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US-style 'personality' right in the UK – *en route* from Strasbourg?

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1. Introduction

The use of one's image or personality for the marketing of goods and services has become more and more valuable for both the individuals who boast celebrity status and the undertakings who seek to hire their image for endorsement and marketing purposes. There are many examples – the chef Jamie Oliver and his association with Sainsbury's, Elton John is the latest Orange Telecommunications adverts, David Beckham for various companies etc. It is clear that in the Information Age the image of a celebrity can become a valuable brand in itself. To use that image or the trade marks of a celebrity in a way that implies product endorsement tends to be an expensive mistake. Consequently, there are also a number of examples where undertakings have used individual's images without prior permission which caused embarrassment and negative headlines for the business at best, or potentially expensive court action at worst. The former runner David Bedford probably got the ball rolling with his complaint to Ofcom about The Number's alleged use of his image in their 118 118 advertising campaign.[1] Caledonian MacBrayne, the ferry operator sailed into stormy waters in November 2004, when it used without authorisation or payment the names and photographs of famous celebrities such as Madonna, Gwyneth Paltrow, Kate Moss, Pierce Brosnan and many other glitterati who have used the CalMac service in their new advertising brochure. The brochure included "articles" which are purported to have been written by the celebrities and many were none too pleased.[2] Also last autumn, Catherine Zeta-Jones sued a strip club in Reno, Nevada over its use of her image on its web site, which carried the tagline "The Friendliest Topless Cabaret in Reno." Zeta-Jones, currently the face of Elizabeth Arden's new fragrance, says the images would 'dilute the value of her celebrity endorsement'. However, the club's owners say they obtained the photo from a "royalty free" web site and did not recognise the Oscar-winning star.[3] And as recently as early March 2005, David Beckham, Zinedine Zidane, Luis Figo, Raul and Ronaldo, together with their club Real Madrid, are concerned that seven on-line bookies have used the names and pictures of the club, the players and club strips in ads without consent.[4] Infringement actions have been filed in France, Germany and Belgium, and further details on the alleged charges are awaited with interest.

These examples merit an examination of the legal position of a so-called 'personality right' in the United Kingdom where such a right has been traditionally posted missing. Other jurisdictions, notably the United States and Germany have had decades of experience with regard to a personality right, and may offer some insight and point to possible solutions. It is argued that the fledgling UK position is in danger to be dragged into the human rights/law of privacy mire that currently exists on these shores. Germany serves as a good example in order to illustrate the likely problems that can arise if property law and human rights law concepts are mixed up, while the US appears to offer a more attractive way forward.

2. The US position – strong laws based on property law concepts

It goes beyond the scope of this paper to provide an exhaustive account of US law in this area. Rather, it is attempted to show the difference in underlying legal concepts compared to German and

UK law. For this purpose, a short explanation of US common law and the statutory provisions available in California should be enough to illustrate the point.

2.1. The position under the Common Law

The publicity right in the US can be traced back to the often cited essay written by Warren and Brandeis in 1890, calling for a right to privacy.^[5] At first, like in other jurisdictions there was an attempt to apply existing law to protect the commercial aspects of privacy. The uncertainty changed in the 1950s when the court in *Healan Laboratories v Topps Chewing Gum*^[6] prohibited the use of the names and pictures of famous baseball players on cards that were marketed together with chewing gum. His rival had owned the rights in the photographs, and the respondent had not asked for prior permission. This decision put the publicity right on a property law footing, distinct from the human rights/privacy doctrines. The right of publicity was affirmed later by the US Supreme Court in *Zacchini v Scripps-Howard Broadcasting Co.*, 433 U.S. 564 (1977). In order to succeed, a claimant must prove ownership of the publicity right, that the respondent used the image without permission in a way that leaves in no doubt who the figure in question is, and that this damages the commercial interest of the right owner. The wide scope of this right may be illustrated by the well-known case of *Carson v Here's Johnny Portable Toilets Inc.*^[7] where the expression 'Here's Johnny' that was used at the beginning of a TV show can serve as indication of a celebrity and may therefore not be used for portable toilets.

This strong right is balanced against the First Amendment Freedom of Speech, including press freedom. This means that only commercial use without permission is prevented.^[8]

It is clear that this route of action goes far beyond what is available in jurisdictions of this side of the Atlantic. The common law right of publicity, albeit wide in its scope, appears to be straightforward in its application as a property right, with punitive damages providing an additional attraction.

2.2. A strong statute in the state of California

Being the hotbed of celebrity, it is unsurprising that California boasts strong image rights. § 3344(a) of the Californian Civil Code states that

“any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.”

§ 3344(b) further states that the term photograph includes any photographic reproduction and covers films, videos and broadcasts as long as the individual can be identified. It is clear from these parts of the statute that only commercial usage of one’s image is covered. Consequently, exemptions cover incidental or educational usage, as well as use in news, sports and public affairs programmes. § 3344.1 of the statute provides that this right exists for life plus 70 years, which means that both the living individual plus his or her estate may benefit from the exploitation of the right.

The Californian Civil Code represents a good example of a straightforward image right, based solely on property law principles. It can be waived, transferred or inherited, its duration is clearly stated, and damages may be assessed in a clear and predictable manner. It leaves human rights concepts which have somewhat less mundane purposes outside its scope, and therefore seems to avoid the problems that occurred in Germany and may well be about to occur in the UK.

3. The situation in Germany – a mixture of property law and human rights concepts

Celebrities who want to exploit their images commercially face similar problems with regard to trademark and copyright protection in Germany.^[9] However, there are other legal avenues available.

3.1. Artistic Authors Rights Act^[10]

As Klink explains, this Act got onto the German statute book by an accident of history.^[11] Two journalists entered the death room of Otto von Bismarck and took photos of the deceased Iron Chancellor. Eventually, Bismarck's son succeeded in preventing the publication of the photos after the court with some difficulty built an argument based on trespass. The lacuna in the law was then closed in the early twentieth century with the passing of this Act. §§22 and 23 created a formal right to control one's picture, meaning that without one's authorisation the item cannot be legally published. The courts have afforded the term 'picture' a wide interpretation, including one's likeness on photos, paintings etc. In order to launch a successful action, the individual must show that he can be identified from the image – this can be difficult in respect of 'crude' digital or electronic images.^[12]

The drawback of the right is that if celebrities are 'personalities of history' they fall under an exemption. If they are part of public life, they have to accept that publication of their photograph as part of the legitimate interest of the public. In this respect, politicians, sport people, socialites and so on may find it difficult to prevent publication, although the recent *Von Hannover v Germany* judgment, as discussed below, may to some extent strengthen their rights here. With regard to the usage of photographs in advertisements, however, the courts in Germany have been sympathetic to celebrities, as it was held that this represents an individual's economic interest rather than the wider public interest to be informed.^[13] Having been introduced as a tool to protect undignified public exposure of one's photograph, the Act has indeed gone full circle to be available as a rather powerful weapon to take on those who use one's picture for profitable commercial exploitation. Since it has got its roots in human rights rather than property rights, however, it is not possible to waive or transfer this right. The possible difficulties that can occur when concepts of property law and human rights law are mixed is also illustrated by the right of personality guaranteed by the German Constitution.

3.2. German Constitution^[14]

The German Constitution, the *Grundgesetz*, provides an over-arching personality right in Articles 1 and 2. A human right in essence, it is available to claimants in situations where certain aspects of one's personality are not protected by a specific statute. Under Article 1(1) the human dignity is inviolable. Article 2 provides for the general entitlement to develop one's personality. The German Federal Supreme Court in its *Caterina Valente* decision made it clear that this general personality right includes the commercial aspects of personality.^[15] The Court created a right of economic self-determination which allows individuals to determine whether or not to use one's features of personality commercially, or how these may be used by others in the business world. The rights can be enforced by means of injunctions, available under §§ 823 and 1004 of the German Civil Code. For example, it has been used to prevent the use of look-alikes^[16] and sound-alikes^[17]. While this appears to be effective, the situation seems to alter drastically when the availability of damages is considered. Before damages can be granted, the claimant must take a number of hurdles. He must show that the personality right can be commercialised, that it is usually made available for remuneration and that the holder of the right would indeed allow to use it. Coupled with § 253 of the German Civil Code which allows recovery of compensation only for damage to material assets, this has led to a reluctance in the courts to grant huge pay-outs. For example, the actor Paul Dahlke received only £250 for the use of his picture in an advertising campaign without his consent.^[18] This is hardly encouraging for the individual whose personality right has been violated, as it appears to allow players in the media and the business world to ride roughshod over human rights, as the profits will always outweigh the potential damages claims.

Recently, the German courts have attempted to develop this aspect into a more convincing tool. In

Caroline von Monaco, the Hamburg Court of Appeal seemed to consider the introduction of punitive damages, a concept hitherto unknown to German law.^[19] Princess Caroline had complained about the publication of an exclusive interview she, in fact, had never given. The court awarded her £90,000, but the case illustrates also the difficulty to put a value on the infringement of the personality right based on human rights principles. In *Marlene Dietrich*^[20] the daughter of the famous actress tried to stop the licensing without consent of the likeness and name of her deceased mother for automobiles and general merchandise articles. Both lower courts were prepared to grant injunctions only. The availability of damages was negated on the grounds that human rights of one person are neither transferable nor heritable; as a consequence, her daughter could not have been in possession of those rights which would give rise to damages. However, on appeal, the Federal Supreme Court was embarking once again on judicial activism. It was argued that the economic personality right of an individual consist both of the control of its commercial use and the reaping of the financial benefits of its commercial exploitation. Such benefits should be earned not by third parties, but by the relatives of that individual. Having established in this way that this human right could indeed be heritable, the court had removed the obstacle and granted damages. Another useful feature of that decision is that it is no longer necessary to show that considerable harm has been done by the alleged infringer.

One prominent individual who has recently benefited from the current developments in this area of law is Oliver Kahn, the goal-keeper of Germany's national soccer team. In *Kahn v Electronic Arts GmbH*^[21] the claimant complained about the usage of his image and his name by the respondent in the computer game "FIFA Soccer Championship 2002" and its marketing campaign. Granting an injunction which stopped the sale of the game in Germany, the Hamburg Court of Appeal held that to use the name and image of Kahn without his prior consent in the advertising campaign was unlawful. In addition, the court argued that while a person who is in the public eye may under certain circumstances not be able to prevent the usage of his portrait under § 23(1) of the Act, he certainly may do so if such unauthorised use violates his justified interests, for example if his personality is commercially exploited for financial gain. Kahn succeeded with his arguments based both on the Civil Code, the Artistic Authors Rights Act and the human rights provisions of the *Grundgesetz*. Electronic Arts had obtained permission to use images of footballers both from the German *Bundesliga* and the European Football Players Federation, but Kahn is not a formal member of either organisation. Electronic Arts were also told to compensate Kahn, who sought damages to the tune of €500,000.

The German attempt at protecting a personality right does not seem to be without its pitfalls, despite the sleight of hand shown by the court in the *Marlene Dietrich* decision. Individuals who use their name, image or 'get-up' do this commercially, which requires protection under some form of property law. Property law often puts a heavy burden of proof on the complainer. A personality right based on human rights seems to be attractive in order to gain an injunction, but has got an apparent weakness in respect of the assessment and granting of damages. The approach by the German courts may be seen as progressive; however, it blurs the boundary between an economic right and a human right, the latter of which should not become a tradable commodity. Human rights are playing a more fundamental role in our society, rather than be hijacked by celebrities in order to protect their image. This is not to say that one's personality or image is not worth protecting: looking at some of the startling figures that are traded between celebrities and undertakings who hire them to endorse their products it is clear that they are of an outstanding commercial value to both the individual, the undertaking and the economy as a whole.

4. The situation in the UK – piece-meal and bound for the human rights route?

In the United Kingdom, the personality and image of individuals has been stunningly under-protected. While there appears to be protection for certain aspects of one's personality under various areas of law, be they based on statute or common law, there does not seem to exist a coherent approach to protection.

4.1. Copyright, Designs and Patents Act 1988

Copyright law with its traditionally low threshold of originality appears to be a good option at first as a basis for a personality right. After all, we are concerned about the *commercial exploitation* of our personality, so a place amongst other members of the intellectual property family would be welcome. However, the UK courts rebuffed that argument some time ago. After the Whitford Committee[22] dismissed the idea of a new right for fictitious figures – effectively leaving it to the courts to create a niche for such rights, subsequent case-law confirms that copyright is not an option. In *Exxon Corp. v Exxon Insurance Consultants International Ltd*[23] it was argued that the word EXXON should be protected under copyright as an original, literary work, in particular since a considerable amount of research had gone into the creation of the term. Although that this seemed to satisfy the skill, labour and judgment test of originality under s. 1 of the 1988 Act, the court rejected the argument on the basis that a literary work had to convey information, instruction or pleasure. A single word could not have these characteristics in the opinion of the court.[24]

In respect of photographs the situation is as bleak, since the creator of the photograph is regarded as the author and first rights owner under s. 9 (1) and s. 11(1) of the 1988 Act. Only if photographs have been commissioned do we get some protection under s. 85, when the person who commissioned the pictures is seen as the owner of the copyright in them.

4.2. Trade Marks Act 1994

Trade mark legislation is of course widely used by celebrities from all fields, be they footballers[25], film stars or others.[26] Section 1(1) of the 1994 Act provides that any 'sign capable of distinguishing goods and services of one undertaking from another' can be registered. This encompasses words (including names), design, numeral and shape of goods or their packaging. Applicants must overcome a number of hurdles before they can successfully register their names as trade marks. If it is lacking in distinctive character it falls foul of section 3(1)(b). This makes it difficult for common surnames to be registered, while full names may find it easier to be accepted.[27] The Trade Mark Registry may also take the relevant area of the market into account for which an individual seeks to register the trade mark.

As Davies points out, this will be done on a first-come-first-served basis, and in certain markets there may only be room for one particular name, e.g. Robbie Williams as a singer. Section 5 of the 1994 Act sets out relative grounds of refusal, and an application may be refused if the mark applied for is identical with an existing mark for identical purposes. Section 5 does go even further, covering similar marks for similar goods or services.

The next problem may be to make a decision as to what specific classes of goods and services to apply for. Davies notes that while Zeta-Jones has been rather modest and has only registered for 'entertainment services', others like Jamie Oliver have registered for a variety of classes.[28] Both scenarios could, of course backfire: the former protects only against a limited amount of infringements, while the latter, albeit wider, runs the risk of losing trade mark protection due to non-usage of the mark under section 46(1) of the 1994 Act.

Furthermore, case like *Re Elvis Presley Trademark*[29] and *Re Diana Trademark*[30] indicate that the more famous a person's name becomes, the more difficult it may be to protect the trade mark. Trade marks, first and foremost protect goods and services. If these are connected to an endorsing celebrity, their source or origin may well be non-apparent. The personality of the celebrity is important, not the origin of a product. This then allows trade mark protection slip away, as people would buy a memento with the celebrity depicted on it for exactly that reason, without much care who actually manufactured or licensed the product. So, while Elvis Presley and Diana, Princess of Wales may well have been enormously popular figures, but this will not allow their 'likeness' to be protected by trade mark law.

Another feature of trade mark law that may make this area of law somewhat unattractive is provided by section 11(2)(b) which allows use of the trade mark as “an indication concerning (...) characteristics of goods or services”. The pop group Wet Wet Wet had protected its name for books, but could not prevent the use of the term on a book cover.[31] The subject matter that the book was about that pop group was an indication of a characteristic of that book, and the use of the band's name legitimate.

As this brief excursion shows, trade mark law may have some attractive features, but falls well short of a full-blown publicity right in the strict sense.

4.3. Defamation

Defamation law has been used often by people in the public eye in order to defend their reputation, the former Labour MP George Galloway being the most recent high-profile example.[32] In *Tolley v Fry*[33] an amateur golfer won an argument in defamation against an undertaking which insinuated that the sportsman had been paid for the usage of his image in an advertisement – this diminished his amateur status. However, this case represents very much the exception, as the usefulness of defamation law in respect to protect image rights has one over-arching limitation: whoever wants to use the image of a famous person in for the purpose of endorsing products or services will not want to harm that individual's reputation.

4.4. Passing Off

The tort of passing off has shot to prominence recently as a possible avenue for an individual to take action against unauthorised usage of one's photograph in an endorsement scenario. Traditionally, passing off has sought to prevent one undertaking to pass off their products or services as those of somebody else. The three ingredients of a typical passing off action are the existence of goodwill and/or reputation on the part of the claimant, a misrepresentation by the respondent that causes confusion as to the origin of the products or services and damage.[34] There is a long line of cases where attempts to protect the commercial exploitation of popular images have failed. The crux of the matter has been the legal concept of a 'common field of activity'. This means that a misrepresentation can only cause confusion about businesses and, subsequently, damage to the claimant if both parties operated in a common field.of activity. This doctrine dates back to the decision in *MacCulloch v May*, where the court refused to prohibit the usage of a children's broadcaster's nick-name 'Uncle Mac' on the packaging of cereals.[35] It was held that

“upon the postulate that the plaintiff is not engaged in any degree of producing puffed wheat, how can the defendant, in using the fancy name used by the plaintiff, be said to be passing off the goods or the business of the plaintiff? I am utterly unable to see any element of passing-off in this case. If I were to accede to the plaintiff's claim I should as I see it, not merely be extending quite unjustifiably the scope of the action of passing-off, but I should be establishing an entirely new remedy; and that I am quite unprepared to do.”[36]

This decision has made it very difficult for celebrity to raise successful actions in passing-off, since they accumulate goodwill not in a particular product or service, but in their 'personality'. Up until recently, businesses appeared to be able to use the characteristic features of famous people at will. The Swedish pop band ABBA was unable to prevent its name and characteristics on merchandise articles like clothes and bed covers;[37] it was not passing-off to use the term 'The Beatles' and photos of the group on a record that contained interviews of the Fab Four.[38] The name of the hugely popular but fictitious characters 'The Wombles' could be used by a manufacturer of refuse skips.[39] What led to the downfall for the claimants in all these cases was a lack of a common field of activity which would prevent confusion as to the products and services in question.

The picture was bleak indeed, but the case of *Irvine v Talksport Ltd*[40] appears to provide a silver

lining for celebrities whose photograph has been used without consent in endorsement cases. Eddie Irvine, the former Formula 1 racing driver, made a claim in damages against Talksport Ltd who had used a photograph of him in promotional packs to advertise its new product, 'Talk Radio'. Talksport had doctored a photograph of Irvine so that he seemed to hold a radio sporting the name 'Talk Radio', instead of the mobile phone Irvine had held in the original photograph. At first instance, Laddie J found in favour of Irvine, arguing that there was no good reason why the law of passing off in its modern form and trade circumstances could not be applied to scenarios featuring false endorsements. The court noted, obiter, that it was now a common situation that celebrities wanted to exploit their names and image by means of endorsement. On the one hand, the famous individual would boost the respective goods and services by lending his or her image, on the other hand the business benefits from the fame and reputation of the celebrity. Laddie J held that in order to raise a successful action under the law of passing off, the claimant must prove that he had enjoyed a significant reputation or goodwill at the time of the acts complained of, and that the actions by the respondent had created a false message. This message must be shown to have been misunderstood by a significant section of the market that its goods had been endorsed, recommended or approved by the claimant. All three conditions were fulfilled in this case, with 981 promotional packs constituting a significant section of the market. On appeal, Irvine was awarded £25,000 in damages, the Court of Appeal looking at the likely licence fee Irvine would have charged Talksport. In addition, *MacCulloch v May* was rejected by the court.

This judgment is, without doubt, very welcome, as it appears to give some hope to those who market their image and features of personality by means of endorsement of goods and services. On the one hand, this judgment supports those who argue that this is yet another example where the common law proved to be flexible enough to adapt to a changing world. On the other hand, a word of caution may be allowed, as this was a rather extraordinary case on the facts. With product endorsement being a multi-million pound industry, do we really want to leave it to chance and the unpredictability of court actions? At the moment, there seems to be an aura of legal uncertainty engulfing the issue.

5. Recent jurisprudence European Court of Human Rights jurisprudence

Further changes may yet follow on the back of a ruling by the European Court of Human Rights in Strasbourg, where Princess Caroline of Monaco recently celebrated a famous victory over Germany's privacy laws.^[41] This has come as a shock to many, as it was thought that compared to most other jurisdictions, Germany's privacy laws were quite progressive and striking a fair balance between a right to privacy and freedom of expression.^[42] Princess Caroline, a well-known media celebrity in Germany, had largely unsuccessfully embarked on a crusade against certain parts of the German media. She complained about being constantly hounded by reporters and photographers following her every move, taking photographs of the most innocuous situations. In holding that even celebrities 'par excellence' have a reasonable expectation of privacy if they are in a public place and do not fulfil an official function at that time. While the judgment is probably more relevant to legal advisers of the entertainment press, some nuggets from the judgment may well be indicating that a human rights aspect could before long creep into the image rights debate in the United Kingdom.

The ECtHR reiterated that the notion of 'private life' includes aspects relating to personal identity, such a photographs of an individual. Referring to its jurisprudence, for instance *Niemietz v. Germany*^[43], 'private life' extends to the physical as well as psychological integrity of an individual:

“the guarantee afforded by Article 8 (...) is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (...). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life' (...).”^[44]

As a consequence, the Court had no problems to conclude that photographs of the Princess showing

her enjoying a cup of coffee in a bistro, or dropping her children off at school, fell within the scope of her private life. After some debate amongst German legal circles as to the binding nature of the judgment, the *Landgericht München*¹ has recently applied the decision in the *Tatjana Gsell* case. [45] Here, the court agreed with the German socialite that a magazine may not publish photos depicting her as a sixteen year old without her permission. [46]

Of more importance for the purposes of our discussion in this paper is the Court's affirmation that

“although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (e.g. *X and Y v. Netherlands*, 26 March 1985). That also applies to the *protection of a person's picture against abuse* by others.” [47]

This paragraph of the judgment appears to provide individuals whose image or personality rights allegedly have been infringed with a human rights argument. The UK has of course 'brought human rights home' by means of the Human Rights Act 1998. Naturally, private individuals cannot rely directly on the provisions of the Human Rights Act in disputes against other private individuals, be they natural or legal persons. However, public authorities, a term which includes courts and tribunals, are to take the Strasbourg jurisprudence into account when enacting laws or delivering judgment. [48] This means that while, for example pursuing an action under the law of passing off, a claimant may well point to the *Von Hannover* judgment and argue that their picture was abused when used by others for unauthorised endorsement purposes. This doesn't appear as far fetched as it sounds, judging by the long list of legal actions between individuals that attracted a 'human rights angle', e.g. cases based on the law of confidence. [49] Under the 'positive obligation' doctrine, the courts in the UK, if not the Government could find itself under some pressure to develop image rights comparable to those that already exist in other jurisdictions.

6. Outlook - Are we moving closer towards a UK 'personality' right?

The answer to this question appears to be 'yes'. The situation in the UK is a bit confusing at the moment due to the variety of legal tools that seem to protect certain aspects of a personality or publicity right, with the limitations of intellectual property and defamation law well documented. On the other hand, the law of passing-off appears to swing into the direction of celebrities who want to prevent false endorsement. However, while the hysteria regarding that case is understandable and the decision is welcome, we still seem to be a fair distance away from a coherent right to publicity. The question is what will happen next. The ECtHR has apparently widened the scope of Article 8 of the ECHR and called on signatory states to protect one's pictures against abuse under the auspices of a general right to privacy. It is debatable whether such a move was to be applauded, as it could lead in the UK to a similar situation existent in Germany: concepts of property law are thrown together with human rights principles. With regard to the commercial exploitation of one's image, these make uneasy bedfellows. The former are heritable, can be waived and transferred, and damages can be assessed sensibly. The latter are meant to protect 'higher principles', something that is not to be regarded as a commodity that one can trade in. Hence, there are difficulties when a publicity right is based on human rights.

The development of the right to publicity in the US has culminated in an easily applicable tool which focuses on the commercial and economic aspects of this right, as it recognised the necessity to protect one's image against unlawful misappropriation early on. Therefore, the problems encountered by European jurisdictions are virtually unknown. While one of the judges in the *Von Hannover* case, Judge Zupančič, bemoaned the American influence on the freedom of the press, it may well be worth a thought to take some ideas of our American counterparts into account when

designing a workable right to publicity.

That the debate is necessary is beyond doubt – case like the one featuring the footballers or international film stars indicate that we are dealing with a phenomenon that is bound to ever-increase in importance, not least due to the economic significance of these rights. There is already a lively licensing trade in operation, and this will not stop at national borders. If we have a situation where some countries' rights are stronger than elsewhere, forum shopping may be inevitable. It may be desirable to consider the opportunity to harmonise the law in this area throughout the member states at EU level, in order to create a level playing field, but more importantly to offer legal certainty to both those who want to market their publicity and those who hire celebrities for those purposes. If nothing is done, we may witness another instance of buck-passing between the courts and the government, comparable to the current debate surrounding a general law/tort of privacy in the UK. It seems that the players in the entertainment, or 'endorsement', industry deserve better than having to gamble on what is lawful and what is not.

Bibliography

- Anson, W. "What's it worth?" C.W. 2004, Vol. 145, 21-25
- Bolger, P. "The Common Law and the Tort of Appropriation of Personality: Part 1" I.I.P.R. 1999, 3 (1), 16-30
- Bolger, P. "The Common Law and the Tort of Appropriation of Personality: Part 2" I.I.P.R. 1999, 3 (2), 2-9
- Boyd, S. "Does English Law recognise the concept of an image or personality right" Ent.L.R. 2002, 13(1), 1-7
- Boyd, S. and Jay, R. "Image Rights and the effect of the Data Protection Act 1998" Ent.L.R. 2004, 15(5), 159-162
- Buchan, R. "Personality Rights: a brand new species?" J.L.S.S. 2004,
- Carty, H. "Advertising, publicity rights and English Law" I.P.Q. 2004, 3, 209-258
- Coombes, S.W. and May, E. "Getting 'personal in the UK" C.W. 2002, Vol. 119, 16-18
- Craig, C. (2004) "Zeta-Jones – so what's the damage?" C.L.S.R. 2004, 2, 137-138
- Davies, G. "The Cult of Celebrity and Trade Marks: the next instalment" (2004) 1:2 *SCRIPT-ed* 280, @: <<http://www.law.ed.ac.uk/ahrb/script-ed/docs/agents.asp>>
- Dresden, B. and Andrews, R. "Is the number up for caricatures in advertising?" Comms L 2004, 3, 85-86
- DLA, "118 118: Has David Bedford Got Your Number?" B.L.R. 2004, 12, 331-332
- Goldberg, S. "The contest for a new law of privacy. A battle won, a war lost? *Campbell v MGN Ltd* (2004) UKHL 22" Comms L. 2004, 4, 122-125
- Guntz, P. "Wie öffentlich ist das Gesicht von Tatjana Gsell?" Press Notice of 22.12.2004, LG München I @ <http://www.justiz.bayern.de/lgmuenchen1/presse/presse1.html>
- Hennigan, J. "Altered image rights" Ent.L.R. 2003, 14(7), 161-163

- Klink, J. (2003) “50 years of publicity rights in the United States and the never ending hassle with Intellectual Property and personality rights in Europe” I.P.Q 2003, 4, 363-387
- MacQueen, H. “Protecting Privacy” Edin.L.R. 2004, 8, 248-254
- MacQueen, H. “Protecting Privacy” Edin.L.R. 2004, 8, 420-423
- McKie, D. “Private lives in public” J.L.S.S. 2004, 8, 24-25
- Morgan, J. “Privacy in the House of Lords, again” L.Q.R. 2004, 120(OCT), 563-566
- Phillipson, G. “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” M.L.R. 2003, 66(5), 726-758
- Robinson, F. “How image conscious is English Law” Ent.L.R. 2004, 15(5), 151-156
- Skinner, L. “You’re a celebrity, madam. So do we have a right to share your privacy in a public place?” Comms L. 2004, 4, 118-121
- Tomlinson, H. and Thomson, M., “Bad news for paparazzi – Strasbourg has spoken” N.L.J. 154 (7136), 1040
- Tunney, J. and Jameson-Till, J. “Do you want to know a secret? Exploring the boundaries of non-contractual confidence” S.L.G. 2003, 71(1), 7-11
- Turle, M. “Press reigned in by House of Lords decision” C.L.S.R. 2004, 4, 314-316
- Vahrenwald, A. “Germany: Personality rights – computer game ‘FIFA Soccer Championship 2004’” Ent. L.R. 2004, 15(5), N41
- White, A. “Data Protection and the Media” E.H.R.L.R. 2003, (Special Issue: PRI)

[1] See, for example, DLA, “118 118: Has David Bedford Got Your Number?” B.L.R. 2004, 12, 331

[2] See article in The Scotsman newspaper, 13 November 2004

[3] See note at <http://www.out-law.com>, 26 October 2004

[4] The Guardian newspaper, 2 March 2005.

[5] Warren and Brandeis, “The Right to Privacy” (1890) Harv.L.Rev. 193

[6] 202 F. 2d 866 (2d Cir. 1953)

[7] 698 F. 2d 831

[8] see Carty, H. “Advertising, publicity rights and English Law” I.P.Q. 2004, 3, 209 at 220

[9] Klink, J. (2003) “50 years of publicity rights in the United States and the never ending hassle with Intellectual Property and personality rights in Europe” I.P.Q 2003, 4, 363 at 377.

[10] Kunsturhebergesetz

[11] Klink, J., *op cit* at 377

[12] see *Kahn v Electronic Arts GmbH*, as discussed below.

[13] *Paul Dahlke* (1956) GRUR 427

[14] Grundgesetz

[15] *Caterina Valente* (1959) Neue Juristische Wochenschrift 1269, Bundesgerichtshof

[16] *Blauer Engel* (2000) Neue Juristische Wochenschrift 2201, BGH

[17] *Heinz Erhardt* (1989) G.R.U.R. 666, Oberlandesgericht Hamburg

[18] *Paul Dahlke* (1956) Neue Juristische Wochenschrift 154

[19] (1996) NJW 2870

[20] (2000) NJW 2195, BGH

[21] unreported, 13 January 2004, OLG Hamburg

[22] Cmind.6732, HMSO

[23] [1982] RPC 69

- [24] Authority used in this case was the decision in *Hollinrake v Truswell* (1895) 3 Ch.D. 420.
- [25] David Beckham being the typical example; also Alan Shearer and Paul Gascoigne have got their names protected as trade marks.
- [26] There are, of course, many examples, including Catherine Zeta-Jones, Robbie Williams etc.
- [27] See Davies, G. "The Cult of Celebrity and Trade Marks: the next instalment" (2004) 1:2 *SCRIPT-ed* 280, @: <<http://www.law.ed.ac.uk/ahrb/script-ed/docs/agents.asp>>, page 2.
- [28] *Ibid.*, at page 5.
- [29] [1997] RPC 543
- [30] [2001] ETMR 25
- [31] *Bravado Merchandising v Mainstream Publishing* [1996] FSR 205
- [32] *Galloway v Telegraph Group Ltd* [2004] EWHC 2786
- [33] [1931] AC 333.
- [34] *Reckitt & Colman v Borden* [1990] RPC 340, HL.
- [35] (1948) 65 RPC 58
- [36] *Ibid.*, at p. 67.
- [37] *Lyngstad v Annabas* [1977] FSR 62
- [38] *Harrison and Starkey v Polydor* [1977] FSR 1
- [39] *Wombles v Wombles Skips* [1977] RPC 99
- [40] [2002] EWHC 539; [2003] EWCA Civ 423
- [41] *Von Hannover v Germany* (Application no. 59320/00, judgment of 24 June 2004)
- [42] Articles 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms 1950
- [43] 23 November 1992, Series A no. 251-B
- [44] *Von Hannover v. Germany*, para. 50.
- [45] *Tatjana Gsell*, 22 December 2004, LG Muenchen1.
- [46] See Guntz, P. "Wie öffentlich ist das Gesicht von Tatjana Gsell?" Press Notice of 22.12.2004, LG München1 @ <http://www.justiz.bayern.de/lgmuenchen1/presse/presse1.html>
- [47] *Ibid.*, para. 57, emphasis added.
- [48] Human Rights Act 1998, section 2.
- [49] E.g. *Douglas v Hello!* [2003] 3 All E.R. 996, *Campbell v MGN* [2004] 2 WLR 1232