing-up the competing interests of the claimant on the one hand and the press/freedom of information on the other.[58] The balancing of fundamental rights is a hallmark and requirement of European jurisprudence, and represents a fundamentally different approach to the United States. This difference was highlighted by Sedley L.J. in the leading UK privacy case *Douglas v. Hello! Ltd* (2001):

> The European Court of Human Rights has always recognised the high importance of free … communication in a democracy, but its jurisprudence does not — and could not consistently with the [European] Convention [on Human Rights] itself — give article 10(1) [freedom of expression] the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.[59]

### f) Street Photography as Protected Free Speech

Whilst the firm line held by New York's courts on privacy claims may raise eyebrows from an ethical perspective, it is undoubtedly helpful to practitioners of street photography in New York. Building on the caselaw concerning the press, this section will consider two recent cases filed by members of the public against renowned artist-photographers Philip-Lorca DiCorcia (in 2006) and Arne Svenson (in 2015).

#### *i. Nussenzweig v. Philip-Lorca DiCorcia (2006)*

DiCorcia shot his *Heads* series in New York's Times Square in 2000-2001. The series was exhibited at his gallery – PACE, in New York's Chelsea district – between 6th September

58 This can be contrasted with greater judicial efforts to balance competing interests outside New York State. Thus, in 2014, Utah's highest court held in *Judge v. Saltz Plastic Surgery*, PC, 330 P.3d 126 (Utah Ct. App. 2014) that the question of newsworthiness (i.e. whether the information disclosed is a legitimate public interest) should be put to the jury rather than decided in an early motion by the judge (as appears standard in New York). This was in line with an earlier Californian decision in *Shulman v. Grp. W Prods., Inc*., 955 P.2d 469 (Cal. 1998) which considered the filming and subsequent broadcasting of an air rescue operation in the immediate aftermath of a serious car accident. California's highest court held that whilst the accident victims who filed suit did not have a reasonable expectation of privacy on the highway itself (i.e. at the scene of the accident), they did have a reasonable expectation of privacy in the helicopter which was analogous to an ambulance or hospital room. As in *Judge*, the Californian Court held that newsworthiness was a question of fact for a jury to decide and not a matter for summary judgment (Fredrick R. Kessler, 'In the Privacy of One's Own Home: Does New York State Law Prevent Invasions of Privacy in the Home?' (2018) 36(2) *Cardozo Arts & Ent L.J.,* 481-507, Pp. 492-494, <http://www.cardozoaelj.com/wp-content/uploads/2018/10/KESSLER_NOTE.pdf>). Noting this judicial shift, one commentator suggests that "a First Amendment bubble of protection for media is in the process of bursting because of courts' privacy concerns, and the sometimes-appalling decisions by push-the-envelope publishers that then attempt to cloak themselves with the Constitution" (Amy Gadja, 'The Present of Newsworthiness' (2016) 50 *New Eng. L. Rev*. 145, p. 147. <https://ssrn.com/abstract=2977489>.

59 *Douglas v. Hello! Ltd* [2001] QB 967, 1004, para. 135, cited by the UK House of Lords (now Supreme Court) in *Campbell v. MGN Ltd* [2004] 2 AC 457, 486, para. 106. [Author's emphasis in square-brackets].

and 13th October 2001.[60] Innovatively bringing studio lighting to the street, DiCorcia attached flashes to street scaffolding and synchronised these with a camera 20 feet away which was equipped with a telephoto lens. When members of the public entered the pre-determined zone on which the camera and lights were pre-focused, DiCorcia released the shutter and the flash was activated simultaneously to create the image.[61] The contrast between the low light beneath the scaffolding and the illumination of the flash created a series of powerful street portraits which the subjects were unaware had been taken. DiCorcia approached the project "like a day job", working four to five hours each day and photographing as many as 3,000 people before selecting the seventeen final images which comprise the series.[62] Regarding his process, DiCorcia commented:

> I never talk to them... that was one of the points of doing it. I don't ask their permission… I don't pay them... I was investigating things… the nature of chance, the possibility that you can make work that is empathetic without actually even meeting the people… I was not trying to hide from them: I was trying to show how they tried to hide from those around them.[63]

DiCorcia was sued, together with PACE, in early 2005 pursuant to sections 50/51 of NY CVR by one of his subjects – an elderly Holocaust survivor called Erno Nussenzweig (b. 1922) who held a deep religious belief that use of his image violated the Second Commandment prohibition against graven images.[64] Nussenzweig alleged that DiCorcia's exhibition and sale of the image via PACE[65] and inclusion in the exhibition catalogue constituted 'advertising' or 'trade' under NY CVR and sought an injunction preventing future use of the image and monetary damages for past use.[66] Nussenzweig also argued that use of his photograph interfered with his constitutional right to practise his religion.

While Nussenzweig's claim was ultimately held to be time-barred,[67] both the Supreme Court (1st Instance) and Appellate Division considered the merits and concluded that:[68]

(1) the use of a person's likeness as a component in a work of art is protected by the First Amendment and is accordingly exempted from actions under sections 50/51 of NY CVR;

60 The exhibition coincided with the terrorist attacks of 11 Sept. 2001: <https://www.pacegallery.com/exhibitions/11963/philip-lorca-dicorcia-heads>.

61 DiCorcia described his process in a 2010 interview with Tate regarding the Heads series: <https://.youtube.com/watch?v=bpawWn1nXJo>.

62 *Ibid*.

63 2010 Tate interview, *ibid*.

64 *Nussenzweig v. DiCorcia*, 2006 NY Slip Op 50171 (U) [Supreme Court/1st instance], *4. <http://www.nycourts.gov/reporter/3dseries/2006/2006_50171.htm> Nussenzweig was an Orthodox Hasidic Jew and member of the Klausenberg Sect which was almost completely destroyed during the Holocaust. Zeronda (2010), above, note 10, p. 1141.

65 DiCorcia admitted to creating ten edition prints of the Nussenzweig image plus three artist's proofs. PACE sold the ten edition prints at between USD 20,000-30,000 each. *Nussenzweig v. DiCorcia* (2006), above, note 64, *3.

66 Zeronda (2010), above, note 10, p. 1141.

67 New York follows the so-called 'single publication' rule pursuant to which a one-year statute of limitations runs from first exhibition of the plaintiff's photograph (i.e. 6 Sept. 2001). The claimant filed suit in 2005. See *Costanza v. Seinfeld* 279 AD 2d 255, NY: Appellate Div. (2001), 255-6.

68 *Nussenzweig v. DiCorcia* (2006), above, note 64,*7; *Nussenzweig v. DiCorcia* NY Slip Op 02413 (2007) [Appellate Division],*348/9. <https://law.justia.com/cases/new-york/appellate-division-first-department/2007/2007-02413.html>.

(2) the sale of a limited number of prints by PACE, being an art gallery with a commercial objective to make a financial profit, did not "convert art into something used in trade";[69] and

(3) since the claimant identified no state action which had allegedly interfered with his right to practise his religion – only private actions of DiCorcia/ PACE – no constitutional right was infringed.[70]

Both courts recounted the development of protected uses which are exempt from action under sections 50/51 of NY CVR – the most widely recognised being for 'newsworthy' matters (per *Arrington*, *Finger*, *Messenger* and *Howell*) – and reiterated that a profit-generating motive does not convert an otherwise newsworthy use of an individual's image into one that is for advertising or trade purposes.

In concluding that DiCorcia's image of Nussenzweig was Constitutionally-protected free speech exempted under sections 50/51 of NY CVR, the courts cited three New York decisions which considered the interplay between New York's statutory right to privacy and art.[71] Central to the courts' findings in favour of artistic expression in each case was the principle that the visual arts – which include photography – constitute 'speech' in the same manner that a newspaper or magazine article does:

> Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing… paintings, photographs, prints and sculptures... always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.[72]

Acknowledging that Nussenzweig "finds the use of the photograph bearing his likeness deeply and spiritually offensive", the Supreme Court nevertheless concluded:

> While sensitive to plaintiff's distress, it is not redressable in the courts of civil law. In this regard, the courts have uniformly upheld Constitutional 1st Amendment protections, even in the face of a deeply offensive use of someone's likeness… constitutional exceptions to privacy will be upheld, notwithstanding

69 *Nussenzweig v. DiCorcia* (2006), above, note 64,*7. Recalling *Roberson*, the concurring justices of the Appellate Division noted that DiCorcia's use of Nussenzweig's photograph was "a far cry from the use of a person's likeness to adorn sacks of flour": *Nussenzweig v. DiCorcia* (2007), *ibid*. at *347.

70 Indeed, the Appellate Division noted that DiCorcia's Constitutional freedom of expression would have been infringed had they granted Nussenzweig's request: see *Nussenzweig v. DiCorcia* (2007), above, note 68, at *349.

71 Regarding sculpture, the Court in *Simeonov v. Tiegs*, 159 Misc 2d 54 [1993] held that: "An artist may make a work of art that includes a recognizable likeness of a person without her or his written consent and sell at least a limited number of copies thereof without violating Civil Rights Law §§ 50 and 51" (at *60); In *Hoepker v. Kruger*, 200 F Supp 2d 340, 349 (2002), the Court found that artist Barbara Kruger's photographic collage "should be shielded from [the claimant's] right of privacy claim by the First Amendment. The Kruger [work] itself is pure First Amendment speech in the form of artistic expression… and deserves full protection even against [the claimant's] statutorily-protected privacy interests" (at *350); and, in *Altbach v. Kulon*, 302 AD2d 655 [2003], New York's Appellate Division held that a satirical painted portrait and subsequent publication on flyers were "artistic expressions . . . entitled to protection under the First Amendment and excepted from New York's privacy protections" (at *657).

72 *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir.1996), *695/696.

> that the speech or art may have unintended devastating consequences on the subject, or may even be repugnant.[73]

After his claim was dismissed on statute of limitations grounds by the Supreme Court and the dismissal was affirmed by the Appellate Division,[74] Nussenzweig appealed to New York State's final instance – the Court of Appeals. Highlighting the powerful press lobby and inseparability of press and artistic freedom under New York law, a group of eight leading publishers[75] including the *New York Times* and magazine-behemoth Hearst Corporation filed a joint nineteen-page Amicus brief to the Nussenzweig Court of Appeals.[76] Hoping to avoid an unfavourable decision from New York State's highest court which would impact their respective businesses, the *Amici* characterised Nussenzweig's claims as:

> a radical departure from the intent of the legislature and nearly a century of jurisprudence construing §§ 50-51 [which] would be disastrous for the media and the public interest generally.

In the event that it were to overturn the statute of limitations question and reach the merits of the claim, the Brief cogently described why the Court "Should reaffirm the historic view New York law has taken limiting §§ 50-51 to commercial misappropriation, and holding it inapplicable as a matter of statutory law to expressive uses, be they informational or artistic"[77]. The Court of Appeals ultimately issued a short decision affirming the order of the Appellate Division.[78]

*ii. Foster v. Svenson (2015)*

If *Howell v. New York Post*[79] highlighted the inability of New York's statutory right of privacy to provide a remedy for an egregious invasion of privacy by the press (which it will be recalled was able to rely on the 'newsworthy' exception), *Foster v. Svenson*[80] is the equivalent case for artistic-photographic expression and confirms – per the earlier comment of Peter van Agtmael – that "more or less anything goes" in New York.[81]

Like DiCorcia, Arne Svenson is an American photographer living and working in

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73 *Nussenzweig v. DiCorcia* (2006), above, note 64, *7.

74 See above, note 67.

75 Advance Publications, Inc., The Association of American Publishers, Inc., Hachette Book Group USA, Inc., Hearst Corporation, Home Box Office, Inc., the New York Times Company, Time Inc. and Volunteer Lawyers for the Arts.

76 Amicus briefs allow one or more non-parties interested in a proceeding's outcome (known as *amici curiae* or 'friends of the court') to present information or arguments which may not have been presented by the parties – often including the wider consequences of a particular decision on third parties. See *Amicus Curiae, Practical Law Glossary Item*. The author is grateful to Proskauer Rose, New York – counsel for the *amici curiae* – for providing a copy of the Amicus brief by email on 23 July 2019.

77 Author's emphasis.

78 *Nussenzweig v. DiCorcia* 878 N.E.2d 589, Ct. of Appeals (Nov. 2007) <https://www.courtlistener.com/opinion/2070155/nussenzweig-v-dicorcia/>.

79 Considered above, note 52.

80 *Foster v. Svenson* NY Slip Op 31782(U), Sup Ct. – NY (2013) <https://cases.justia.com/new-york/other-courts/2013-ny-slip-op-31782-u.pdf?ts=1462395840>; *Foster v. Svenson* NY Slip Op 03068 [128 AD3d 150], Appellate Div. 1st Dep. (2015) <http://courts.state.ny.us/reporter/3dseries/2015/2015_03068.htm>.

81 See above, note 7.

New York City.[82] Starting around February 2012, Svenson used a powerful bird-watching telephoto lens from the window of his Tribeca apartment to surreptitiously photograph through the floor-to-ceiling windows and into the interiors of his neighbours' apartment building.[83] Whilst the marketing website of the Zinc Building highlights the "large windows… assuring residents of some beautiful views of the city along with an abundance of natural light in their rooms", it fails to mention potential privacy issues or Svenson's now infamous project which featured the Zinc Building and its then-residents.[84] The resulting series of limited-edition prints[85] – which Svenson rather brazenly called *The Neighbors* – was exhibited in galleries in Los Angeles and New York and captured his unsuspecting neighbours in a variety of intimate domestic moments including napping on a day-bed and having breakfast in dressing-gowns.

Svenson's website description of the series stated:

> there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high.[86]

Svenson confirmed that his subjects were unaware that they were being photographed and that he "carefully [shot] from the shadows [of his apartment] into theirs".[87] Whilst Svenson obscured the majority of his subjects' faces – "seeking to comment on the anonymity of urban life, where individuals only reveal what can be seen through their windows"[88] – some faces, including those of the plaintiffs' children, were identifiable.

Upon discovering that two photographs of their young children (images #6 and #12) had been secretly taken, publicly exhibited and sold, the *Foster* claimants filed suit against Svenson in May 2013 before the New York Supreme Court alleging violation of their right of privacy under sections 50/51 of NY CVR.[89] Although Svenson agreed, upon the Fosters' request, to withdraw image #6 (showing their son in a nappy and daughter in her swimsuit) from the series, he refused to withdraw image #12 which was broadcast on a number of popular television shows along with the building's residential address.[90] The Fosters' claim expressed their anger at Svenson's "utter disregard for their privacy and the privacy of their children" and "fear that they must now keep their shades drawn at all hours of the day to avoid telephoto photography by a neighbor who happens to be a professional

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82 <https://arnesvenson.com/bio.html>.

83 *Foster v. Svenson* (2015), above, note 80, *2. Svenson's project highlights the eerie prescience of Warren and Brandeis who in 1890 forewarned the threat to 'private and domestic life' posed by increasingly sophisticated photographic equipment: "mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Warren and Brandeis (1890), above, note 8, p. 195.

84 <https://thezincbuilding.com>; <https://www.ibtimes.com/arne-svenson-photographer-who-spied-tribeca-neighbors-wins-legal-battle-privacy-court-case-1374381>.

85 The Foster complaint suggests that each image was available in editions of five prints. Available at: <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=xfy1AdVZ3RB8DWxeAVDt0g==&system=prod>.

86 *Foster v. Svenson* (2015), above, note 80, *2.

87 *Ibid*. at *2.

88 *Ibid*. at *2. It is interesting to read Svenson's stated intention alongside DiCorcia's comments regarding his Heads series – see above, note 63.

89 *Foster* claim, above, note 85.

90 *Mary Bessone, Foster v. Svenson*, 128 A.D.3d 150 (2015), (2019) 27 *DePaul J. Art, Tech. & Intel. Prop. L*. 271, p. 273. <https://via.library.depaul.edu/jatip/vol27/iss2/7>.

photographer."[91] As in *Nussenzweig v. DiCorcia*, the Fosters alleged that Svenson was "promoting a commercial venture" since his images of their children were "up for sale at an exhibition scheduled to open at a Manhattan gallery" and provided the Court with pricing and edition information.[92]

*© Arne Svenson. Courtesy of the artist and Robert Klein Gallery*

The trial judge dismissed the proceedings in August 2013 on the grounds that the photographs were art protected by the First Amendment since they conveyed Svenson's "thoughts and ideas to the public" and "serve[d] more than just an advertising or trade purpose because they promote the enjoyment of art in the form of a displayed exhibition".[93] The newsworthy exception covered the broadcast of image #12: "'The Neighbors' exhibition is a legitimate news item because cultural attractions are matters of public and consumer interest"; thus, news organisations and broadcasters "are entitled

91 *Foster* claim, above, note 85, para. 9.
92 *Ibid*. at paras 10-11.
93 *Foster v. Svenson* (2013), above, note 80, *5.

*Neighbors #12, 2012*
*© Arne Svenson. Courtesy of the artist and Robert Klein Gallery*

to use Defendant's photographs of Plaintiffs, which have a direct relationship to the news items – the photos are the focus of the newsworthy content."[94] Whilst acknowledging that the claimants may "cringe to think their private lives and images of their small children can find their way into the public forum of an art exhibition", the trial judge emphasised that "an individual's right to privacy under the New York Civil Rights Law sections 50 and 51 yield to an artist's protections under the First Amendment under the circumstances presented here".[95]

On appeal, the Appellate Division recounted the history of New York's limited statutory right of privacy following the 1905 Roberson criticism and the subsequent emergence of exceptions to the right based on the First Amendment which extend to artistic expression. It reiterated that the derivation of profit from the sale of art work "does not diminish the constitutional protection afforded by the newsworthy and public concern exemption".[96] Citing its decision in *Nussenzweig v. DiCorcia* alongside the three leading cases on artistic expression cited in *Nussenzweig*,[97] the Appellate Division held that:

> works of art fall outside the prohibitions of the privacy statute under the newsworthy and public concerns exemption… This is because the informational value of ideas conveyed by the art work is seen as a matter of public interest… In our view, artistic expression in the form of art work must therefore be given the same leeway extended to the press.[98]

The most significant section of the Appellate Division's decision relates to the surreptitious and invasive manner in which Svenson worked 'from the shadows'. Whilst expressing sympathy for the claimants, the Appellate Division affirmed the lower court's finding that there was "no viable cause of action for violation of the statutory right to privacy under these facts".[99] Acknowledging that Svenson's conduct – "however disturbing it may be"[100] – was arguably more offensive than that of the defendant newspaper in *Howell v. New York Post*[101] "because the intrusion here was into plaintiffs' home, clearly an even more private space",[102] the Appellate Division was nevertheless clear that Svenson's actions did not rise to the level of "atrocious, indecent and utterly despicable" required for the tort of intentional infliction of emotional distress (which it may be recalled can

94 *Ibid*. at *5.
95 *Ibid*. at *6.
96 *Foster v. Svenson* (2015), above, note 80, *7.
97 See above, note 71.
98 *Foster v. Svenson* (2015), above, note 80, *6.
99 *Ibid.*, *8.
100 *Ibid.*, *8.
101 Which it will be recalled trespassed onto a private psychiatric facility where the claimant was undergoing treatment.
102 *Foster v. Svenson* (2015), above, note 80, *8.

defeat the First Amendment exception to sections 50/51 of NY CVR).[103] Reflecting the Court's unwillingness to expand the statute's narrow ambit, the Appellate Division concluded with a *Roberson*-esque[104] plea to the Legislature:

> we do not, in any way, mean to give short shrift to plaintiffs' concerns. Undoubtedly, like plaintiffs, many people would be rightfully offended by the intrusive manner in which the photographs were taken… As illustrated by the troubling facts here, in these times of heightened threats to privacy posed by new and ever more invasive technologies, we call upon the legislature to revisit this important issue as we are constrained to apply the law as it exists.[105]

Recounting the differing approaches to the right of privacy across the United States,[106] Kessler notes that the application of "California reasoning to Foster would have produced a different outcome"[107] and suggests that "Svenson's ability to evade reprimand for an action that so egregiously violated social norms proves that Civil Rights Law section 51 is outdated and must be amended".[108] New York's Senate was quick to engage with the Appellate Division's April 2015 ruling in *Foster v. Svenson,* presenting *Memorandum A07804 in Support of Legislation*[109] the following month and facilitating its evolution to Bill No. 1648 by January 2017.[110] Responding directly to *The Neighbors*, Bill No. 1648 proposed amending sections 50/51 of NY CVR to create a new offence of recording another person within a dwelling where that person has a "reasonable expectation of privacy".[111] Consistent with the Legislature's historic reluctance to expand New York's privacy protection beyond its narrow ambit, Bill No. 1648 has not, however, been enacted into law.

*iii. Comment*

The comments of Peter Funch and Peter Van Agtmael regarding the law applicable to street photography in New York are supported by the caselaw: New York's courts will indeed offer broad protection to artists who are sued by individuals photographed without their consent, even where the artist violates social norms to some degree. Since 'speech' includes artistic expression, a photographer's art will attract full First Amendment protection and avoid court censure provided there is no commercial or trade aspect, per *Roberson.*[112]

Comments by DiCorcia and Svenson regarding the proceedings against them reveal an interesting sense of *entitlement* to produce their contested work. Speaking of his *Heads*

103 *Ibid.*,*7/8.
104 See above, note 18.
105 *Foster v. Svenson* (2015), above, note 80,*8/9.
106 This was touched upon above at note 58.
107 Kessler (2018), above, note 58, p. 497.
108 *Ibid*., at 490.
109 <https://nyassembly.gov/leg/?default_fld=&bn=A07804&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y>.
110 Bill No. 1648 available at: <https://legislation.nysenate.gov/pdf/bills/2017/S1648>.
111 The Bill's preamble cited *Foster v. Svenson* as justification, stating: "This case illustrates the glaring absence of the protection that people expect within the confines of their home. This bill seeks to remedy that, by protecting people in their homes from uninvited surveillance, no matter the motive." Memorandum A07804 in Support of Legislation, above, note 114.
112 The *Foster* claimants may, for example, have had a remedy under NY CVR had Svenson's images been used to market the sale of apartments in the Zinc Building.

series, DiCorcia said: "I'm not sure I would like it to happen to me; but I maintain *my right* to do it".[113] In respect of Bill No. 1648, which if passed would have effectively prevented photography through apartment windows per *The Neighbors*, Svenson said: "If it passes, it would be a deep erosion of *our First Amendment rights*".[114]

## 3. France

### a) Freedom of Expression: The Anticipation of Abuse

Freedom of expression under French law is protected by Article 11 of the Declaration of the Rights of Man and of the Citizen.[115] The Declaration was adopted by the National Assembly during the French Revolution in 1789 and has constitutional value following a 1971 decision of the Conseil Constitutionnel.[116] Article 11 provides:

> The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

Whilst freedom of expression was recognised as "one of the most precious… rights of man" in this formative document of the French Nation, all members of the Constituent Assembly nevertheless agreed that the right was not unlimited and that the language of Article 11 should refer expressly to the possibility of legally-determined limitations against 'abuse'.[117] As one commentator has astutely observed, the French approach to freedom of expression is thus conceptually different from the First Amendment of the US Constitution: whereas the American approach reflects suspicion and mistrust towards the legislature in designating "the forum of ideas as beyond government intervention", the French approach reflects trust in the legislature and a perceived need "for a regulation of the forum of ideas and of a civil society more generally".[118] In contrast to the US reluctance to interfere with freedom of expression and tacit tolerance of abuse by the press,[119] freedom of the press in France is regulated by the Law of 29 July 1881[120] ('the 1881 Law'). Though officially titled the 'Law on the *Freedom* of the Press', the 1881 Law might equally be described as the 'Law on the *Limitations* of the Press' given the

113 2010 Tate interview, above, note 61 (author's emphasis).

114 Talk by Arne Svenson regarding *Foster v. Svenson* posted on YouTube 29 March 2016 (author's emphasis). Available at: <https://www.youtube.com/watch?v=-p6jiuEVABc> (last viewed 25 Oct. 2019).

115 Ioanna Tourkochoriti, 'Speech, Privacy and Dignity in France and in the U.S.A.: A Comparative Analysis' (*Loyola L.A. Int & Comp. Law Review*, Vol. 38, 101-182, 2016), p. 103. <https://ssrn.com/abstract=2850087> Declaration available at: <https://dp.la/primary-source-sets/declaration-of-the-rights-of-man-and-of-the-citizen/sources/889>.

116 Decision no. 71-44, July 16, 1971 cited by Tourkochoriti (2016), above, note 115, p. 103.

117 Tourkochoriti (2016), above, note 115, p. 103.

118 *Ibid.*, p. 104.

119 In a landmark 1964 case on First Amendment freedom, the US Supreme Court held that some "degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than… the press": *New York Times Co. v. Sullivan*, 376 U.S.254*271. Tourkochoriti (2016), above, note 115, pp. 103-4.

120 Loi sur la liberté de la presse: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722>

extensive list of 'abuses' which it criminalises (and which would indeed be protected as First Amendment free-speech in the US[121]).

**b) Personality Rights under French Law**

In their famous article of 1890, Warren and Brandeis observed – with a hint of admiration, perhaps – that: "The right to privacy, limited as such right must necessarily be, has already found expression in the law of France."[122] Unlike the US, French law recognises a general category of 'personality rights'[123] which include the right to private life; the right to protect one's reputation and honour; and the right to control the use of one's image (*droit à l'image*). Conceptually different from the New York approach, these rights – as the name suggests – are considered by the French to be an extension of one's *personality.*[124]

The French courts began protecting the individual's private life from unwanted press intrusion in the second half of the nineteenth century using a combination of Article 35 of the 1881 Law and the general civil law provision for tortious liability then contained in article 1382 of the French Civil Code[125] (*Code civil*). Article 35 of the 1881 Law[126] is still in force today and protects the individual's private life indirectly by providing that proof of truth – which would ordinarily defend a publication in a defamation action – is no defence where the publication relates to private life.[127] The French courts have always taken an expansive approach in determining what attracts protection as 'private life', with publications sanctioned for disclosures relating, *inter alia*, to: a person's health, love life, salary, sexuality, family life, friendships, relational difficulties, divorce, religious or political opinions, holidays and even images of one's home (as an intrinsic informational source regarding one's lifestyle and personal tastes).[128] It was presumably the risk of having her work judicially sanctioned for invasion of privacy that Sophie Calle – perhaps

121 Tourkochoriti (2016), above, note 115, p. 104.

122 Warren & Brandeis (1890), above, note 8, p. 214.

123 Elisabeth Logeais and Jean-Baptiste Schroeder, 'The French Right of Image: An Ambiguous Concept Protecting the Human Persona', 18 *Loy. L.A. Ent. L. Rev.* 511 (1998), p. 513, <https://digitalcommons.lmu.edu/do/search/?q=author_lname%3A%22Schroeder%22%20author_fname%3A%22Jean-Baptiste%22&start=0&context=1609392>; Tourkochoriti (2016), above, note 115, p. 125.

124 *Ibid*.

125 "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer". ["Anyone who causes harms to another must compensate the other for the harm they have caused"]. This provision is now found at Article 1240 following a significant 2016 reform of the Code civil: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000032041571&cidTexte=LEGITEXT000006070721&dateTexte=20161001> .

126 Which amended the first French law to protect privacy of 11 May 1868. Tourkochoriti (2016), above, note 115, p. 125.

127 See Ruth Redmond-Cooper, 'The Press and the Law of Privacy' (1985) 34(4) *ICLQ*, 769-785, p. 770; Tourkochoriti (2016), above, note 115, p. 125. Article 35 of the 1881 Law provides:
*La vérité des faits diffamatoires peut toujours être prouvée,sauf:*
*a) Lorsque l'imputation concerne <u>la vie privée de la personne</u>;* (author's emphasis).

128 Redmond-Cooper (1985), above, note 127, p. 771; Tourkochoriti (2016), above, note 115, p. 127; Kessler (2018), above, note 58, p. 499; Agathe Lepage, Laure Marino and Christophe Bigot, 'Droits de la personnalité' *Recueil Dalloz*, 2007, p. 2771, <https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/panorama_dts_de_la_personnalite.pdf>.

France's most eminent conceptual artist – agreed to effectively self-censor her infamous 1983 work *The Address Book.*[129]

### c) Codification in Civil and Criminal Codes

After over a century of caselaw, the right to private life was given statutory footing by the Law of 17 July 1970 (the 1970 Law) to "strengthen the existing guarantee of the individual's rights".[130] The codification reflects the protections for private and family life contained in the international charters which emerged after the Second World War and were adopted by France.[131] Article 22 of the 1970 Law introduced Article 9 of the *Code civil* which enshrines the principle that "Everyone has the right to respect for their private life"[132] and, in addition to damages, provides for a variety of judicial remedies including sequestration, injunction and seizure of copies of offending publications[133] to bring an end to the invasion of private life.

Article 23 of the 1970 Law replaced Article 368 of the previous French Criminal Code (*Code pénal*) with Articles 226-1 to 226-9 of the new *Code pénal* regarding invasions of privacy.[134] Article 226-1 provides criminal sanctions of up to one year's imprisonment and a fine of €45,000 where anyone intrudes on the intimacy of another's private life either by: (1) Capturing, recording or transmitting words spoken in a private or confidential context without the speaker's consent; or (2) Fixing, recording or transmitting the image of a person in a private place without the individual's consent.[135]

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129 After finding an address book belonging to 'Pierre D.' in the street, Calle proceeded to contact the people listed and produced a composite 'portrait' of text and photographs about him which was published as a column in the newspaper *Libération*. Whilst the work would likely have been protected as First Amendment free speech under New York law, Pierre D. threatened to sue Calle who agreed not to publish the work until after his death. This seems to have been in 2012, 29 years later: <https://observer.com/2012/08/sophie-calles-controversial-address-book-to-be-published-in-its-entirety-for-first-time/>. Molly Stech, *Artists' Rights: A Guide to Copyright, Moral Rights and Other Legal Issues in the Visual Art Sphere* (Institute of Art and Law, 2015), p. 132.

130 <https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=5E3399C7166BA187BD6B7655975D24E4.tplgfr24s_1?cidTexte=JORFTEXT000000693897&dateTexte=19700720>

131 Logeais and Schroeder (1998), above, note 123, p. 513. Article 8 of the European Convention on Human Rights (ECHR) states: "Everyone has the right to respect for his private and family life, his home and his correspondence" (<https://www.echr.coe.int/Documents/Convention_ENG.pdf>).
Article 12 of the Universal Declaration of the Rights of the Human Being and the Citizen provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks" (<https://www.un.org/en/universal-declaration-human-rights/>).

132 "*Chacun a droit au respect de sa vie privée.*"

133 Whilst the seizure of offending copies had been ordered prior to 1970, its legal basis had been questionable. Redmond-Cooper (1985), above, note 127, p. 771.

134 See: <https://www.legifrance.gouv.fr/affichCode.do;jsessionid=086BAD56D0906E1C66C233F2ABB52ACA.tplgfr24s_1?idSectionTA=LEGISCTA000006165309&cidTexte=LEGITEXT000006070719&dateTexte=20190813>.

135 *Est puni d'un an d'emprisonnement et de 45 000 euros d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui :*
*1° En captant, enregistrant ou transmettant, sans le consentement de leur auteur, des paroles prononcées à titre privé ou confidentiel;*
*2° En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé.*

The second limb of article 226-1 is potentially relevant to street photography since images are typically taken without the subject's consent, although photographers should avoid criminal liability provided they avoid 'private property'. The definition is fluid, however, and 'borderline' cases have gone each way; thus, a beach with both private and paying access has been held to be public;[136] a prison has been held to be private;[137] and a synagogue has been held to be public.[138] Significantly, the *Cour de cassation* has held that photographing somebody through the window of their private apartment and publication of the resulting images without consent constituted criminal offences under both articles 226-1 (unauthorised taking) and 226-2 (unauthorised dissemination) of the *Code pénal.*[139] Whilst criminal proceedings regarding invasions of privacy are rare,[140] the existence of a criminal sanction alongside long-established civil remedies protecting private life demonstrates French concern in this area and presumably deters egregious transgressions. Arne Svenson was notably able to avoid civil liability altogether before New York's courts for taking and disseminating his controversial *Neighbors* series. Had he made that series on French soil, he would likely have faced damages and seizure of the negatives/artworks under article 9 of the *Code civil* together with a potential fine and prison sentence under articles 226-1 and 226-2 of the *Code pénal*.

**d) The Right to One's Image and Consent**

Whereas the right to privacy enshrined in Article 9 of the *Code civil* protects the constituent *elements and events* of one's private life,[141] the right to one's image – as the name suggests – protects against the unauthorised use of one's *image.* The image is accorded significant weight under French law as "a constitutive element of the person",[142] with an abundance of French case law establishing that:

> everyone has an exclusive right to their image, which is an integral part of his/her personality, which allows him/her to prohibit its reproduction.[143]

Central to the right to one's image is consent. To avoid infringement, the subject must give express consent to both the taking and the subsequent use of their image, even where a photograph is taken in a public place.[144] Whilst proof of consent need not be in writing, it is for the person publishing a photograph or disclosing information about private life to prove that the subject's consent was obtained, and liability is strict.[145]

136 CA Paris, 11 March 1971, D.1971, 71-447 (note Foulon-Piganiol). Logeais and Schroeder (1998), above, note 123, p. 519.
137 CA Paris, 23 Oct. 1986, Gaz.Pal. 1987, 1-22 (note Bertin). Logeais and Schroeder (1998), above, note 123, p. 519.
138 CA Paris, 11 Jan. 1987, Gaz.Pal.1987, 1-138 (note Bertin). Logeais and Schroeder (1998), above, note 123, p. 519.
139 Cass. crim., 25 April 1989, Bull.Crim., No.165. Logeais & Schroeder (1998), above, note 123, p. 519.
140 Most claims are brought before the civil courts. Logeais and Schroeder (1998), above, note 123, p. 518.
141 André R. Bertrand, Dalloz action: Droit d'auteur 2018/19 (Dalloz, 4th edn, 2019), para. 204.42.
142 Tourkochoriti (2016), above, note 115, p. 128.
143 Cass. Civ. 1ère, 27 Feb. 2007, n° 06-10393 [free translation]
144 It should be noted that the courts have condemned a variety of infringing mediums in addition to photography, including dolls and animated computer-game characters. Logeais & Schroeder (1998), above, note 123, p. 519.
145 Agathe Lepage, *Répertoire Dalloz de droit civil - Vol. 5- Rubrique: Droits de la personnalité*

The courts have developed a number of limited exceptions to the right to one's image on account of freedom of expression and information which are described below, but the starting point is highly restrictive. The requirement of consent to take and publish the photograph of another – even when taken in a public place – is woven into the fabric of French consciousness and goes some way to explaining the Parisian public's concern regarding Peter Funch's *42nd and Vanderbilt* series at *Paris Photo*. As noted in the Introduction, Funch understood that French law would operate to prevent such a series from being produced on the streets of Paris.[146]

**e) Nature of the Right to One's Image**

The right to one's image was initially seen as a minor personality right absorbed into the right to privacy, and a minority of scholars continue to take this view.[147] The ambiguous nature of the right is perhaps reinforced by the absence of a specific statutory provision and the fact that judicial awards for violation of the right to one's image are typically made pursuant to Article 9 of the *Code civil*. That being said, there is broad academic consensus today that the right to one's image is an autonomous personality right[148] and this is supported by over a century of caselaw.[149] The *Papillon* decision of 1970 highlights the right's independent nature: although a biography of a former convict (nicknamed *Papillon*) was held not to be an invasion of his privacy, the Court nevertheless held that the use of Papillon's photograph on the book-cover without his consent infringed his right of image and awarded damages.[150]

The existence of a stand-alone right to one's image, independent of other personality rights,[151] is particularly significant for street photography. This is because, whereas the framing of a photograph may well reveal elements of a subject's private life (leaving a hospital, church or political rally for example may disclose information regarding health, religious or political affiliations) – in which case they would have a right of privacy claim – a photographer could conceivably capture the subject in a neutral public place without revealing any element of their private life or damaging their reputation or honour: in such a case, the individual would be entitled to file proceedings based on the right to one's image alone.[152]

In terms of the nature of the right to one's image, until the end of the twentieth century French courts generally took the view that this was a *personality* right rather than a *property* right.[153] Commentators highlighted the right's ambiguous nature however, noting that it

(Dalloz, 2009, updated 2019), para. 202.

146 See above, note 6.

147 Jeremy Antippas, 'Le droit de la personne sur son image face à la liberté artistique: plaidoyer pour une résistance.' *Revue Le Lamy, Droit de l'Immatériel* (Nº 59, 1 April 2010), para. 6.

148 See, e.g. Logeais and Schroeder (1998), above, note 123, pp. 513-516; Antippas (2010), *ibid.* at paras 6-8.

149 The right is traditionally thought to date back to the *Rachel Affair* of 1858, when family members objected to the unauthorised publication of images of the famous actress on her deathbed. Redmond-Cooper (1985), above, note 127, p. 772; Logeais and Schroeder (1998), above, note 123, p. 514.

150 TGl Paris, ord. ref., 27 Feb.1970, *JCP* 1970, II, 16293, note Lindon. Logeais and Schroeder (1998), above, note 123, p. 515.

151 Such as the right to private life or the right to protect one's reputation or honour.

152 Antippas (2010), above, note 147, paras 6-8.

153 Logeais and Schroeder (1998), above, note 123, pp. 517-518.

encompassed both a negative, subjective right (to prevent unwanted exposure of one's image) embodying a *privacy/personality* interest; and a positive right (pursuant to which popular individuals can protect and commercially exploit their images) embodying a *patrimonial/property* nature.[154] As famous models and athletes sell their image rights for ever increasing sums, Bertrand notes that the French courts are increasingly recognising the "patrimonialisation of the right to one's image*"* based on the American approach.[155] This draws parallels with New York's statutory right of privacy which it will be recalled protects against the unauthorised use of an individual's image for *trade or commercial purposes* (only). Reflecting this shift, the Versailles Appeal Court commented in 2005 that:

> the right to one's image has the essential characteristics of patrimonial attributes, and may validly give rise to the formation of contracts… between the transferor, who has legal control over his image, and the transferee, who becomes the holder of the prerogatives attached to this right.[156]

Judicial recognition that a celebrity's right to his or her image has a patrimonial aspect is certainly noteworthy and attests to the ambiguous, potentially hybrid (personality/ property) nature of the *droit à l'image*. From a street photography perspective, however, the nature of the right to one's image remains essentially personal assuming – as is typically the case – that the subject is not famous.

**f) Exceptions**

As mentioned above, the French courts have developed a limited number of exceptions to the robust rights to private life and one's image on account of Article 10(1) of the ECHR, which provides:

> Everyone has the right to freedom of expression… includ[ing] freedom to hold opinions and to receive and impart information and ideas without interference by public authority...[157]

In the interests of public information, the press can legally publish photographs of individuals at events of legitimate public interest without consent provided the photographs:

(i) do not violate the individual's dignity;

(ii) do not distort their image; and

(iii) have a direct connection with the event being reported.[158]

It was accordingly lawful for the press to publish photographs from the 1995 bomb attacks on the St Michel subway station in Paris[159] and the Paris riots of late 2005.[160]

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154 *Ibid*.

155 Bertrand (2019), above, note 141, para. 204.42.

156 Free translation: CA Versailles, 12e ch., 22 Sept. 2005, *Calendriers Jean Lavigne c/ Universal Music, CCE* Jan. 2006, § 4, p. 29, obs. Caron. Bertrand (2019), above, note 141, para. 204.42.

157 ECHR, above, note 138.

158 Civ. 1re, 20 Feb. 2001, no.98-23.471, Bull.civ.I, no.42; D.2001.1199, note Gridel. Bertrand (2019), above, note 141, para. 204.42.

159 TGI Paris, 10 Sept. 1996, D.1997, obs. Hassler. Logeais and Schroeder (1998), above, note 123, p. 528.

160 TGI Paris, 17th ch., 5 March 2007, *Mme Mouis c./Le Parisien*, Légipresse mai 2007, no. 241,

Whilst this exception may seem similar to the 'newsworthy' exemption under New York law, it is significantly narrower given that the photograph must be taken at the newsworthy event itself and should neither distort the individual's image nor violate their dignity. The publications involved in the New York cases of *Arrington*, *Finger* and *Messenger* would likely have fallen at each of these judicial hurdles had the claims been heard before the French courts.

With a view to facilitating the freedom of information and expression, the courts have also recognised an exception to allow historians and critics to disclose intimate but truthful facts about people who have died. This was articulated in a 1982 case brought by the son and daughter of artist Henri Matisse against a television company for producing a documentary about their father which included a detailed description of his final illness.[161] Whilst Matisse had died in 1954, the children alleged that the documentary was an invasion of both their father's right to private life and the intimacy of their family.[162] In rejecting the claims, the Paris Appeal Court held:

> Whereas Article 9 confers on everyone the right to forbid any form of disclosure of their private life, this right belongs only to living people, with the descendants of a deceased person only entitled to defend their memory against an attack which contains falsehoods or errors or is published in bad faith.[163]

This decision of the highly influential Paris Court of Appeal was rendered in 1982, the year before artist Sophie Calle agreed not to publish *The Address Book* until after her subject had died.[164]

French courts permit the publication of photographs without consent of groups of five or more people taken in a public place provided they neither focus on a particular person nor ridicule or insult the subjects.[165] This exception is however tightly policed: the Paris Court of Appeal found a newspaper liable for breaching the plaintiff's right of image when it illustrated an article about the 1989 stock market crisis with a photograph of a group of identifiable stock-brokers including the plaintiff taken outside the Paris Stock Exchange.[166] The Court held that the plaintiff's central position and expressive body language "made him a distinctive character embodying the main interest of the photograph", thereby necessitating his prior consent.[167]

The press may take and publish photographs of celebrities and public figures without consent whilst in a public space and in the course of professional or public duties; but those individuals otherwise retain their 'off duty' rights to privacy and image, even in a public space:

> the fact that a person of interest in the news is in a public place cannot be

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I, 61. Bertrand (2019), above, note 141, para. 204.42.

161 *Matisse v. Antenne 2 et Aragon* (CA Paris, 13 Nov. 1982) D.1983.J.248. Redmond-Cooper (1985), above, note 127, p. 775.

162 *Ibid*. at p. 775.

163 *Ibid*. at pp. 775-6.

164 See above, note 129.

165 Civ. 1ère, 12 Dec. 2000, n° 98-21.311; Bertrand (2019), above, note 141, para. 204.42.

166 Logeais and Schroeder (1998), above, note 123, p. 522.

167 CA Paris, 3 May 1989, C.D.A., 273 [*Serge July, Std Nvelle de Presse et Communication v. Tamarat*]; Logeais and Schroeder (1998), above, note 123, p. 522.

> interpreted as a waiver of the right that everyone has over their image, nor as a presumption of authorisation.[168]

There can be no infringement of a person's right of image unless they are definitively identifiable.[169] It was on this basis that the Paris courts dismissed the well-publicised right of image claims brought by two women[170] against Robert Doisneau in 1993 alleging they were the young woman in his iconic 1950 image, *Kiss at the Hôtel de Ville.*[171]

During the proceedings, Doisneau revealed[172] that his concerns around the rights to private life and one's image meant he had in fact staged the image by collaborating with a consenting couple whom he had noticed kissing.[173] This somewhat disappointing admission by Doisneau, one year before his death, suggests that France's robust rights of privacy and image impact artistic creation on two levels: not only do they empower subjects to seek judicial redress where their photograph or private information is published without consent; but they also inhibit artist-photographers from taking infringing photographs or producing/publishing infringing work in the first place. The sense of entitlement of New York-based artist-photographers to photograph members of the public in New York and publish those images[174] is in stark contrast to the caution and restraint shown by Doisneau – one of the founding fathers of French street photography – in producing one of the genre's most famous images; by Sophie Calle – one of France's most famous living artists – who agreed to withhold a major work from the public for almost 30 years;[175] and by the new generation of artist-photographers including Peter Funch and Peter Van Agtmael who, as described in the Introduction, are perhaps reluctant to produce creative work in France for fear of legal consequences.

### g) Reconciling the Right to One's Image with Freedom of Artistic Expression

Whilst the French courts are regularly called upon to resolve conflicts between the right to one's image and freedom of information (typically involving the press), conflicts between the right to one's image and freedom of artistic expression are quite rare.[176] Several significant decisions have however been handed down by the Paris Court of First Instance's 17th Chamber (which handles press and privacy matters) in recent years regarding claims by members of the public who were photographed by renowned professional photographers whilst in public without consent and subsequently discovered

168 Cour d'Appel de Paris, 16 June 1986 : D. 1987; Cass. Civ., 10 March 2004, n° 01-15322.
169 Cass. Civ. 1ère, 5 April 2012, n°11-15328.
170 One of the women filed suit with her husband.
171 TGI Paris, 1e ch., 2 June 1993, Gaz. Pal.1994, 16 [*Epoux Lavergne v. R. Doisneau; and Françoise Bornet v. R. Doisneau*]. Logeais and Schroeder (1998), above, note 123, p. 520. Though Doisneau acknowledged that one of the claimants was indeed his model, the courts nevertheless dismissed her right of image claim on the basis that her facial features could not be positively identified (the young woman is indeed facing away from the camera).
172 <http://www.bbc.com/culture/story/20170213-the-iconic-photo-that-symbolises-love>.
173 The Versailles Court of Appeal recently affirmed that the publication of a photograph of two people kissing in the street without their consent infringes their right to private life: "A sentimental relationship is a private matter and can only be exposed to the public with the consent of the person concerned, who alone can set the limits of what can be published in the press about him/her" (Cour d'appel, Versailles, 1re chambre, 1re section, 11 March 2010 - n° 09/08383).
174 See comments of DiCorcia and Svenson above, notes 113 and 114.
175 See above, note 129.
176 Lepage (2009/2019), above, note 145, para. 360.

their recognisable images in artistic photography books. The subjects, who were either unaware that they had been photographed or actively expressed their opposition at the time, sued for invasion of privacy and/or violation of their right of image.[177] Promisingly for street photographers, the 17th Chamber has dismissed all such claims to date and its position was affirmed by the Paris Court of Appeal in one case. Whilst the body of case law is limited, it supports the recognition of a significant new judicial exception to the right of image based on the freedom of artistic-photographic expression. This section will consider the facts of each claim and the courts' decisions.

*i. Luc Delahaye: L'Autre*

In 1999, renowned Magnum documentary photographer Luc Delahaye[178] published a book entitled *L'Autre* ('The Other') containing 89 black-and-white portraits of fellow commuters taken on the Paris Métro using a hidden camera[179] and a three-page text by a respected French sociologist, Jean Baudrillard. Delahaye introduced his book with an admission of liability:

> I stole these photographs between '95 and '97 in the Paris metro. 'Stole' because it is against the law to take them, it's forbidden. The law states that everyone owns their own image.[180]

Describing his creative process to the press in 1999, Delahaye said:

> The metro is a place where people are portraits of themselves. When they come to the surface, they take a mask, pretend to believe that everything is fine, adopt false relational codes - otherwise life would be untenable. In the subway, there is no relationship at all, so I can find more truth in it. I stole these photos, that's true, but it's in the name of a photographic truth that I couldn't have reached otherwise.[181]

The portrait of one of Delahaye's subjects, Neji Bensalah, appeared in *L'Autre* and made a two-second appearance in a film by Austrian director Michael Haneke called *Code inconnu (2000)*. Bensalah filed suit in 2004 before the Paris courts against Delahaye, Magnum, Phaidon (the book publisher), Haneke and his production company.[182] Bensalah alleged violation of his right of image which was reproduced for commercial purposes in two different media (book and film) without his consent. He further alleged that he had been ridiculed by "the expression of sadness" in the portrait which had "negative repercussions on his family balance" and claimed 100,000 French francs damages[183] (approx. USD 17,000[184]).

The 17th Chamber dismissed Bensalah's claim in June 2004, noting that whilst everyone

177 *Ibid*.
178 <https://www.theguardian.com/artanddesign/2011/aug/09/luc-delahaye-war-photography-art>
179 In the spirit of Walker Evans: <https://www.moma.org/learn/moma_learning/walker-evans-subway-portraits-1938-41/>.
180 Luc Delahaye and Jean Baudrillard, *L'Autre* (Phaidon Press, 1999), p. 3.
181 *Le Monde* 'Un jugement limite le droit à l'image au nom de l'art et de l'information' 5 Nov. 1999. <https://www.lemonde.fr/archives/article/2004/06/17/un-jugement-limite-le-droit-a-l-image-au-nom-de-l-art-et-de-l-information_369370_1819218.html> .
182 TGI Paris, 17e ch. civ., 2 June 2004, *M. Bensalah c/ L. Delahaye Magnum, Éditions Phaidon Presse Limited et SA Mk2*.
183 *Le Monde,* 5 Nov. 1999, above, note 181.
184 <https://coinmill.com/FRF_calculator.html#FRF=100000>.

has an exclusive right to their image enabling them to prevent their photograph being taken and used, the right is not absolute and gives way in particular to the right to information guaranteed by Article 10 of the European Convention on Human Rights which, as noted above, permits publication of people involved in a public event subject to respect for human dignity.[185] The Court went significantly further, however, holding:

> it must be the same when the exercise by an individual of his right to an image would arbitrarily interfere with the freedom to receive or communicate ideas that are expressed especially in the work of an artist.[186]

This appears to be the first time that the French courts invoked such an exception.[187] The decision stated that the contested photograph portrayed Bensalah in neither a degrading nor ridiculous light; and that Delahaye's aim was not particularly commercial but rather to provide "special sociological and artistic evidence on human behaviour, backed by the analysis of a sociologist/philosopher" – an aim that could not have been achieved by taking the images openly.[188] The Paris Court commented on the work's critical acclaim and cited Delahaye's 1999 interview with *Le Monde* in which he explained his creative process[189] before concluding that *L'Autre* was "undeniably an artistic work by the originality of the author's approach".[190]

*Selected images from L'Autre by Luc Delahayhe. © Luc Delahayhe*

185 Lepage (2009/2019), above, note 145, para 361.

186 *Bensalah v. Delahaye et al*., above, note 182: "*qu'il doit en être de même lorsque l'exercice par un individu de son droit à l'image aurait pour effet de faire arbitrairement obstacle à la liberté de recevoir ou communiquer des idées qui s'expriment spécialement dans le travail d'artiste*". Lepage (2009/2019), above, note 145, para. 361.

187 Amélie Blocman, *Exception for Artistic Purpose – Another Exception to the Right of Personal Portrayal?* (Légipresse, 2004).<http://merlin.obs.coe.int/iris/2004/9/article19.fr.html>.

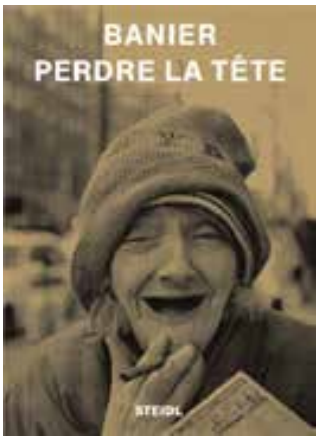
188 *Bensalah v. Delahaye et al.*, above, note 182.

189 See above, note 181.

190 *Bensalah v. Delahaye et al*., above, note 182.

*ii. François-Marie Banier: Perdre la Tête*

The Paris courts were given further opportunity to define the legal relationship between artistic street photography and the right to one's image three years later, in 2007, when three individuals filed suit against the influential society photographer, François-Marie Banier, regarding his use without consent of images of them in his 2005 book, *Perdre la tête* ('Losing Your Head)'.[191] *Perdre la tête* comprises 263 pages of black-and-white portraits, without captions, juxtaposing a broad spectrum of Parisian society including French celebrities, the well-heeled, students, workmen and roller-bladers alongside individuals from more marginal groups such as the homeless and mentally-ill. The book concludes with two short texts by a novelist and a filmmaker who comment on the work, together with an interview with Banier.[192]




*© François-Marie Banier.*
*The photograph of Banier's five images of 'Michelle D.' ican be found on Banier's website: http://fmbanier.com/exposition/perdre-la-tete/ (last viewed 28 Oct. 2019).*

The first claim was filed in January 2006 against Banier and his publisher by the woman sitting on a public bench in Paris.[193] The claimant, who worked in the art world, sought damages of €200,000 pursuant to Articles 9 and 1382 of the Civil Code alleging breach of her rights to private life and image.[194] She alleged voicing her explicit objection to Banier when she realised he was photographing her and that her inclusion in a book "devoted to exclusion and marginality" – which her complaint described as a "museum of horrors" – harmed her reputation by implying that she was "indifferent to the fate of others"[195] (it may be recalled that the claimant in *Arrington v. New York Times* had made a similar allegation before the New York courts).[196]

The 17th Chamber began its decision of 9th May 2007 by swiftly rejecting the claim for invasion of privacy, holding that the claimant's:

> overall attitude, the presence of a pet beside her, or taste in clothing are all insignificant indications… which do not fall within the sphere protected by article 9 of the Civil Code as regards respect for private life.[197]

Regarding the alleged infringement of the right of image, the Court reiterated its 2004

191 <https://steidl.de/Books/Perdre-la-tete-1933365455.html>.
192 The photograph of Banier's five images of 'Michelle D.' can be found on Banier's website: <http://fmbanier.com/exposition/perdre-la-tete/> (last viewed 28 Oct. 2019).
193 TGI Paris, 17e ch. civ., 09-05-2007 – n° 06/03296 (Recueil Dalloz 2008 p. 57).
194 *Ibid*.
195 *Ibid*.
196 See above, Part 1(e).
197 TGI Paris, 17e ch. civ., 09-05-2007 – n° 06/03296 (Recueil Dalloz 2008 p. 57).

holding in *Delahaye* that the right is not absolute and must yield to the freedom to receive or communicate ideas when "its exercise would arbitrarily obstruct the freedom of artistic expression".[198] The Court significantly added that:

> this would be particularly the case in the field of photographic art if the photographer were forced to systematically seek the consent of individuals to take and publish their images, which would have the effect of compromising… the representation of street scenes, despite the age and nobility of this artistic form to which illustrious names are attached, and to limit the artist's form of expression by depriving him of the choice of shots to be published and the overall presentation he wishes to give to his work. Therefore, in this field, only a publication that is contrary to the person's dignity or has particularly serious consequences for them is likely to infringe the right to one's image.[199]

As in *Delahaye*, the 17th Chamber acknowledged Banier's reputation as a "renowned photographer", the work's artistic nature "which is not disputed or even contestable", and critical acclaim. It held that Banier's inclusion of the claimant alongside portraits of the marginal and eccentric was neither disparaging nor a violation of her dignity, "underlin[ing], on the contrary, their common humanity".[200]

The 17th Chamber's decision was affirmed by the Paris Court of Appeal on 5th November 2008 which stated that "those who create, interpret, disseminate or exhibit a work of art contribute to the exchange of ideas and opinions essential to a democratic society".[201] It noted that Banier's work has been exhibited internationally since 1991 and that *Perdre la tête* had won an award for best art/photography book in 2006. Affirming that the disputed image raised no question of invasion of privacy, the appeal court reiterated that the right to one's image must be reconciled with the freedom of expression guaranteed by both Article 11 of the 1789 Declaration of the Rights of Man[202] and Article 10 of the ECHR. It held that that the protection of the rights of others and freedom of artistic expression "have the same value" and that it is accordingly necessary to find "a solution that protects the most legitimate interest". The Paris Court of Appeal significantly affirmed the 17th Chamber's recognition of a judicial exception to the right of image for artistic freedom as follows:

> the right to one's image must yield to freedom of expression whenever the exercise of the former would arbitrarily interfere with the freedom to receive or communicate ideas that are expressed especially in the work of an artist except in the case of a publication contrary to the dignity of the person or having particularly serious consequences for him;[203]

The appeal court further affirmed its agreement with the 17th Chamber that far from violating the claimant's dignity, Banier underlined the common humanity of the characters portrayed.[204]

198 *Ibid*.
199 *Ibid*.
200 *Ibid*.
201 Cour d'appel de Paris ch. 11 A 05-11-2008 N° 07/10198.
202 See above, Part 3(a).
203 Cour d'appel de Paris ch. 11 A 05-11-2008 N° 07/10198.
204 *Ibid*.

The other two claims against Banier were filed jointly by the *Espace Tutelles* on behalf of two adult women – 'Patricia G.' who appeared on the cover and 'Michelle D.' who was included in a series of five images (see above) – under judicial guardianship on account of their fragile mental state. Seeking damages of €30,000 each, the claims noted that artistic creation cannot take precedence over the right to one's image unless human dignity is respected, and alleged that Banier's images violated the claimants' dignity: "the violation of dignity… is constituted by the mere disclosure of their image, which clearly leads the public to smile, laugh, mockery or rejection".[205] The claims also alleged that the book's title ('*Losing Your Head*') was a deliberate play on words which targeted the claimants and invited further mockery.

In rejecting the Tutelles claims on 25th June 2007, the 17th Chamber noted that, in the field of photographic art:

> the photographer's creativity and the artist's freedom of expression are limited only by respect for the dignity of the person represented or by the particularly serious consequences that the publication of the photographs would have for the subject.[206]

The Court acknowledged the book's artistic and sociological interest and was unable to find "particularly serious consequences" for the claimants.[207] Acknowledging that the claimants' "particular fragility… leads to an even more demanding protection of their dignity",[208] the Court nevertheless found no infringement by Banier. It referred to critical acclaim of the work as a whole which "underlined the humanity of the characters" and considered Banier's gaze "treats his subjects with respect and tenderness".[209] The Court also acknowledged that Banier's inclusion of so-called 'outsiders' was deliberate, quoting his below comments from the interview at the book's conclusion:

> As for the outsiders, who does not envy their courage, who does not admire their originality… we who accept social roles, the comedy of artificial hierarchies, out of fear, and above all to keep control of our place in society… [210]

*iii. Comment*

The *Delahaye* and *Banier* decisions confirm that artistic street photography will attract broad legal protection where proceedings are filed before the Paris courts by members of the public who are photographed in public without their consent. Once the *artistic* nature of the work is established, the artist's freedom of creative expression will take precedence over the subject's right to privacy and image *unless* the work disrespects the subject's dignity or publication has "particularly serious consequences". Whilst the artist's freedom is not absolute, it is placed at the highest level on the freedom scale.[211] The caselaw is undoubtedly positive for the art of street photography and should reassure the world's photographers that compassionate work undertaken on the streets of Paris will be protected by the courts.

205 TGI Paris 17e ch. 25-06-2007 N° 06/10149.
206 *Ibid*.
207 *Ibid*.
208 *Ibid*.
209 *Ibid*.
210 *Ibid*; François-Marie Banier, *Perdre la tête* (Steidl, 1st edn, 2005), p. 228.
211 Lepage, Marino and Bigot (2007), above, note 128, p. 2771.

It should be noted that these developments have raised some concerns. Lepage states that the courts have sacrificed France's historic right to an image on the altar of artistic creation:[212] "the balance between the right to one's image and the freedom of artistic creation is rather an annihilation, since there is little or nothing left of the former".[213] In practice, subject to dignity and serious consequences, once a work is deemed artistic then *any* exercise of the right to one's image will seemingly constitute an illegitimate and arbitrary interference with freedom of artistic creation – which seems surprisingly similar to the unassailable protection afforded to First Amendment free speech in the United States. The key to protection evidently lies in a work's qualification as 'artistic' and, where this is disputed, the French courts will be required to adjudicate. In this respect, the decisions in *Delahaye* and *Banier* suggest that the originality of the artist-photographer's creative process, together with their exhibition/career history and any critical reception of the contested work, will all be taken in account.

## 4. Conclusion

This paper has demonstrated that the law governing artistic street photography in New York and Paris is favourable to artist-photographers in both cities. Whilst this was already understood to be the case in New York, it is perhaps more surprising for Paris.

Returning to Peter Funch's series, *42nd and Vanderbilt*, the New York decisions in the *DiCorcia* and *Svenson* cases confirm that Funch should certainly prevail in the (unlikely) event that any of his subjects were to sue him before the New York courts alleging breach of their statutory right of privacy. Given that the law in New York is so clear on this question, anyone seeking competent legal advice on the merits of a claim would presumably be advised to desist[214] – in which case Funch would also avoid legal defence costs.

What would the situation be if Funch produced a similar series on the streets of Paris? The Paris decisions in *Delahaye* and *Banier* introduced the principle that the individual's right of image yields to artistic freedom of expression provided the publication is neither contrary to the dignity of the individual nor has "particularly serious consequences". Similar to Delahaye, Funch adopted a methodical, sociological approach in *42nd and Vanderbilt* and the author submits that most of the series would be protected by the Paris courts in the hypothetical event of legal claims. The lack of clarity on what *would* offend an individual's dignity or have "particularly serious consequences" leaves some unanswered questions, however. The unsuccessful *Tutelles* claims against Banier provide some guidance on the dignity question and suggest that the photographer's humane approach will be recognised. Might Funch's below images of a man looking into a rubbish-bin offend his dignity?

Regarding "particularly serious consequences": do the consequences have to be reasonably foreseeable and how far into the future can a photograph have "particularly serious consequences"? Must the consequences be "particularly serious" for the

212 Lepage (2009/2019), above, note 145, para. 361.
213 Lepage (2009/2019), above, note 145, para. 362.
214 The subjects might consider buying the offending limited editions themselves to control the circulation.


*2012.07.18 09:16:02 © Peter Funch 2012.07.23 09:15:20*

subjects alone, or will the effect on third parties be considered? It is clear that romantic relationships form part of private life under French law:[215] what if Funch's below images of a man and woman were to reveal a 'secret' relationship, with consequences for the subjects and others?

*2012.06.15 08:36:02 © Peter Funch 2012.07.03 09:03:19*

If the New York decisions in the *DiCorcia* and *Svenson* cases have emboldened artist-photographers to work on the streets of New York, the French decisions in *Delahaye* and *Banier* confirm that the streets of Paris are similarly 'open for business' provided the editing is sensitive to the dignity and serious consequences points described above. The fact that no conflicting decisions have been rendered in the intervening eleven years suggests that French law is reassuringly stable on this issue.[216] That said, the French public's concern at *Paris Photo* in November 2018 came a full decade after the *Banier* appeal. A significant section of the French public may therefore be unaware of the change in law and, accordingly, no less inclined to file proceedings against artists who they believe are infringing their right of image. Such proceedings would need to be defended, at potentially significant cost – especially if the contested work finds itself at the threshold of the dignity or particularly serious consequences questions. Whilst *Delahaye* and *Banier* introduced the principle that the right of image yields to freedom of artistic expression under French law, it will likely take time and further caselaw for the principle to become established.

215 See note 173 above, for example.

216 Whilst the Paris Court of Appeal's 2008 decision in Banier is not binding on lower French courts as it would be in common law jurisdictions, it is persuasive. (Art. 5 of the French Code civil provides: "*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*").