



PERSONALITY RIGHT: CONCEPT AND PROTECTION IN ENGLISH LEGAL SYSTEM

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Abstract

The personality right is a comprehensive right that includes both economic and non-economic aspects of personality rights. In the present context, there is a heightened emphasis on an individual's right to prohibit the commercial use of their personal attributes, like their name, image, and likeness, for business purposes. This has generated significant interest and scrutiny, particularly concerning the economic aspects of protecting one's personal identity. The terminology indicates that the economic aspect of personality differs in each country. Some use personality rights: others use image rights or publicity rights. The UK uses the term 'image right', although the term 'image' has been used not in a narrow sense but in the broader sense of 'persona', (a wider term used to indicate different attributes of personality), which means it includes any attribute of personality. The concept of image rights in the UK has evolved throughout cases as there is no specific law for protecting image rights in the UK. The court provides protection by resorting to various other legal mechanisms like contracts, breach of trust, passing off, trademarks, and similar avenues. However, it has become evident from numerous rulings in UK courts that they have consistently declined to broaden their legal framework to address matters related to image rights. Hence, this paper delves into the examination of the United Kingdom's perspective on the protection of personality rights and explores the historical, cultural, and legal factors that have shaped the current landscape in the UK, where image rights are not recognized as a distinct and independent legal concept.

Keywords: Personality Rights, Commercial Misappropriation, Economic Value, Legal Protection, Image rights, Exploitation of Value

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Introduction

The UK's approach to protecting personality rights has been far from clear, making it difficult for individuals to protect their identity from commercial exploitation. Currently, the UK does not recognize image rights as an independent legal concept, instead relying on other laws such as contracts, breach of trust, passing off, trademarks, etc., to grant protection. This has been particularly evident in the sports sector, where players' image rights are licensed to companies through contracts, a combination of different rights, including trademark rights, data protection rights, and disclosure rights. Nevertheless, UK Courts have maintained a consistent stance of not extending their legal provisions to encompass image rights, reflecting a reluctance to offer explicit safeguards for individuals' identities. Overall, the UK's approach to protecting personality rights is lacking in clarity, leaving individuals vulnerable to commercial exploitation of their identity. The lack of a distinct and independent legal concept to protect image rights means that individuals are unable to easily prevent their identity from being used for commercial purposes.

Historical Development of Personality Rights in the English Legal System

Upon delving into the origins of image rights within the English common law framework, it has become evident that the system has hesitated to offer a recourse for cases involving the unauthorized use of an individual's persona. Consequently, many individuals have encountered difficulties in pursuing legal remedies for such misuse of their identity for an extended period.³ Even compared to other jurisdictions towards protecting personality rights, the majority says that English followed a rigid approach to identity appropriation.⁴ Additionally, variations in legal developments across different jurisdictions have highlighted significant disparities in the approach to legal protection within the English legal system. Historically, common law has not recognized an individual as having a proprietary interest in their personality, even when that person's persona possesses economic value.⁵ Despite the well-established recognition of the commercial value associated with image rights, certain other jurisdictions, including the United States, Germany, and France, have enacted their own statutory laws to safeguard privacy rights against unauthorized use of an individual's image. In contrast, English law, historically, did not

³ *In Clark v. Freeman* (1848) 11 Beav 112; *Williams v. Hodge* (1887) 4 TLR 175; *Dockrell v. Dougall* (1899) 15 TLR 333.

⁴ Beverley-Smith, H. *The Commercial Appropriation of Personality*, 42 (Cambridge University Press, Cambridge-2002)

⁵ B. St. Michael Hylton, and Peter Goldson. "The New Tort of Appropriation of Personality: Protecting Bob Marley's Face." *The Cambridge Law Journal*, vol. 55, no. 1, pp. 56–64. (1996)

provide a specific remedy for image rights infringement because the protection of image rights was not a prominent concern until the 1990s. The commencement of the 21st century marked a significant shift in image rights protection in the UK, with the pivotal *Sports Club* case in (2000),⁶ serving as a catalyst that gave the green light for future image rights planning and structuring within the country.

In the 18th and 19th centuries, the basic protection for image rights in England was done through contract law principles⁷ and breach of confidence.⁸ They were not ready to recognize image rights as a separate legal right as the US did. The first case in the United Kingdom in which the so-called right to one's own image was recognized was *Prince Albert v. Strange* from 1849.⁹ Although the court did not directly mention the image right, the court protected the plaintiff's images under breach of trust as it is a private photograph and is subject to common law copyright as it is considered an unpublished work.¹⁰ Here, for the first time, the Court recognized that there is a right to one's own picture, but the issue is that the Court hasn't provided any conceptual clarity for such a right. This case also became the foundation of privacy rights in USA because, at that period, common law is followed by most countries. The main reason for the recognition of privacy rights is due to the inadequacy of existing remedies; for example, the breach of contract can only be claimed once there is a contractual relationship between parties. Also, even common-law copyright law only protects if the person owns the work. Due to these factors slowly, the English court tried to provide relief for the unauthorized appropriation of personality attributes under defamation law,¹¹ but to some extent, it also became inadequate on the ground that such right can only be avail if such use caused any injury to that person's reputation.¹² For example, in *Tolley v. Fry*¹³ case, the plaintiff claims image misappropriation under false endorsement and defamation. In this case, the UK court expressly stated that the UK does not consider image rights as a legal right. However, after analyzing this case, it became well understood that defamation law is not a valid remedy for the protection of image rights because to claim under defamation, the use should amount to be something that lowers the estimation of the personality in the eyes of the reasonable member of the public. In

⁶ *Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443.

⁷ *Pollard v Photographic Company* (1888) 40 Ch D 345).

⁸ *Prince Albert v Strange* (1848) 64 ER 293.

⁹ *Prince Albert v. Strange* (1848) 64 ER 293.

¹⁰ *Prince Albert v. Strange* (1848) 64 ER 293.

¹¹ *Pollard v. Photographic Co.* (1889)

¹² Beverley-Smith, H. *The Commercial Appropriation of Personality*, 42 (Cambridge University Press, Cambridge-2002).

¹³ *Tolley v Fry & Sons Ltd* [1931] AC 333.

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this case, it became clear that defamation law is not a supportive remedy for protecting personality rights because using the personality might not always defame the person. Thus, even if the defendant used the commercial value persona for the commercial purpose, the person can't claim under defamation law if it does not defame the player's image. In such cases, defamation became an invalid law for protecting personality right.

From the end of the 20th century, the Court stated to apply passing off remedy, though, before the 1980s, the tort of passing off was there. Still, it was unsuccessful in image rights primarily because the courts were not prepared to acknowledge image rights as a business.¹⁴ When the existing laws became inadequate, the Court applied the passing-off principle. The major reason behind this is that from the end of 20th century, a massive change has happened in the personality rights context. The business of marketing products is used to reference real or fictional characters as an endorser or sponsor of their product or services. Because in the market context, the competition became high, and the need to attract consumers also increased; thus, they used different personality attributes to make the product more attractive to potential buyers, drawing attention to it or implying that the character approves or endorses it. As this enlarged, the chance of unauthorized appropriation of persona increased. Which, consequently, gave rise to the need for proper protection from the unauthorized exploitation of personalities or characters in marketing goods and services.¹⁵ This led to the application of passing off,¹⁶ the only available remedy in English law to prevent the unauthorized commercial exploitation of personality attributes such as name, likeness, voice, signature, or other references. In that way, passing off became the primary remedy for protecting personality rights in UK. While claiming under Passing off, three elements need to be proven: goodwill, misrepresentation, and damage. The goodwill applies to something economically important; thus, anything can be covered, but it is difficult to define. In image right context, it is synonymous with a person's reputation in this sense. As in the case of an ordinary man in the street, he will always struggle to prove that there is any goodwill attached to his name or image, whereas in the case celebrity, it is much easier. For this reason, passing off remedy is not adequate because here the right of celebrity is protected but according to personality right it is considered as an inherent right of every person. Thus, passing off is limiting it to celebrity only. Therefore, passing off is a remedy that enables

¹⁴ Robert G. Howell, "Publicity Rights in the Common Law Provinces of Canada," 18 Loy. L.A. Ent. L. Rev. 487 (1998).

¹⁵ B. St. Michael Hylton, and Peter Goldson. "The New Tort of Appropriation of Personality: Protecting Bob Marley's Face." *The Cambridge Law Journal* 55, no. 1 56–64 (1996):

¹⁶ *Irvine v Talksport* 2003] EWCA Civ 423; [2003] 2 All ER 881; [2003] EMLR 538.

celebrities to stop advertisers from taking advantage of their goodwill without paying for it. The second element is misrepresentation. While linking misrepresentation with a personality right, it refers to an advertisement that makes a false statement, such as implying that a celebrity is promoting a product when he has never agreed to do so. If they see the commercial, the consumer will assume that the celebrity was paid to promote the product. This element focuses on consumer confusion, but every commercial misappropriation of personality rights may not amount to consumer confusion. In such cases, fulfilment of this element became difficult, which shows the inadequacy of passing off to protect personality rights. Later, plaintiffs in England failed to convince the courts that unlicensed commercial use of a person's identity can constitute passing off.¹⁷ The main cause of this is that the plaintiff found it challenging to show these three requirements. First, the interest protected is the plaintiff's ownership of the reputation or goodwill associated with his name or trademark; If the ownership is on the goodwill, only the celebrity can be protected from unauthorized commercial appropriation, and the non-celebrity is barred from the preview. Because of this, the passing off remedies became inadequate for those who did not have sufficient goodwill. It is in fact a major concerning issue that what will be the remedy for them? Moreover, the other element that the defendant's conduct must involve some form of misrepresentation, which causes confusion or deception among consumers. This second element, misrepresentation,¹⁸ is needed to establish a passing-off claim, but as in the case of merchandising cases, however, the essential factor is misappropriation, not misrepresentation. Therefore, in some situations, much broader extension is given for passing off in case of appropriation of image right by interpreting misrepresentation as misappropriation¹⁹ of personality right. However, the courts have resisted developing the tort of passing off into a wider tort of unfair competition to cover the misappropriation of valuable intangibles for some extent. The third, element is damage that such misrepresentation must damage the plaintiff's goodwill; what sort of damage is not clear. However, in the earlier period, the Court stretched these three elements to bring appropriation of personality within the scope of passing off. While claiming for the Passing off, one more element was there that the parties needed to establish such a common field of activity;²⁰ the courts were looking for an obvious link or connection in the course of trade between the owner

¹⁷ *McCulloch v. Lewis A. May (Produce Distributors) Ltd* (1948) 65 RPC 58; *Lyngstad v. Anabas Products Ltd* [1977].

¹⁸ Visser, D. J. G. "Misrepresentation and Misappropriation". In *Common Principles of European Intellectual Property Law* (pp.247-254). (2012).

¹⁹ *Ibid.* 16

²⁰ *Wombles Ltd v Wombles Skips Ltd* (1977) RPC 99., *Lyngstad v Anabas Products* (1977) FSR 61.

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of the name, the licensor, and the goods to which the name was to be applied.²¹ Later, in *Irvine v Talksport Ltd*, Mr. Justice Laddie stated: “*The extended action of passing off today does not require the plaintiff to prove a common field of activity.*”²² It shows the extension of principle in a broader sense going beyond parameters. As development happened, such extension of the principle led to more practical and conceptual issues as well as difficulties, by the way passing off became unsatisfactory as well as insufficient to cover problems that arise due to appropriation of personality right. Even still courts apply passing-off remedies in certain situations for the protection of personality right.²³

As time passed, various cases of appropriation of identity were brought before the English courts, but the Court was never willing to accept the concept of ‘personality rights or image rights; the law offers neither coherent nor consistent defense, as the courts are ‘skeptical about creating monopoly rights in nebulous concepts such as names, likeness, or popularity.’²⁴ It can be seen in the earlier case of *Du Boulay v Du Boulay*²⁵ where the Court held that recognition of a proprietary right over a name enabling one to exclude others from adopting a particular name was conclusively not an acceptable principle to provide a monopoly right over a particular person on the name of image right. Therefore, the Court stated that using another’s name is a grievance for which English law affords no redress.²⁶ English law has always rejected the creation of rights in a name or other personality features such as likeness, appearance, or a more general right of publicity.²⁷ In every case, the Court cited no need for particular legislation relating to image rights under English law; therefore, the idea of ‘image’ or ‘personality’ rights was altogether rejected in so many instances in the United Kingdom.²⁸

Compared to other countries, the English court is much more focused on the public's interests than a private individual. That is why it says that the English Courts have generally supported the principle of freedom of expression and have argued that true events should be generally published even if it has commercial value. In very rare cases, the courts have deviated from this

²¹ Coors, Corinna “Is the UK heading towards protection of image rights? In: Selected Issues in Public Private Law.” ATINER, Athens, Greece, pp. 187-199. (2015)

²² *Irvine v Talksport* [2002] F.S.R. 60 at paras 13-14 and 39

²³ *Irvine v Talksport* (2002), *Fenty & Ors v Arcadia Group Brands Ltd (Topshop) & Anor* -2012

²⁴ The Doctrine of ‘Personality Rights’ in the UK- URL- <https://www.ukessays.com/essays/law/the-doctrine-of-personality-rights-in-the-uk.php>

²⁵ *Du Boulay v. Du Boulay*- 2 L.R.-P.C. 430 (1869).

²⁶ URL: <https://theiprbeacon.wordpress.com/2014/03/26/what-are-personality-rights/>

²⁷ First in 1931 in *Tolley v Fry*, then in 1948 in *McCulloch v May*, through various celebrity merchandising cases in the seventies, by the Whitford Committee in 1977.

²⁸ *Douglas v Hello* -2005, *Campbell v MGN*-2004, *McCullough v Lewis A. May Ltd*- 65 R.P.C. 58 (1947) *Fenty v Arcadia Group Brands Ltd*. EWCA (Civ 3 2015) at [29.].

principle, though intellectual property is said to be the main form of encroachment on the freedom of expression however, intellectual property is said to promote innovation that benefits the public at large. But for image rights, they argued, it benefits the private individual without benefiting the public. Even so, the trademark law helps to protect image rights to some extent; for example, if the personality registers their name or other attributes as a trademark, they have absolute right over the mark. Traditionally, trademarks aim to indicate the source or guarantee of the quality of goods and services; therefore, the English court provided the greatest weight to this function. In the modern era, the way of business changed, and traders started to use the names and images of well-known persons in their trade and business to stand in the competitive market hence the practice of using personalities as trading symbols has been much flourished today.

Therefore, the majority of well-known personalities use trademark law to protect their personality rights i.e., image rights but the English court was not much satisfied with for granting protection for image rights in trademark law, which is very much clear in Elvis Presley's case,²⁹ where the English courts' unwilling to grant a broad right for indicia of identity through trademark by claiming that such mark has lower inherent distinctiveness. Hence it will be less likely to distinguish the goods and services of one person from other which in fact ground for rejection of the trademark. One of the judges in the judgment mentioned that the celebrity who registers his name under the trademark law, the celebrity or his successors may have the complete right to license to market his trademark; but monopolies should not be so readily created easily as in the case of name.³⁰ One of the views is that trademark law³¹ under Section 1 allows for trademark registration for personal names,³² and most famous sports players register their names. All the issue is even though the statute protects names but, once a case emerges regarding name protection of a personality under trademark law, the Court does not give a proper interpretation for this clause.³³ Here, the Court adopted the stance that the plaintiff's features may be easily recognizable, but if they do not meet the requirements for trademark registration, the mark can be "*distinguish goods or services of one*

²⁹ *Elvis Presley Enterprises Inc V Sid Shaw Elvisly Yours* - 936 F.2d 889 (6th Cir. 1991).

³⁰ *Elvis Presley Enterprises Inc V Sid Shaw Elvisly Yours* - 936 F.2d 889 (6th Cir. 1991).

³¹ Trademarks Act of 1994- Section -1 A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals, colours, sounds or the shape of goods or their packaging.]

³² *Du Boulay v. Du Boulay* (1869) L.R. 2 PC 430, Guinchard, Audrey, Is the Name Property? Sketches of an Answer between England and France (September 30, 2008). Journal of Civil Law Studies, Vol. 1, 2008, *Dockrell v. Dougall* (1899) 80 L T 556.- Trade Marks Registry Work Manual (1998), Ch. 6, para. 9.

³³ *Elvis Presley Enterprises Inc V Sid Shaw Elvisly Yours* -1999.

undertaking from those of other undertakings"³⁴ or be granted registration as a trademark, the proprietor's trademark must be unique from others.³⁵ Here the trademark law in the UK demands that trademarks must be used in the trade for which they are registered,³⁶ if they never use the mark in relation to the trade for which it is registered, the plaintiff cannot ensure that trademark registration will grant ant protection of personality attribute.³⁷ Because when a trademark has not been used continuously, the trademark registry has the complete right to remove the mark from the trademark registry. Then there is always a question raised to what extent can indicia of personality, particularly personal name, be registered as a trademark? The indicia of identity, especially name, always have an issue, which consists of two sides; one, the recognition of the absolute right of a person to a particular name enabling one to exclude others from adopting a particular name was conclusively denied which public side. On the other hand, if a particular name becomes valuable or famous due to one personality and if the value attached to the name is used without the particular person's consent, it will amount to commercial misappropriation of personality rights. However, the English court always supports public interest rather than private interest. While as in the case of a celebrity using their name, image, etc., for trade purposes, it will help to indicate that the particular person has authorized the use of his image, and it might assume that such authorization is an effective guarantee of the quality of the merchandise in the mind of purchasers. Likewise, trademark law can protect image rights, but the judiciary is not willing to provide protection.³⁸ Certain articles have highlighted that public figure, particularly athletes, have the option to utilize copyright law as a means of safeguarding their image. However, it's important to note that copyright law doesn't inherently protect a broad right of personality that encompasses elements like the image, name, or other distinguishing attributes of professional footballers.³⁹

In essence, copyright law doesn't apply to features like an individual's face, and it's widely recognized that a name, no matter how creative or well-crafted, is not subject to copyright protection. While copyright law isn't designed specifically to safeguard image rights, there are instances where the courts, due to the absence of dedicated legislation in this area, have

³⁴ Trademarks Act 1994 CHAPTER 26 Section 1(1).

³⁵ Sabah Qasim Khedir- The Legal Protection and Regulation of Sponsorship Rights in English Football-2018

³⁶ Trademarks Act 1994 CHAPTER 26 S. 46(5)

³⁷ Sabah Qasim Khedir- The Legal Protection and Regulation of Sponsorship Rights in English Football-2018

³⁸ *Elvis Presley Enterprises Inc V Sid Shaw Elvisly Yours* -1999

³⁹ In the case of *Merchandising Corpn of America Inc v Harpbond Inc* [1983] FSR 32, the Court of Appeal held that facial make-up is not painting within the definition of artistic works in the copyright Act 1956 section 3.

extended protection to image rights under the CDPA (Copyright, Designs and Patents Act).⁴⁰ In the case of *Football Association Premier League Ltd v Panini UK Ltd.*,⁴¹ the Court of Appeal examined whether the presence of logos in images of well-known football players⁴² on stickers and albums may be considered an incidental inclusion under section 31 of the CDPA 1988.⁴³ In this case, the Court held that, according to copyright, it could be used to prevent unauthorized exploitation of the footballer's image only when that image includes logos of his club or the Football Association. In the CDPA statute, if a particular individual is the copyright owner of an original art photograph, drawing, or caricature, he/she may prevent third parties from substantially reproducing or exploiting the work. Signatures of personality can fall under graphic work is unique, as would other aspects of perceived identity, such as a team badge or strip also. But practically, copyright law was not much focused by the Court for image rights protection. This may be because the subject matter of both rights is different even though copyright⁴⁴ protects the economic and moral aspects; likewise, personality rights protect both, but the subject matter is different; one is the protection of creative work, and the other is the protection of personality attributes from commercial misappropriation. Sometimes there might have been a clash between copyright and personality rights, and sometimes the copyright is inadequate to protect image rights.⁴⁵

When it comes to safeguarding image rights, trademark law offers more effective protection compared to copyright. However, it's worth noting that in the case of Elvis Presley, the court declined to register his name as a trademark but permitted the registration of his signature as a trademark. This demonstrates that elements other than names, such as an individual's signature, can be eligible for trademark registration in trademark law. Similarly, a person's likeness or portrait can also function as a distinctive symbol capable of distinguishing one company's products or services from those of another.⁴⁶ The registration process typically involves a specific image that serves as a distinctive symbol.⁴⁷ Therefore, some articles⁴⁸ mentioned that

⁴⁰ See *Exxon Corp v Exxon Insurance Consultants International Ltd* [1982] Ch 119, [1981] 2 All ER 495.

⁴¹ *The Football Association Premier League Limited and Others v Panini UK Limited* [2002] EWCA Civ 995.

⁴² Acritas Sharplegal- Copyright Infringement and "Incidental Inclusion".
<https://cms-lawnow.com/en/ealerts/2003/10/copyright-infringement-and-incidental-inclusion>

⁴³ Sabah Qasim Khedir-The Legal Protection and Regulation of Sponsorship Rights in English Football-2018.

⁴⁴ *Bauman v. Fussell*-1978 R.P.D & T.M. 485 (C.A.) (Eng.).

⁴⁵ *Bauman v. Fussell*-1978- R.P.D & T.M. 485 (C.A.) (Eng.).

⁴⁶ *Rowland v. Mitchell* [1897].

⁴⁷ UK Registration 2036489 (close-up portrait of racing driver Damon Hill in racing helmet).

⁴⁸ Hayley Stallard, The Right of Publicity in the United Kingdom, 18 Loy. L.A. Ent. L. Rev. 565 (1998). Available at: <http://digitalcommons.lmu.edu/elr/vol18/iss3/7>, TAKER, IAIN, KEITH (2011) An examination of the commercial and non-commercial appropriation of persona within the United Kingdom, with a comparative

IP law is the best law available in the UK for the protection of image rights. This is why some sources have pointed out that intellectual property (IP) law is considered one of the most effective legal frameworks in the UK for safeguarding image rights. However, the Court has expanded these principles to encompass image rights protection under various other legal aspects. In a similar vein, the concept of privacy has not traditionally been readily recognized in the UK, which has significantly influenced the development of persona protection. Consequently, the UK's breach of confidence legal action has undergone a distinctive evolution. Instead of a right to privacy, the Court initially emphasized the importance of the right to privacy at the end of the 19th century.⁴⁹

In certain instances, the evolution of image rights has rendered breach of confidence insufficient to offer a suitable remedy. However, the Court has taken an expansive approach to interpreting breach of confidence. Subsequently, within the realm of private information, the Court endeavors to safeguard image rights, as demonstrated in cases of this nature such as in *Campbell v MGN*,⁵⁰ in *McKennitt v Ash*,⁵¹ and *Douglass v Hello*.⁵² In all cases, the Court safeguards image rights under the preview of private information and protects them under breach of confidence. The case illustrates that the form of information protected through a breach of confidence action includes photographs. Some authors⁵³ justified the concept with trade secrets, as in this case, Judge Lindsay J characterized the photographic representation of the wedding reception as commercially confidential information or else of a hybrid kind, i.e., private information that had been commercialized. Therefore, there is a need to distinguish between the issues concerning the publication of information and those concerning its commercialization, not least because there is a tendency to conflate them. Here, though it is information but the attribute of personality, photographs were used which have a commercial value; which defendant misappropriated it with the knowledge that it has commercial value.

analysis with common and civil law countries., Durham theses, Durham University. Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/745/>

⁴⁹ TAKER, IAIN, KEITH (2011) An examination of the commercial and non-commercial appropriation of persona within the United Kingdom, with a comparative analysis with common and civil law countries., Durham theses, Durham University. Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/745>

⁵⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

⁵¹ *McKennitt v Ash* (CA). Reference: [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194; [2007] EMLR 113;

⁵² *Douglas v Hello! Ltd* [2005] EWCA Civ 595.

⁵³ Aplin, Tanya F., *Commercialising Privacy and Privatising the Commercial: The Difficulties Arising from the Protection of Privacy via Breach of Confidence* (January 1, 2012). A Kur, N Lee, A Ohly and G Westkamp (eds), *Intellectual Property, Unfair Competition and Publicity – Convergence and Development* EIPIN Series Vol II (Edward Elgar, 2014), Available at SSRN: <https://ssrn.com/abstract=2621015>.

Instead of mentioning using photographs, the Court stressed the importance of the information on why the plaintiff brought an action to protect the appropriation of the potential commercial aspects of the photograph. For that, the Court rejects recognizing the image right⁵⁴ because the Court does not give much concern about the misappropriation of images but very much on personal or even intimate information about an individual.⁵⁵

While considering image rights as private information, it also has, certain issue such as all information may not be in private nature; for example, if a photo taken of a personality in public may not be protected as private information; likewise, any photo of a live match cannot be protected as it is already in the public domain. If, later on, those photos were used by anyone to promote or endorse their product, it should be done without breaching the law of protection of private information.⁵⁶ Conversely, when it comes to offering a remedy through breach of confidence, specifically under the banner of private information, the judicial system is primarily dedicated to broadening the scope of the equitable breach of confidence cause. This expansion is aimed at encompassing scenarios involving the unauthorized public disclosure of private information. Historically, the equitable action for breach of confidence necessitated the existence of a confidential relationship between the plaintiff and the defendant.⁵⁷ However, following this case, the House of Lords embraced a broader interpretation of the breach of confidence doctrine, eliminating the necessity to prove the existence of a relationship between the plaintiff and the defendant that imposes a duty of confidence.⁵⁸ Numerous commentators have voiced criticism regarding the United Kingdom's approach to expanding breach of confidence to encompass situations that were neither conceptually nor practically intended to be included.⁵⁹ Later in 1998, the Human Rights Act, introduced under articles 8 and 10, was used by the Court to protect image rights. Some scholars say this act is the extension of a

⁵⁴ *Douglas v Hello! Ltd* [2005] EWCA Civ 595 Para -124.

⁵⁵ *Douglas v Hello! Ltd* [2005] EWCA Civ 595 Para-288.

⁵⁶ Image Rights Protection Of Footballers In English Law And How It Can Be Improved- available at: [HTTPS://LAWINFOOTBALL.WORDPRESS.COM/2014/06/28/IMAGE-RIGHTS-PROTECTION-OF-FOOTBALLERS-IN-ENGLISH-LAW-AND-HOW-IT-CAN-BE-IMPROVED/](https://lawinfootball.wordpress.com/2014/06/28/image-rights-protection-of-footballers-in-english-law-and-how-it-can-be-improved/) (last visited on October 6, 2023)

⁵⁷ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (Ch).

⁵⁸ Chamberlain, Nikki, "Misappropriation of Personality: A Case for Common Law Identity Protection" (October 19, 2020). "Misappropriation of Personality; A Case for Common Law Identity Protection" (2021) 26 TLJ 195.

⁵⁹ Chris DL Hunt, "Rethinking Surreptitious Takings in the Law of Confidence" [2011] 1 Intellectual Property Q 66; Jillian Caldwell, "Protecting Privacy Post Lenah: Should the Courts Establish A New Tort or Develop Breach of Confidence?" (2003) 26 UNSW LJ 90; Des Butler, "A Tort of Invasion of Privacy In Australia?" (2005) 29 MULR 339; Ayre Schreiber, "Confidence crises, privacy phobia: why invasions of privacy should be independently recognised in English Law" [2006] IPQ160, as cited to in Chris Hunt "From Right to Wrong: Grounding a 'Right' to Privacy in the 'Wrongs' of a Tort" (2015) 52 Alta L Rev 635.

breach of confidence⁶⁰. It is clear from an analysis of the number of UK judgements that the country has not taken any action to establish identity protection rights comparable to publicity or image rights.⁶¹ Because there isn't specific legislation protecting identities, people rely more on incidental protection in other legal laws such as Copyright⁶², trademark⁶³, breach of confidence⁶⁴ and the tort of passing off, however in compare to these rights courts used IP laws very often most of the remedy granted though passing off and breach of confidence as they consider these as the best ways to stop commercial exploitation in the UK.

Present context

During the 20th century, English courts sought to fortify the legal framework around image rights by recognizing the significance of "passing off"⁶⁵ to deter the illicit merchandising of fictional characters. While the UK courts have not yet granted comprehensive legal protection for image rights, this area of law continues to evolve⁶⁶. In the 21st century significant developments, largely driven by technological advancements, resulted in a substantial increase in the value of personalities' names and images compared to previous decades. The necessity to safeguard these personality rights has become particularly pronounced, especially within the globalized sports sector, where sponsors are eager to make substantial investments to associate their companies, products, and brands with renowned personalities.⁶⁷

In the United Kingdom, while there is no formal legal definition for image rights, sports

⁶⁰ Identity Protection In The UK How unauthorised commercial exploitation of a person's identity should be protected under English law. A comparative study of publicity rights in the UK, the US and Norway. Identity Protection In The UK How unauthorised commercial exploitation of a person's identity should be protected under English law. A comparative study of publicity rights in the UK, the US and Norway.

⁶¹ Identity Protection In The UK-How unauthorised commercial exploitation of a person's identity should be protected under English law. A comparative study of publicity rights in the UK, the US and Norway. The Dickson Poon School of Law.

URL- <https://digilabs.global/wp-content/uploads/2021/07/IdentityProtectionintheUK.pdf> see Hayley Stallard, The Right of Publicity in the United Kingdom, 18 Loy. L.A. Ent. L. Rev. 565 (1998). Available at: <https://digitalcommons.lmu.edu/elr/vol18/iss3/7>

⁶² Copyright, Designs, and Patents Act ("CDPA") 1988 c. 48. *Du Boulay v Du Boulay* (1867-9) LR 2 PC 430.

⁶³ Trade Marks Act 1994 CHAPTER 26 -Tarzan Trade mark Case-1970("TARZAN" TRADE MARK, Reports of Patent, Design and Trade Mark Cases, Volume 87, Issue 15, 3 December 1970, Pages 450–461) *Arsenal Football Club v. Matthew Reed*- England and Wales Court of Appeal 2003 E.T.M.R. 73 (2003)

⁶⁴ The potential protection of identity through the breach of confidence has increased. An exclusive right of privacy is rejected in the UK. However, it has developed a right against unjustifiable disclosure of private information under the breach of confidence.

⁶⁵ *Edmund Irvine Tidswell Ltd. v Talksport Ltd* - [2001] 1 WLR 2355., *Fenty & Ors v Arcadia Group Brands Ltd (Topshop) & Anor* - Case No: A3/2013/2087 & A3/2013/2955

⁶⁶ *Mirage Studios v Counter-Feat Clothing Co Ltd*- (1991) FSR 145.

⁶⁷ Coors, Corinna, "Are Sports Image Rights Assets? A Legal, Economic and Tax Perspective" (February 22, 2015). The International Sports Law Journal, Volume 15, Issue 1, pp 64-68. , Available at SSRN: <https://ssrn.com/abstract=2736291>

agreements between players historically included clauses related to licensing their image rights. Over time, image rights clauses within sporting contracts have become one of the most intricate and contentious areas of dispute between sports clubs and their players, involving issues such as sponsorship conflicts of interest and licensing agreements. A landmark case, *Proactive Sports Management Ltd v. Wayne Rooney*,⁶⁸ marked the first instance in which the English High Court formally defined image rights.⁶⁹ This high-profile case revolved around the sports image rights of Wayne Rooney, the former Manchester United striker and England captain.⁷⁰ However in the *Proactive Sports Management Ltd v Rooney -2011* case, the UK court defined image right for the 1st time, which is very similar to the definition given in the US in *Haelan Laboratories v. Topps Chewing Gum (1953)*. However, a key distinction between the two countries is that the United States recognized image rights as a distinct legal concept, while the UK did not. While the UK has not yet expressly acknowledged image rights, despite being aware of its existence in other jurisdictions, they have sought to extend existing laws to protect image rights, primarily in the context of the sports sector, where conflicts over image rights are prevalent.

Conclusion

In the United Kingdom, the protection of image rights remains insufficient within the current legal framework. The Court has made efforts to stretch and modify the principles of passing off to safeguard against the unauthorized exploitation of an individual's rights, but these attempts have frequently fallen short. While trademark law may offer a higher level of protection, it still falls short of being comprehensive. The absence of a dedicated legal provision to prevent the unauthorized use of individual identities has created a situation where individuals have no effective recourse when their identity is misused. A specific image rights statute should be introduced to improve image rights protection in the UK, mirroring the approach taken in Guernsey and other jurisdictions. This would recognize image rights as a distinct form of

⁶⁸ *Proactive Sports Management Ltd v. Wayne Rooney*- [2011] EWCA Civ 1444.

⁶⁹ In *Proactive Sports Management Limited v Rooney* [2011] EWCA Civ 1444 – “Image Rights means the right for any commercial or promotional purpose to use the Player’s name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights

⁷⁰ Ian Blackshaw And Athena Constantine-“Football: Sports Image Rights and The Geovanni Case Football: Sports Image Rights and The Geovanni Case”. Coors, Corinna, “Are Sports Image Rights Assets? A Legal, Economic and Tax Perspective” (February 22, 2015). *The International Sports Law Journal*, Volume 15, Issue 1, pp 64-68.

intellectual property and grant protection to those whose identities have been misappropriated. Alternatively, the existing IP framework could be augmented to provide better protection for image rights. This could be done by allowing the registration of names, images and signatures as trademarks, giving individuals greater control over how their identity is used. Ultimately, the UK needs to take steps to improve protection for image rights as it is clear that the current legal system is failing to protect individuals from the misappropriation of their identities. This must be addressed if the UK is to remain a leader in the field of intellectual property protection.
