

CELEBRITY RIGHTS AS A FORM OF MERCHANDISE - PROTECTION UNDER THE INTELLECTUAL PROPERTY REGIME

By

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Intellectual Property deals with intangible interests that carry societal values. They are not confined to art literature or in the area of technology. They also cover commercial interests and protects against all forms of unfair competition. Rights are granted to intangible interests only when they are able to be transformed into tangible embodiments. The categories of intellectual property rights are expanding and evolving. New rights are being extended wherever necessary to provide exclusive rights to all kinds of works involving skill and labour. There is one area, which seeks a distinct approach with a humane touch. This is the area where in celebrities seek exclusive rights to exploit the name and fame they have acquired through hard labour. Having toiled to gain fame, celebrities in the area of art music drama and even athletes who have acquired fame through hard work and dedication earn a good will and reputation that needs legal protection. Various rights are granted to the celebrities, which can be classified into two broad categories.

(1) **Economic Rights** - that include (a) trading or licensing rights (b) Other intangible recognition values.

(2) **Dignitary Rights** - (a) Interest in reputation (b) Interest in personal privacy (c) Interest in freedom from mental distress.

These two broad categories get merged into one single right and that is the right to protect the personality of a famous celebrity. Before examining the rights claimed by a celebrity there is a need to prepare a basic foundation to build any special rights that are necessary for maintaining the halo surrounding these personalities. This basic right in the form of human dignity is granted to any individual that includes a common man and a celebrity.

Human Dignity - The fundamental right that any individual seek is the right to protect one's dignity. This right includes the right to be protected from "Prying Eyes", "Intrusion into the Private life", "The right to exploit the name and fame acquired by a person".....and other recognition values. Various international conventions have recognised the inherent value of human dignity.

The Preamble to the Charter of the United Nation states - "We the peoples of United Nations determined..... to re affirm faith in fundamental human rights, in the dignity and worth of the human persons....."

Similarly in the Universal Declaration of Human Rights, (1948) the Preamble begins with "where as recognition of the inherent dignity and the equal and unalienable rights of all members of the human family is the foundation freedom justice and peace in the world.... This declaration shall strive to promote respect for these rights and freedom...

The European convention of human rights seeks to balance the privacy rights of an individual with the rights of the media to publish personal information of individuals Article 8 states every one has the right to respect for his private and personal life his name and his home and his correspondence.

Article 10 states every one has the right to freedom of expression, this right shall include freedom to hold opinions and to receive and impart information any ideas without interference by public authority regardless of frontiers.

Along with the general right to protect their dignity, the celebrities claim various rights that can be classified as - (1) Privacy Rights

(2) Publicity Rights (3) The Right to Protect their personality. The rights sought by the celebrities fall within the regime of intellectual property rights in the form of copyrights; trade marks and claim these rights as a form of merchandise. These rights can also be claimed by adopting the principles relating to fair competition to protect the interests of the famous personalities.

Publicity Rights - The right to exploit the economic value of the name and fame of an individual is termed as publicity right to claim this right it is necessary to establish that fame is a form of merchandise and any act that impinges these rights are considered as unfair trade practice. In the *Hanna Manufacturing Company v. Hillerich & Bradsbury Co.*, 78F 2nd 763 5th Circuit Cent denied 296 US 645 (1935), the Plaintiffs contracted with certain famous base ball players for the exclusive right to use their names, autographs and photographs in connection with the sale and advertising of base ball bats. The plaintiffs sued to prohibit a competing manufacturer from using similar marks. The Court of first instance granted to the plaintiff the right to use the name of the celebrity and equated this right to a property right. Reversing the above decision the Court of appeals declared that 'fame is not a form of merchandise. It would help neither sportsmanship nor business to uphold the sale of famous name to the highest bidder as a form of property consequently the fifth circuit held that the plaintiffs contract with the players operated only to prevent the players from objecting to its own use of their names. However in *Haelen Laboratories v. Topps Chewingum*, 202F 2d 866 2nd circuit cert. denied 346 US 816 1953, the defendants had produced base ball card bearing the photograph of a base ball player who had already granted to the plaintiff an exclusive license to his picture in connection with the sale of the plaintiffs products. Rejecting the defendants arguments that the agreement between the player and the plaintiffs did not provide any enforceable right to the plaintiffs, the 2nd circuit held that the New York's common law recognizes the players right to assign the publicity value of

his photograph. The Court granted recognition to the right of publicity for the simple reason that it provides economic value to the identity of the celebrity. Performers are given exclusive rights in the form of copyright protection. In *Zacchini v. Cripps Harvard Broadcasting Company*, 433 US 562, 578 Ohio 1977, Hugo Zacchini made his living by performing as a human cannon ball. When Zacchini appeared at the country fair in Ohio, a T.V. station cameraman filmed the 15-second act of Zacchini shooting out of a cannon. Zacchini succeeded in an action claiming violation of his publicity rights. The right of publicity is a property based doctrine and is an injury caused to the celebrity impinging upon exclusive right to exploit the commercial use of the fame acquired by him. It is the economic value of his identity.

Privacy Rights - The four distinct rights that are included under the rubric of the right of privacy are - (1) The right to prevent public disclosure of private rights (2) Right against intrusion into the solitude of a person and prevent any form of prying into the private affairs of a person (3) Prevent false light publicity (4) Curb misappropriation of a person's name and likeness. Various defenses are raised when there is a intrusion into the private affairs of a personality. A celebrity Courts publicity and people are interested to know trivial information dealing with the person including the clothes that they wear, the cosmetics they apply, the places they visit which to an ordinary person would seem very trivial. In the case of *Hyde Park Residence Limited v. Yelland*, (2000) EMLR 363, - the rights involved include the copyright protection along with the privacy rights of the plaintiffs. A company, The Hyde Park Residence Limited was responsible to make all security arrangements at the Villa Windsor, which is a property in Paris owned by *Md. Ali Fayed*. When Princess Diana visited the Vilia along with Mr. *Dodi Fayed* the security cameras recorded their entry and departure on 30th August 1997. The next day they were killed in a car accident. Naturally all evidence prior to the death was of immense public interest. One of the employee of Mr. *Fayed*, Mr. *Murrel* took the photos that were available with the

security to prove that the couple had stayed in the Villa. When these photos were published along with an article in the Sun magazine, Hyde Park filed a suit against the Sun magazine and against Mr. *Mumel* on the grounds of breach of confidence and infringement of copyrights. The defendants claimed that their intention was to use the stills for a "fair purpose" as the disclosures were of "public interest" the defendants claimed that they had a just cause for infringing the copy right of Hyde Park over the photos. While the Court of first instance accepted the defence of public interest the Appellate Court did not accept the defence of public interest. *Aldous*, J stated that "I do not believe that a fair minded would pay for the dishonestly taken driveaway stills and publish them in a News paper knowing that they had not been circulated by the concerned authorities and the only relevance was the fact that the Princess and Mr. *Dodi Fayed* had stayed for 28 minutes at the Villa Windsor". The publication therefore was not considered as a fair purpose "to describe what the Sun did as fair dealing is to give honour to dishonour" further the Appellate Court held that the extent of use was excessive and is not within the range of fair use and gave a verdict in favor of Hyde Park Residence Limited on the grounds that the action of the defendants in revealing the stills amounted to an infringement of copyrights.

Duty of non-disclosure of confidential information

In the case of *Naomi Campbell v. Vanessa Frisbee*, 2002 EWCA Cir, No.1374, - the facts of the case were that the Newspaper - "News of the world" published certain intimate details of Miss. Campbell a famous model with the actor Mr. Joseph *Fennes*. This matter was very confidential and it was known only to Miss. Frisbee, the employee of Miss. Campbell. When Miss Frisbee entered the service of Miss Campbell she had signed an agreement not to disclose any information relating to the professional or personal life of Miss. Campbell that would pose a threat to Miss. *Campbell's* professional, economic, commercial and personal interest. The duty

of nondisclosure was to continue beyond the professional relationship between the employer and employee. When Mr. *Frisbee* disclosed intimate details relating to Miss. *Campbell*. Miss. Campbell filed a suit for the breach of the confidential agreement made with her and claimed damages/accounts for profits arising from the breach of the agreement. In her defence Miss. Frisbee stated that Miss. Campbell behaved in an unruly manner and had wrongfully repudiated the contract. Now discharged from her services, Miss. Frisbee claimed that she was now released from all obligations towards Miss. Campbell and that she had disclosed the personal details relating to Miss. Campbell with the actor in public interest to the newspapers. The Court did not accept this contention, as it was a breach of an obligation of confidentiality that survives the contract of employment. However the Court cited the decision given in *Wood Ward v. Hutchins*, 1977 (1) WLR 760 - wherein it was observed "It seems to me that those who seek and welcome publicity of every kind bearing upon their private life's so long as it shows them in a favorable light are in no position to claim an invasion of their privacy which shows them in an unfavorable light: Based on the facts of the case the Court came to "The reluctant conclusion that Miss. Campbell was not entitled for any judgment in her favor and appeal made by Miss. Frisbee was allowed

In the case of *Michael Douglas, Catherine Zeta Jones v. Hello Limited, Hola S.A. and others*, 2003 EWHC 786 CH. High Court of justice, Chancery division 11th April 2003 the facts of the case the were that the well known film stars Michael Douglas and Zeta Jones celebrated their wedding on 18th November, 2000 they had intended to keep the wedding confidential and have only selected gathering for the function. Heavy security arrangements were made to make it an "Exclusive wedding" with limited friends and family members. The wedding was a grand success however an intruder had surreptitiously taken relatively poor photos that were bought by the paper - Hello the Douglas couple immediately moved the Court seeking an

injunction to restrain publication of their photos and an injunction was granted. However, the Court of Appeal lifted the injunction leaving the claimants to seek only damages. The plaintiffs had initially entered into a contract with the paper - OK whereby OK had agreed to pay 500,000/- each to Michael and Zeta Jones for the photographs taken by OK during the course of the wedding celebration. No other photographer was permitted to take photos. The copyright was to be retained by Michael and Zeta Jones who would approve the photos before being released by the magazine OK. On the day of Wedding paparazzo photographer Mr. Rupert Thorpe attended the wedding and had taken photos with out using the flash. The photo of the bride coming down from the aisle was taken showing only the arm of her father, in another photo she was shown holding the cake knife at her husband while yet another photo showed her dancing with an invitee. All these photos were very shabby. The initial reaction of the Jones was that "We were devastated and shocked by the News, we felt as if our home had been ransacked and everything taken out and spread on the streets - it was truly gut -wrenching and very disturbing experience which left us both deeply upset. The claims of the plaintiffs were - (1) The wedding ceremony was a private affair and the plaintiffs claimed a duty of confidences that was violated by the defendants (2) The wedding was exploited for gain and it amounted to a breach of commercial/trade secret (3) There was a violation of rights conferred under the Data Protection Act wherein personal information was not allowed to be revealed without the consent the data holder (4) There was breach of privacy (5) There was deliberate interference by the defendants with the rights/business of the plaintiffs by unlawful means (6) There was conspiracy by the Hello magazine to injure the plaintiffs.

One of the main claims of the plaintiffs was that the defendants had committed a breach of confidence owed to them. The 3 elements necessary to constitute a breach of confidence is (1) The information itself must

have the necessary quality of confidence about it (2) The information must have been imparted in circumstances importing a obligation of confidence about it (3) There must be an unauthorized use of that information to the detriment of the party communicating it that means the confidential information has an attribute of inaccessibility. The breach of confidence also has to be evaluated in accordance with the Data Protection Act (1988), Human Rights Act 1988 and Specific Codes such as the code of press complaints commission. As celebrities Court publicity they have a less ground upon which they can object to intrusion, the information relating to the private life of a celebrity has become a favorite subject to the media however there is no "presumptive priority "to freedom of expression when it conflicts with other human rights provisions. In this particular case the Jones family had agreed to sell and permit publication of their photo to OK magazine and had waived their right of privacy. The defendant being an intruder a breach of confidence cannot be claimed against him. In its judgment the Court of appeals did not provide any injunctive relief to the plaintiffs however they were permitted to seek damages for the intrusion into their privacy/publicity rights.

In *Michaels v. Internet Entertainment group Inc.*, 5F. Supp. 2D. 823 US District Court CD can 1998, the plaintiffs Pamela Anderson Lee and Bret Michaels sought an injunction to prevent the dissemination of a videotape in which intimate scenes between Pamela Anderson and Michael were depicted. The contention of the plaintiff was that distribution of tapes would violate their rights of publicity/privacy under the Californian Law. The public disclosure of private facts can be prohibited as being offensive and objectionable to a reasonable man and when there is no legitimate public concern in publishing the facts. The public disclosure is acceptable by law provided it is "news worthy". News worthiness is broadly defined as to include all matters of public interest, including accomplishments everyday lives and even romantic involvements of famous people.

Legal protection is not granted for such matters when the information relating to personal affairs turns into morbid prying into the personal lives for its own sake. The surprising feature of this case is that the contention of the defendants is that Pamela Anderson Lee has always been considered as a sex symbol therefore the publication cannot be objected by her. To determine the news worthiness of the information the Court sought to balance (1) The social value of the facts published (2) The depth of the intrusion into the private affairs (3) The extent to which the party voluntarily acceded to a position of public notoriety. Weighing all the above factors together to the fact of the case the Court concluded that the contents of the tape are not covered within the range of news worthiness. By the dissemination of the contents of the tape it would inflict injury to the plaintiffs human dignity and peace of mind, which cannot be restored by monetary damages. Accordingly the Court granted an injunction prohibiting the dissemination of the tape.

Personality Rights - An individual's personality is not merely a form of trading symbol, it carries with it elements of personal identification that cannot be exploited by others. It involves emotional and dignitary values associated with an individual -he may be a celebrity or a common man. A separate right protecting the personality of an individual has emerged with the confluence of the right of privacy and right of publicity. This right is an extension of the right of passing off. In the case of *Erven Warnick v. Town end and Sons (Hull Limited)*, (1979) AC 731, Lord Diplock laid down 5 elements to establish the tort of passing off-it is necessary to prove (1) Misrepresentation (2) Made by a trader in the course of trade (3) To prospective customers (4)Which is calculated to injure the business of another trader (5) Which causes actual damage. Subsequent cases have extended the element of misrepresentation and Courts have applied the action of passing off to cases wherein a person misrepresents the name and likeness of an individual more so in case of celebrities. In *Henderson v. Radio Corporation Private Limited*, 1969 RPC 218.

The plaintiffs a pair of professional ballroom dancers were able to restrain the unauthorized use of their likeness on the cover of a musical record. *Evatt. C.J.* stated that the remedy of passing off is necessarily available only where the parties were engaged in business, that expression would be used "in its widest sence to include professions and callings". *Manning, J* elaborated, stating that the development in advertising practices have opened up a new field of gainful employment for many persons who by reason not only of their sporting talent, but of their social, artistic and other activities have attracted notoriety and have found themselves in a position to earn substantial sums of money by lending their recommendations or sponsor ship to an almost infinite variety of commodities.

The misrepresentation that forms the basis of misappropriation arises in case the defendants make the public believe that (1) The plaintiffs business is connected with the defendants business (2) The plaintiff has licensed that the goods of the defendants were of a certain kind, origin or quality (3) The plaintiffs have endorsed the goods. In the case of *Culloch v. Lewis. A May Produce Distributors Limited*, (1948) 93, RPC 58. The plaintiff was a well-known children's radio broadcaster who was known as uncle Mac in all his radio programs. He claimed that the words use by the defendants for puffed wheat - uncle Mac's puffed wheat - amounted to passing off, dismissing the suit the Court held that for an action of passing off it is necessary to prove a common field of activity between the plaintiff and the defendant.

An action of passing off cannot be extended to all cases relating to celebrities in the case of *Lyngstand v. Anabas Products*, (1997) FSR 62, 67. The members of the pop group ABBA were unsuccessful in establishing a connection with the merchandise of the defendants. In printing the names and photos of pop singers an action of wrongful exploitation cannot be claimed in every case involving celebrities. The Court in this case decided the use of photos of the celebrities amounted to mere catering to the public demand

among teenagers for effigies of their idols.

Voice has also been an aspect of personality protected by the Courts when the voice is identifiable by the public with a celebrity as seen in the case of *Waits v. Frito-Lay Inc.*, 978 2FD 1093 9th circuit 1992. The singer Tom Wait's voice was imitated in the commercial for tortilla chips. He succeeded in an action of misappropriation of his personality for imitating his voice without his consent. Even where a full name is not used, liability has been established if the plaintiff is identifiable from the use of his name partially or otherwise. In the case *Carson v. Here's Johnny Portable Toilets Inc.*, 2 968 FD 831 6 circuit 1983, the phrase **-Here's Johnny and the world's foremost commedian** used for portable was held to violate the right of publicity of comedian Johnny Carson.

Protection of Personality as a Right Against Unfair Competition

Restatement (Third) of Unfair Competition (1995)

Sections 46 to 49 of the restatement of the law (Third) of unfair competition which are set out below considers the appropriation of publicity rights

Section 46 Appropriation of the commercial value of a person's identity: The Right of publicity as a form of unfair practice

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness or other Indica of identity for purposes of trade is subject to liability for the relief apostate under the rules stated in Sections 48 and 49.

Section 47 uses for purposes of trade

The Name, likeness and other Indica of a person's identity are used "for purposes of trade" under the rule stated in Section 46 if they are used in advertising the users goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However,

use "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.

Section 48 injunctions:

Appropriation of the commercial value of a person's identity

(1) If appropriate under the rule stated in sub-section (2) injunctive relief may be awarded to prevent a continuing or threatened appropriation of the commercial value of another's identity by anyone who is subject to liability under the rule stated in Section 46

(2). The appropriateness and scope of injunctive relief depends upon a comparative appraisal of all the factors of the case including the following primary factors:

- (a) The nature of the interest to be protected
- (b) The nature and extent of the appropriation
- (c) The relative adequacy to the plaintiff of an injunction and of other remedies
- (d) The relative harm likely to result to the legitimate interest of the defendant if an injunction is granted and to the legitimate interest of the plaintiff if an injunction is denied
- (e) The interest of third person's and of the public
- (f) Any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights
- (g) Any related misconduct on the part of the plaintiff and
- (h) The practicality of framing and enforcing the injunction

Section 49

Monetary relief: Appropriation of the commercial value of a person's identity

(1) One who is liable for an appropriation of the commercial value of another's identity

under the rule stated in Section 46 is liable for the pecuniary loss to the other caused by the appropriation for the actors own pecuniary gain resulting from the appropriation which ever is greater unless such relief is precluded by an applicable statute or is otherwise inappropriate under the rule stated in sub-section (2)

(2) Whether an award of monetary relief is appropriate and the appropriate method of measuring such relief depends upon a comparative appraisal of all the factors of the case, including the following primary factors:

- (a) The degree of certainty with which the plaintiff has established the fact and extent of the pecuniary loss or the actor's pecuniary gain resulting from the appropriation
- (b) The nature and extent of appropriation
- (c) The relative adequacy to the plaintiff of other remedies
- (d) The intent of the actor and whether the actor knew or should have known that the conduct was unlawful
- (e) Any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights and
- (f) Any related misconduct on the part of the plaintiff

The defense of Public Interest

In the case of *A v. B and C*, (2002) EWCA. Cir 337, the facts of the case were that a famous football player had an affair with two women C and D. B a National newspaper sought to publish a news item relating to his affairs with C. An injunction was sought to restrain B from publishing the information given by C. The claim of A was that he was a married man with a wife and two children. There was no dispute of the fact that A had an adulterous relationship with both C and D. By bringing an injunction A hopes to prevent his wife from learning of his adultery, since if she were to be informed of this matter, it would prejudice

his marriage and his long standing relationship with his wife and also indirectly harm his children. The Court examined the articles sought to be published and found to contain the intimate details between A and C, A and D. The issue that arose was (1) Whether the contents were of private nature (2) Whether the newspaper has any public interest in disclosing the revelations made by C and D to the newspaper. The case of *Australian Broadcasting Corporation v. Lenah Games Meat Private Limited*, (2001) HCA 63, is cited "there is no bright line that can be laid down to differentiate between private and public issue. Use of the term public is often convenient method of contrast, but because an act occurs on a private property it does not necessarily be a private issue and cannot be a subject of disclosure or publication. The practical test is that when a disclosure is found to be offensive to a reasonable man of ordinary sensibilities it is a private issue that should be prohibited from publication. Personal data can be published if it is of any journalistic, literary or artistic material or if it is of special importance of public interest (Section 32 of the Data Protection Act). In many of the situations involving celebrities it would be over stating the position to say that there is a public interest in the information being published it would be more accurate to say that public has a legitimate interest in the information. The Courts have not ignored the fact that if newspapers do not publish information in which the public is interested there will be fewer papers published which will not be in public interest. When a person is a public figure he is entitled to have his privacy respected in a limited manner he must because of his public position accept the fact that his actions will be closely scrutinize by the media. He is considered as the role model for many fans and the information that was sought to be published carries with it the element of the public interest and therefore the Courts permitted the publication of the information given by C to B.

Celebrity Rights in the Cyber Space-

Globalization and technological advances have expanded publicity rights and enhanced the

commercial value of famous personalities. In a recent ruling given by the WIPO complaint and arbitration centre on June 2nd 2000. The claim of Julia Roberts a famous film star was accepted by WIPO. She protested when it had come to her knowledge that an American dealer had registered a domain name as Julia Roberts Com. The dealer Russel Boyd of Princeton said that he had selected that name as "a tribute to the actress and that Julia Roberts had no trade mark registered in her name". He even claimed that no common law right can be granted over her name. Mr. Boyd made a statement before the WIPO panel that "if Julia Roberts had picked up the phone and said "Hi Russ, can we talk about the domain name of Julia Roberts.com. She would have owned it by now". The WIPO Tribunal ruled that Boyd had no rights nor legitimate interest in the domain name and that Boyd had registered it in bad faith. It ordered the transfer of the domain name to Julia Roberts. Julia Roberts had to justify her claim by proving either of the following elements - (1) That the domain name was identical to her name or (2) She had a trade mark right over that name or (3) That the domain owner had no legitimate right over the name or (4) That the use of domain owner was in bad faith. The argument of the plaintiff was that though she had not registered any trade mark on her name yet she could prove that her name carries a "distinctiveness" and though it was only a name it carried a secondary meaning over which she could claim a monopoly and prohibit others from using it. Evidence proved that the domain owner had no legitimate right over that name. He can neither claim exemption on the grounds of fair use. He had in fact on several occasions indulged in

the business of registering domain names using the names of celebrities and selling by auction. This illegitimate practice was not approved by the WIPO panel and he was ordered to transfer the domain name in favor Julia Roberts.

Conclusion - The final question that remains unanswered is - Why must all intangible interests of economic value be given a status of a property right? It is true that the popularity of a celebrity is to be cherished and nourished yet to give them an extra right of exclusivity delinks them from their ardent fans that have raised them on a high pedestal. Taking advantage of their popularity the celebrities hike their signing amounts from the producers. Therefore it would be unfair to give them yet another source of income by granting them exclusive rights to use their name. More over the rights such as copyrights have an in built system of permitting the use of copyrights for a fair use and in cases of parody. Taking into account the public interest in the use of the name and fame and to appease the curiosity of the general public to know the details of the people they idolize absolute rights cannot be granted to the celebrities. In conclusion it would be proper to quote the statement made by Princess Diana during the course of an interview with the BBC in 1995 "they have decided that I am still a product after 15, 16 years that sells well. They shout at me. Oh Di, look up if you give us a picture I can get my children to a better school". It is therefore not surprising that as long as celebrities remain as saleable commodities, new forms of misappropriation of the good will and reputation earned by the famous personalities will emerge as there is no end to human ingenuity. Clear legislation is awaited in this regard.

UNITY IN DIVERSITY — DIVERSITY A PLUS FACTOR IN ADMISSIONS TO THE LAW SCHOOLS OF UNITED STATES

By

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Introduction:—Admissions in all the Universities across the world have always being subjected to perpetual litigation, as it is at this stage that the future prospects of