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of Image Rights?**

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Is the UK heading towards Protection of Image Rights?

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Abstract

This article analyses the background to and latest developments in the case-law in the UK which deals with the commercial exploitation of an individual's personality. It will consider whether the law of passing off in the UK could be extended beyond the traditional common law situations including false endorsement and false merchandising claims. The author concludes that although traditional common law remedies will evolve, a formal recognition of personality rights remains unlikely in the near future in the UK.

Keywords: Image rights, Passing off, Privacy, Personality right, Intellectual property

Introduction

The debate about the recognition of image rights in the UK is gathering momentum in the wake of the recent High Court of Justice decision in *Fenty v Topshop*.¹ The court considered the unauthorised use of the pop star's Rihanna's image on t-shirts produced by the clothes chain Topshop. Although a general right of protection for commercial celebrity image or personality has not been recognised in the UK, this case has once again examined the question of whether using a celebrity's image on merchandise articles can amount to passing off. A celebrity may currently obtain protection through various statutory and common law rights, such as the developing law of privacy, breach of confidence and, in particular, the tort of passing off. None of these rights were designed to protect image or personality rights; however, English courts are increasingly stretching the boundaries of traditional common law by recognising the commercial value of celebrity endorsements.²

Value of Image Rights

The value of name and images of celebrities has increased tremendously over the past decades. Sponsors are willing to pay large sums to align their companies, products and brands with them. For example, Cristiano Ronaldo, current FIFA World Footballer of the year 2013, earns nearly half of his \$44 million income from commercial endorsements from sponsors.³ Given the high value of their names and images it is not surprising that celebrities seek to reap the rewards of the fame and benefit commercially from it. However, some commentators object to such a new property right, arguing that a celebrity's image is public property as part of media culture and so celebrities should accept their name and reputation be used as public property.⁴ Moreover, they claim that the traditional justifications for the protection of intellectual property, such as providing encouragement, incentive and reward for creators, cannot be applied to personality rights.⁵ Those who are in favour of the recognition of a personality right argue that an individual's image constitutes a valuable intangible property right and that he or she should have legal control over it.⁶ Following recent developments in the law of passing off, in particular *Fenty v Topshop*, some academics see personality rights "finally on the UK agenda".⁷

¹Fenty & Ors v Arcadia Group Brands Ltd (t/a Topshop) & Anor [2013] EWHC 2310 (Ch); see: Roberts, pp. 283-285; Beverly-Smith, Barrow, pp. 57-61.

²Walsh, pp. 253-260; Cornish and Llewelyn, p. 618.

³<http://www.forbes.com/profile/cristiano-ronaldo/>.

⁴Davis, p. 33; Carty, p. 252.

⁵Waelde, Graeme (et al) p. 827; Westkamp, p.61.

⁶Shipley, p. 673 (681).

⁷Carty, 106; Wadlow, 447 (455).

International Level of Protection

Despite the economic value of image rights, there is currently no international standard or agreed legal concept for recognising an image right. While certain jurisdictions, such as the US, Germany and France offer statutory protection against the exploitation of an individual's image, English law provides no cause of action for the infringement of image rights as such. Many countries traditionally link the concept of personality rights to the right to privacy.¹ While the former protects against economic loss caused by the commercial appropriation of an individual's personality the right to privacy protects against the intrusion of an individual's private sphere.² It is worth noting that Guernsey, a small British island in the Bailiwick, located in the English Channel, has taken the creation and recognition of image rights to a new level by introducing a registrable statutory image right under its Image Rights (Bailiwick of Guernsey) Ordinance in 2012.³ Registration under the Ordinance creates a recognised defined image right for the first time which is published in Guernsey's Register of personalities and images.⁴ The proprietor of the registered personality obtains a legal property right similar to a trade mark which can then be assigned and licensed.⁵ Moreover, the proprietor of the the registered image right has exclusive rights in the images registered against or associated with that registered personality. This new registration system for image rights has been welcomed by practitioners for bringing important clarity to the meaning and scope of image rights.⁶ However, it should be noted that a year after the establishment of the new system, it has not attracted as many registrations as expected. Potential registrants and celebrities may question the practical relevance of the remedy and its enforceability in other jurisdictions.⁷ Only the first high profile court case could put this new legislation to the test and effectively dispel concerns about the efficiency of the new system.

Traditional English Position on Endorsement and Sponsorship

English courts have traditionally been reluctant to recognise personality rights and to provide protection for vague concepts such as names, likenesses or popularity.⁸ However, as noted above, personalities can seek protection through the various existing intellectual property and privacy rights, in particular registered trade mark rights or common law passing off claims. Although there are a number of actions that might be regarded as examples of

¹Carty, 212.

²Bainbridge, pp. 347, 882.

³The Image Rights (Bailiwick of Guernsey) Ordinance, 2012.

⁴Section 5 of the Image Rights Ordinance 2012.

⁵Romer and Storey, pp. 51-56.

⁶Parr, pp. 19-20; Evans and Romer, pp. 761-763.

⁷Engelman, pp. 24-25.

⁸Ibid.

the protection of the value of image rights, these remedies lack the express protection available in other jurisdictions, in particular, clarity and transparency.¹

Traditional Position of the English Courts

In the UK the first case relating to use of a celebrity's image arose in *Tolley v Fry* which involved a celebrity endorsement and defamation claim.² The claimant in this case was a well-known amateur golfer. The defendants were manufacturers of chocolate in various forms. When the defendant used a caricature of the claimant playing golf with the defendant's chocolate bar sticking out of his pocket without the knowledge or consent of the claimant, the claimant brought an action for damages for libel. The claimant alleged that, as a result of the defendant's innuendo, people would likely believe that the claimant had given his consent to the commercial advertisement which untruthfully suggested that he was not an amateur, but a professional golfer. The House of Lords held that the caricature was defamatory in that it conveyed the false impression that the claimant had sought to commercialise his status as an amateur golfer. As a result the claimant's reputation as an amateur golfer had been damaged. It must be noted, however, that the limitations of the ruling are evident in that it only covered protection for an amateur golfer. The ruling can therefore not be applied to cases involving professional athletes and celebrities who deserve just as much (if not more) protection against the commercial appropriation of their personality as amateurs. As a result, it is unlikely that the remedy in defamation here would provide sufficient protection in contemporary circumstances.³

Character Merchandising

English courts further developed the law of personality rights by considering the scope of passing off to prevent the unauthorised merchandising of fictional characters in the 1970s and 1980s. The term character merchandising refers to the licensing of the reproduction of fictitious characters, such as Harry Potter, the Teletubbies or the Simpsons, on goods sold by the licensee.⁴ The traditional passing off action requires a misrepresentation by the defendant leading to confusion which causes damage to the goodwill established by the claimant in his goods or services ("classical trinity").⁵ Until relatively recently a successful action for passing off involving

¹Romer and Storey, p. 51; Middlemiss and Warner, pp. 131-142.

²*Tolley v JS Fry & Sons Ltd* [1931] AC 333, [1931] UKHL 1.

³Markesinis (et al), p. 142.

⁴Bainbridge, p. 891.

⁵See Lord Oliver in *Reckitt and Colman Products Ltd v Borden Inc & Ors* [1990] UKHL 12 (also referred to as the "Jif Lemon" case).

character merchandising required that the claimant and the defendant were engaged in a 'common field of activity'.¹ To establish such a common field of activity, the courts were looking for an obvious link or connection in the course of trade between the owner of the name, the licensor and the goods to which the name was to be applied.² For example in the *Wombles* case, the claimant owned copyright in the books and drawings of fictitious animals from a television series known for their tidiness and the defendant supplied rubbish skips under the name *WomblesSkips*.³ It was held that, in the absence of a common field of activity between the parties, it was highly unlikely that ordinary members of the public would think that the skips were associated with the *Wombles*.⁴ In the *Abba* case, in which the defendants used the name and image of the popular singing group on goods such as T-shirts and rings, Oliver J. similarly rejected a wide recognition among the public of merchandising activity by famous personalities.⁵ In *Stringfellow v McCain Foods* the Court clearly stated that a misrepresentation which caused damage to the claimant's goodwill was key to an action in passing off. Here, the claimant was a nightclub owner and alleged that McCain's use of a disco scene to promote its 'Stringfellow' chips would damage the goodwill of his nightclub. The action failed on the basis that no damage to the nightclub, for example, falling attendances, was found to result from sales of Stringfellow chips.⁶

Full legal protection of the character merchandising by the law of passing off has not yet been granted by the UK courts, although the law in this area is developing. The case of *Mirage Studios v Counter-Feat Clothing Co Ltd* is a good example. The facts of the case were that the claimant had created the Teenage Mutant Hero Ninja Turtles characters and the defendant, without the claimant's permission, made drawings of turtle characters that were similar in appearance to the claimant's characters.⁷ The defendant then began to licence these drawings to manufacturers for the purpose of applying them to T-Shirts and other items. An interlocutory injunction was granted against the defendant. The Court held that the misrepresentation made by the defendant was that a substantial number of the buying public would believe that the reproduction of the figures was the result of a licence between the owner of the rights in the original drawings of the turtles. The Court held that part of the damage was the defamation of the character's image and reputation if it became associated with inferior goods.

The decision was initially perceived as groundbreaking because the court affirmed that "confusion as to licensing" was actionable. However, the euphoria was soon over as the classic trinity must still be proven. Moreover, as

¹*McCulloch v Lewis A May (Produce Distributors) Ltd* (1947) 2 All ER 845 ('Uncle Mac'); *Tavener Rutledge Ltd v Trexapalm Ltd* (1975) FSR 479 ('Kojak'); *Wombles Ltd v Wombles' Skips Ltd* (1975) RPC.

²Bainbridge, p. 890.

³*Wombles Ltd v Wombles Skips Ltd* (1977) RPC 99.

⁴*Ibid.*

⁵*Lyngstad v Anabas Products* (1977) FSR 61.

⁶*Stringfellow v McCain Tools (GB) Ltd* (1984) RPC 501.

⁷*Mirage Studios v CounterFeat Clothing Co Ltd* (1991) FSR 145.

this was a copyright case, its dicta was of limited use with regard to passing off.¹

False Endorsement

The UK courts came closer to recognising an image right in the decision *Irvine v Talksport* in the High Court in March 2002.² The case is generally seen as a breakthrough for personality merchandising because Mr Justice Laddie rejected the need for a common field of activity and applied passing off to famous people, “who exploit their names and images by way of endorsement”.³ The case concerned the claim of a well-known Formula One racing driver Eddie Irvine who sued Talksport Radio for passing off and, in particular, for using his image in an advert for the radio station without obtaining his consent. In the course of a new promotional campaign the defendants had created a brochure with the photograph of the first claimant on the front. The photograph had been manipulated in such a way that, instead of holding a mobile telephone as in the original photograph, the claimant appeared to be holding a radio bearing the defendant’s then name ‘Talk Radio’. Mr Justice Laddie held that this amounted to false endorsement and awarded *Irvine* £2,000 in damages under the law of passing off. The decision was upheld by the Court of Appeal although the award of damages was increased to £25,000 on the basis of what a celebrity would normally charge as a fee for an endorsement.⁴ Even though *Irvine v Talksport* was largely celebrated as a breakthrough in the protection of image rights, the limitations of this ruling were evident: the defendant will not be liable if his or her name is used in a manner which does not mislead members of the public into thinking that he or she has endorsed the use of the image. The law of passing off as applied in *Irvine v Talksport* would therefore not cover celebrities who simply appear unauthorised on merchandise articles or have not endorsed products in the past.⁵

The Developing Law of Privacy

The next important advance in the protection of image rights after *Irvine v Talksport* were two privacy cases concerning the well-known film star Michael Douglas and Supermodel Naomi Campbell. Privacy rights have received increasing recognition both nationally and at European level. The key justification for this change is Art. 8 (1) of the European Convention on Human

¹Walsh, p. 260.

²*Irvine v Talksport* [2002] EWHC 367 (Ch).

³Bainbridge, p. 875.

⁴*Irvine v Talksport* [2003] FSR 35.

⁵Bainbridge, p. 875.

Rights (ECHR) which provides a right to respect for a person's private and family life. The two cases also reflect the fast developing area of privacy law in the UK which has been supported and enhanced by the enactment of the Human Rights Act 1998.

Douglas v Hello

The first case concerned the two actors, Michael Douglas and Catherine Zeta-Jones. The stars had married in November 2000 and had granted exclusive rights to pictures of their wedding to the Ok! magazine but the defendant, Hello! magazine had its own pictures, which it planned to publish. On application the claimants obtained an interim injunction in the High Court, preventing the defendant from publishing unauthorised photographs of the claimants' wedding on the grounds that the pictures were a breach of confidence and an invasion of the individual claimants' privacy. The defendant, Hello! magazine, successfully appealed to the Court of Appeal, which discharged the interim injunction against the defendant. An emergency injunction was granted which was set aside three days later by the Court of Appeal.

At a full hearing of the case, the High Court held that the defendant was in breach of confidence for publishing the photographs.¹ The Court of Appeal confirmed that there had been a breach of the Douglases right of privacy and a breach of what was referred to as their commercial confidence. The wedding was protected under the law of commercial confidence. The publication of unauthorised photographs by a rival magazine was a breach of that confidence. It was accepted that persons of public interest who seek publicity have a right in their image as a commodity which can be dealt with as with any trade secret. Ordinary people without such a celebrity status, by contrast, would not necessarily have a commercial confidence though they do have a right of privacy.²

The Douglases succeeded in this case because the wedding and party were held to be private events, on private property. The House of Lord affirmed the claimants' right to hold their wedding in private and protect their intimate moments from the distressing and invasive effects of unauthorised photography. The House of Lords, by a split majority of 3-2, upheld the action for breach of confidence. The main issue was whether the photographs represented confidential information. The majority ruled that the disputed photographs provided information as to how the wedding looked and constituted confidential information.

However, Lord Walker in *Douglas v Hello* summed up his position on image rights as follows:

'... , under English law it is not possible for a celebrity to claim a monopoly in his or her image as if it were a trademark or a brand'.³

¹Douglas & Ors v Hello Ltd & Ors [2003] EWHC 786.

²Douglas & Ors v Hello Ltd & Ors [2005] EWCA Civ. 595.

³*Douglas v Hello* [2007] UKHL 21, para 293 per Lord Walker.

Moreover, Lord Justice Hoffman noted:

*“There is ... no question of creating an “image right” or any other unorthodox form of intellectual property. The information in this case was capable of being protected ... simply because it was information of commercial value over which the Douglasses had sufficient control to enable them to impose an obligation of confidence”.*¹

Campbell v Mirror Group Newspapers

In *Naomi Campbell v Mirror Group Newspapers* the model Naomi Campbell was photographed leaving a rehabilitation clinic where she attended regularly meetings of Narcotics Anonymous ("NA").² The photographs were published in a publication run by MG Newspapers. The headline alongside the photograph read: “Naomi: I’m a drug addict” and the article contained some general information relating to Miss Campbell’s treatment for drug addiction, including the number of meetings she had attended in the clinic. Miss Campbell claimed damages under the tort of breach of confidence. On appeal, the House of Lords affirmed a breach of confidence applying a balancing exercise. In this way, in establishing whether a misuse of private information had occurred, the court first established the claimant had a reasonable expectation of privacy. The court then conducted a balancing act between the articles 8 and 10 of the European Convention on Human Rights. Article 8(1) states that "everyone has the right to respect for his private and family life, his home and his correspondence". Article 10(1) states that "everyone has the right to freedom of expression". The court found that Miss Campbell had a reasonable expectation of privacy in respect of information relating to her attendance at Narcotics Anonymous meetings and that her right of privacy outweighed the public interest in being informed about the details of her illness.

However, in her judgment Baroness Hale of Richmond made clear that:

*“..., in this country we do not recognise a right to one's own image... We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential.”*³

In summary, to obtain protection under English privacy laws the activity photographed must be private. If by contrast, someone published a picture of a celebrity going shopping in a public street, a claim for breach of confidence or privacy would most likely fail. Children may enjoy special protection as held

¹Ibid, para 124 per Lord Hoffmann.

²*Campbell v MGN Ltd* [2004] UKHL 22 on appeal from *Campbell v MGN Ltd* [2002] EWCA Civ 1373.

³Ibid, para 154, per Baroness Hale of Richmond.

in *Murray v Express Newspaper Plc* where a photographer depicted the author JK Rowling's son David, then 19 months old, being pushed in a buggy with his parents in an Edinburgh street to and from a local café. In that case it was arguable that an expedition to the café was part of each member of the family's recreation time, such that publicity was intrusive and likely to adversely affect such activities in the future.¹

The English law on privacy has therefore strengthened the economic and private rights of celebrities but it is questionable if and when ordinary people have a right to commercial confidence. What the cases show is that even celebrities have a right of privacy during private events on private property and with regard to information about a person's health and their treatment for ill health. Moreover, *Campbell* has established that the values enshrined in Art. 8 and 10 ECHR will now be considered as part of a cause for an action of breach of confidence.

False Merchandising

The scope and boundaries of an action of passing off were once again tested in the recent case *Fenty & Ors v Arcadia Group Brands Ltd (t/a Topshop) & Anor* concerning the protection of image rights, involving the pop star Rihanna and the fashion chain Topshop.² The facts of the case were that in March 2012 Topshop, a well-known fashion retailer, started selling a T-shirt with an image of Rihanna on it. The image in question was of Rihanna during a video-shoot for her 2011 "Talk That Talk" album. Topshop had obtained a licence from the photographer but no licence from Rihanna. Rihanna claimed that the sale of this T-shirt without her permission infringed her rights and brought an action against Topshop for passing off and trade mark infringement.

The High Court found that all of the elements of a passing off claim were present in the Rihanna case, arguing that the retailer was taking advantage of "Rihanna's public position as a style icon" to increase its own sales. Moreover, the Court found that the use of that particular image on the T-shirt might lead Rihanna fans to believe that it was part of her marketing campaign for the album. Mr Justice Birss concluded,

*"Many will buy a product because they think she (Rihanna) has approved of it. Others will wish to buy it because of the value of the perceived authorisation itself. In both cases they will have been deceived."*³

Moreover, the facts that Rihanna already has her own clothing line with Topshop rival River Island and enjoyed substantial goodwill in the UK and the

¹*Murray v Express Newspapers Plc* [2008] EWCA Civ 446 and recently in: *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), see: Agate, p. 197.

²Supra Fn 1.

³Ibid, para 72, per Mr Justice Birss.

position of Topshop as a major reputable high street retailer were crucial to a finding of passing off.

Considering the special circumstances in the Rihanna case, it is not surprising that the Court found in her favour. The classic passing off elements and circumstances leading to false endorsement as in *Irvine v Talksport* were present: The T-shirt damaged Rihanna's goodwill, resulted in loss of sales for her own merchandising business and represented a loss of control over her reputation in the fashion sphere.

Although the Court found in Rihanna's favour, this decision is unlikely to open the floodgates for claims to be brought every time a celebrity image is used without a licence on merchandising. Mr Justice Birss was keen to stress that:

"Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image".¹

The Court made clear that each case will depend on the individual circumstances, and that, *"the mere sale by a trader of a T-shirt bearing an image of a famous person is not, without more, an act of passing off."*²

The Impact of *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd* on UK law

In *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd*³ the Court of Justice of the European Union (CJEU) ruled that a person who claims an infringement of his or her personality rights by means of the internet can choose to bring an action before the court of the Member State in which they have their "centre of interests" in respect of all of the damage caused.⁴ The CJEU also held that the provider of an electronic commerce service covered by the E-Commerce Directive cannot be made subject to stricter requirements than those provided for by the law of the Member State in which it is established. The joined references to the CJEU both concerned articles published on the internet that were alleged to infringe the rights of the individuals named in the

¹Ibid, para 2, per Mr Justice Birss.

²Ibid, para 75, per Mr Justice Birss.

³*EDate Advertising GmbH v X and Olivier Martinez v MGN Ltd* (C-509/09 and C-161/10).

⁴Smith, pp. 34-35.

³⁸Blum and Round, p. 32.

articles. The second reference, C-161/10, was brought under Art. 9 of the French Civil Code, which provides that “everyone has the right to respect for his private life.” The publisher challenged the jurisdiction of the French court, arguing that there was no sufficiently close connecting factor between the placing online of the information in the United Kingdom and the alleged damage in France. As a consequence of this ruling, publishers in the UK who use images of celebrities may face action in courts in other jurisdictions that recognise image rights as such in relation to damage suffered throughout the European Union. Other Member States could award more generous damages for privacy breaches than the United Kingdom. As a consequence, litigants could turn to the practice of forum shopping to obtain better results in court.¹ Moreover, this judgment makes clear, that European law as far as the treatment of image rights is concerned, is still far away from being harmonised.

Conclusion

Even though English judges do not expressly recognise a general personality or image right per se, the common law actions passing off and breach of confidence have always been flexible instruments to take into account new developments including false endorsement and false merchandising. Claims.

As a consequence of the decisions in *Irvine* and *Rihanna*, it will not suffice to merely obtain a licence of the photograph from the copyright owner where the use of the image amounts to a misrepresentation that the person depicted in the image has endorsed the product.

Following recent developments in Europe, it is very likely that passing off will evolve still further and could be extended beyond the traditional common law situations. Celebrities and licence holders will welcome the latest judgment on passing off as it indicates that the English Court is gradually recognising the need to protect commercial exploitation of image rights. However, because of different legal traditions, the level of unification in Europe may be restricted and the differences between the degree of legal protection provided by the member states may be irreconcilable. Ineffective harmonisation may, however, result in increased conflict of laws and wider possibilities for forum shopping. It also remains to be seen how the unauthorised distribution and use of images for commercial purposes on the internet will enhance and support the development of image and personality rights in the digital era.

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