

Exploiting publicity rights in the EU

EIPIN report

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‘Exploiting Publicity Rights in the EU’

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Introduction

One of the most important commercial aspects of celebrity is exploitation of their image. In order to use the image of celebrities for commercial purposes, usually a license fee has to be paid.¹ However, individuals outside public life may be offended by any commercial exploitation of their personality rights diverging from their own moral concepts. Economic interests are the usual basis for an individual wishing to exploit their personality, whereas 'non-economic interests', e.g. everyone's right to shun publicity, are rather subjective and cannot be evaluated in terms of money.¹ The capability to control the exploitation of personality rights is therefore necessary to sustain 'commercial exclusivity' for celebrities on the one hand and to secure human dignity and the right of self-determination on the other.¹

There is little legal frame work for harmonisation of personality rights in EU law and this has led to great divergence in the approaches taken by different member states. The features of such a right to protect privacy and publicity significantly depend on whether they are derived from 'personal dignity' or founded on 'property rights'.²

However, the European Convention on Human Rights (ECHR) forms the basis for a general understanding of protecting measures to restrict 'unauthorized commercial exploitation of personality'. Against this background, many legal controversies in the field of publicity rights are awaiting a proper solution.

¹ Beverley-Smith [2005], p. 2-4

² Beverley-Smith [2005], p. 11

Exploiting Personality Rights In Common Law Systems

Publicity Rights In The United Kingdom: New Rights By Old Laws?

The Legislation In Force

There is no specific publicity right conferred to an individual in UK statutory law and there has been resistance by the judiciary to create a common law tort to protect a right of publicity. Therefore, it has been left for those who have objected to a loss of control of what amounts to publicity rights in other jurisdictions to seek to remedy their complaint under existing laws regarding copyright³, trade marks⁴, the tort of passing off and the tort of duty of confidence. However, there have been several cases which have explored the limits of these areas of law to protect an individual's right to control their own publicity.

The concept of publicity rights in the UK is becoming increasingly influenced by the ECHR⁵ and jurisprudence from the European Court of Human Rights⁶. The UK Human Rights Act⁷, which came into force on the 2nd of October 2000, was aimed to be 'An Act to give further effect to rights and freedoms guaranteed under the ECHR'. The introduction of the principles outlined in this act have led to some controversial decisions⁸ and the extent to which it protects ones right to privacy and right to publicity has yet to be determined.

The Case Law

There has been an attempt, which has met with limited success, to protect a celebrity's right to exploit their own publicity by registering their name as a trade

³ Copyright, Design, and Patents Act 1988 (CDPA)

⁴ Trade Mark Act 1994 (TMA)

⁵ European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)

⁶ European Court of Human Rights (ECtHR)

⁷ Human Rights Act 1998 (HRA)

⁸ e.g. S and Others v Secretary of State for the Home Department, [2006] EWCA Civ 1157; Campbell v. MGN Ltd [2002] EWCA Civ 1373; Max Mosley v News Group Newspapers Limited [2008] EWHC 1777 (QB)

mark. The difficulty of registering celebrity names as UK trade marks lies in the fact that the celebrity name is part of the product to be purchased and not as an indication of the origin of the goods.^{9,10} Also, UK jurisprudence has explicitly stated that it does not recognise that there is any monopoly in the use of a name outside of trade mark law.¹¹

One area that has proven successful for those seeking to protect their publicity rights has been using the tort of passing off. Passing off was originally created to protect traders from others exploiting their good reputation by 'passing off' inferior goods as originating from the well known trader. In order to succeed three elements must be satisfied 1) the claimant has goodwill 2) there was misrepresentation 3) the claimant has suffered damage.

In *Irvine v Talksport Ltd*¹² a formula one driver by the name of Eddie Irvine brought an action of passing off against a sports radio station (Talksport) for unauthorised use of his image on their promotional material. Talksport had altered a photograph, in which Irvine had originally been holding a mobile phone, to make it appear that he had been holding a microphone emblazoned with the Talksport logo. Laddie J found that this amounted to false endorsement which could be protected under passing off because 'in effect he adds his name as an encouragement to buy or use the service or product'. Others, however, have been less successful in protecting their right to publicise themselves through passing off. The pop group Abba were judged to not have sufficient goodwill in the UK to prevent others from selling Abba related merchandise as they themselves were not selling merchandise.¹³

Another area which has been used to protect the rights of an individual to control their publicity is duty of confidence. The leading authority is *Douglas v Hello!*¹⁴ in which Michael Douglas and Catherine Zeta Jones gave exclusive rights to photograph and publish images from their wedding to OK! magazine, however, a rival publication Hello! bought and published illicitly taken photographs. The Douglasses in conjunction with OK! sued Hello! for invasion of privacy and breach of confidence.

⁹ *Elvis Presley Trade Marks* [1999] RPC 567, *Jane Austen Trade Mark* [2000] R.P.C. 879 and *Diana, Princess of Wales Trade Mark* [2001] E.T.M.R. 25

¹⁰ Carty 'Advertising, Publicity Rights and English Law', [2004] IPQ 209

¹¹ *J. in Burberrys v JC Cording & Co* (1909) 26 R.P.C. 693 at 701

¹² *Edmund Irvine Tidswell Ltd. v Talksport Ltd* [2002] EWHC 367 (Ch)

¹³ *Lyngstad v Annabas* [1977] F.S.R. 62

¹⁴ *Douglas v. Hello Limited* [2001] 2 W.L.R. 992, 1033

The Douglasses claim relied upon breach of confidence and the Human Rights Act 1998 as implementing Article 8 of the ECHR. The Douglasses and OK! were both successful in their claims against Hello!, however, as Lord Hoffman stated in the House of Lord decision in favour of OK! 'The fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been about anything that a newspaper was willing to pay for. What matters is that the Douglasses, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information.'¹⁵ Therefore, this case does not create a right of publicity in UK law and should be viewed in the context of a right to enforce a duty of confidence.¹⁶

It is difficult to predict how UK law will develop in this area, however, it is almost certain that the effect of Articles 8 and 10 of the ECHR will continue to develop UK law in a number of areas including a right to publicity.

¹⁵ Douglas and another and others v Hello! Limited and others [2007] UKHL 21

¹⁶ Gillian Black, 'Douglas v Hello! - An OK! result', [2007] 4:2 SCRIPTed

Exploitation Of Personality Rights In Civil Law Countries

The Very Protective French System

The Legislation In Force

There is a significant amount of legislation in France to protect personality rights, being of civil and criminal origin. However, there is no clear definition as to what rights personality rights encompass. The French judges have therefore determined the scope of personality rights: they comprise of many different rights such as right to image, right to privacy, freedom of speech, religious freedom, family relations and intimacy.

Under article 9 of the French Civil Code¹⁷, each individual is entitled to protection of his privacy, and the judges may take measures in order to stop any kind of infringement thereof.

Furthermore, personality rights are protected by article L. 226-1 of the French Criminal Code which provides a year imprisonment and a 45,000 Euro fine where a person records or tapes and diffuses another person's words which were said in private, or diffuses their image without their consent.

There are also many other pieces of legislation relating to protection of personality rights, private data and the issue of internet. Some of them have implemented different pieces of legislation protecting created specialised agencies. One of them, namely the Commission Nationale de l'Informatique et des Libertés (CNIL) was created by the Loi Informatique et Libertés¹⁸. Its general mission is ensuring that the development of information technology remains at the service of citizens and does not breach human identity, human rights, privacy or personal or public liberties. There has also been a special piece of legislation enforced¹⁹ in order to ratify the Convention on the computerised treatment of personal data²⁰ to try and protect the individual against disclosure of private information on Internet. However, with ever expanding use of internet and the development of social networks such as

¹⁷ Inserted in the French Civil Code by an Act of 17th July 1990

¹⁸ January 6, 1978 Act as amended by the August 6, 2004 Act

¹⁹ Décr. N°85-1203 du 15 November 1985

²⁰ Strasbourg Convention, 28 January 1981

Twitter or Facebook, the protection of personality rights may come as a very difficult task and France may need harsher legislation on personality rights protection.

The Case law

France considers that it is of great importance to protect the right to privacy. This fact is illustrated when reading the decisions of the French Constitutional Council. Indeed, the Council deemed that, in order to protect the rights listed in article 2 of the French Declaration of the Rights of the Man and the Citizen,²¹ it is necessary to protect the right to privacy. The Council decided that protection of fundamental rights among which the rights to freedom, property, safety and resistance to oppression can only be guaranteed where the right to privacy is protected.²² This means that French legislators cannot enforce laws which go against this text.

French judges have a very broad vision of protection of privacy: they have declared that this right must be granted to anyone, regardless of their title, birth, wealth, past or future functions.²³ Judges have often strongly condemned infringement of personality rights. In a decision of the Cour de cassation, the judges set a general and broad ruling that any arbitrary interference with an individual's private life is illegal,²⁴ regardless it being malicious or compassionate.²⁵ It is fundamental to protect such rights, and the judges ensure that they are correctly and thoroughly protected. Nevertheless, even though there is a relatively broad protection of personality rights, French judges have also developed many exceptions in order to balance the public interest with the protection of personality rights and the prevention of their use for commercial benefits. Publicly known facts and images of public figures are not generally protected. For instance, in a decision 1re Civ. 25 January 2000, the French Cour de cassation decided that the reproduction of a politician's image while carrying out his function is authorised, even without the politician's consent. A general trend comes out regarding public figures: they do not have a right to privacy when carrying out their job or when in a public place.

²¹ Art 2, Déclaration des Droits de l'Homme et du Citoyen

²² Conseil Constitutionnel, 23 July 1999

²³ Civ. 1re, 23 October 1990

²⁴ Civ. 1re, 6 March 1996, D. 1997. 7, note Ravanas

²⁵ Civ 1re 23 April 2003

On the contrary, the use of a public figure's personal history has been held actionable under French law. The most famous case in recent history is perhaps the publication of the book on François Mitterrand called 'Le Grand Secret' in which Mitterrand's doctor published a book that not only revealed private facts about François Mitterrand's life, but also revealed medical confidences protected by doctor-patient privilege, after the former President's death.²⁶ However in this case, the claim regarding François Mitterrand's privacy infringement did not succeed on the grounds that a deceased person no longer has a right to privacy. However, his heirs were able to ask for damages for the detriment they suffered after the publication of the book. Nonetheless, in the media's greater interest, the judges may balance the right to privacy, freedom of speech and the necessity to inform the public.²⁷ There is therefore a necessity to define the contours of freedom of speech and information, which may be a restriction to personality rights, but this is another difficult issue...

²⁶ Civ 1re, 14 December 1999

²⁷ Civ 1re, 22 April 2003

Germany: Reconciling Personality Rights And Property Rights

Historical Background

Around 1900, legal scholars' initially attempted to define a 'comprehensive right of personality' in the 'German Civil code (BGB – Bürgerliches Gesetzbuch)' but this was not realized by the legislation.²⁸ At that time, only selected aspects of personality were covered by law, e.g. by the right of name or by the 'right to one's image (Recht am eigenen Bild)', the latter fixed in the 'Act of Artistic Creations (KUG – Kunsturhebergesetz)', which was also applied exceptionally for claimants who obviously had offended common decency.²⁸

In the first decade after the Second World War, the Federal Supreme Court (BGH – Bundesgerichtshof) confirmed a 'general right of personality', deduced from the first two Articles of the 'German Constitution of 1949 (GG – Grundgesetz)', and amended by 'section 823 I BGB'.²⁹ Because the Constitutional Court (BVerfG – Bundesverfassungsgericht) has never provided a clear definition of this right, the personal circumstances of the respective individual have to be evaluated by the court 'on a case-by-case basis'.²⁹ According to the Federal Supreme Court, the 'general right of personality' shall grant protection not only for 'natural persons', but fundamentally also for 'legal entities'.²⁹

Nowadays, the 'general right of personality' comprises a number of protective rights to defend oneself against slandering or libelling, to impede any unauthorized commercial exploitation of someone's identity and to safeguard 'human dignity'.²⁹

The so-called 'Lebach decision' from 1973 is considered as principle-establishing judgement determining the relationship between personality rights and broadcasting freedom in Germany.³⁰ A joint offender, sentenced indefeasibly because acting as an accessory to the murder, could stop a 'television broadcast' of the crime he was involved in on the basis of a preliminary injunction granted by the Constitutional Court.^{30,31} Although the court stated that the population's interest in freedom of information usually predominates, in this case the social adjustment of the accomplice had to take priority. Therefore the conflict between two fundamental

²⁸ Welkowitz [2010], p. 70-72

²⁹ Welkowitz [2010], p.70-72

³⁰ <http://de.wikipedia.org>, 'Lebach-Urteil', accessed 18 March 2010

³¹ Welkowitz [2010], p. 467

rights in Germany was ruled in favour of the personality rights defined by Articles 1 and 2 of the German Constitution.³²

Categories Of Personality Rights

Outside the area of copyright protection, in German law one has to distinguish between a 'general personality right (allgemeines Persönlichkeitsrecht)' and 'specific personality rights (besondere Persönlichkeitsrechte)'.³³ The former has been determined in its entirety on a case-by-case basis and comprises the protection of privacy and human dignity with the main emphasis put on the reputation of an individual or a legal entity in public (see proceeding subchapter). The latter, however, are fixed by statutory enactments, supplemented by a huge compendium of case law, and deal with the 'rights to one's name and likeness'.³⁴ With respect to the fundamental principles prevailing in 'German legal theory', neither general nor specific personality rights fit in with the concept of U.S. publicity rights and therefore do not confer any market value. In contrast to the U.S. 'exploitation rights', they have to be regarded rather as 'anti-infringement rights'.³⁴

Whereas the scope of specific personality rights due to their attachment to tangible objects can easily be defined, e.g. the unauthorized use of someone's image or name, the protective effects of general personality rights often described as 'conglomerates of immaterial interests' are not so obvious at first glance.³⁴ Within the past two decades, case law added a horizontal component to the application of general personality rights, which now also affect 'relationships between private individuals' and not only legal relations between individuals and the state as originally covered by the German Constitution.³⁵

To achieve a balance of powers between individual and public rights, with the aid of case law a system has been established of three 'personality spheres' (intimate / private / individual), which represent different levels of protection granted.³⁶ However, a comprehensive and unambiguous definition of general personality rights

³² <http://de.wikipedia.org>, 'Lebach-Urteil', accessed 18 March 2010

³³ Biene [2005], p. 510-513

³⁴ Biene [2005], p. 510-513

³⁵ Helling [2005], p. 50

³⁶ Helling [2005], p. 53

is currently unknown, and this term is still used as gathering place for all corresponding interests which do not fit in the categories 'rights to one's name' and 'likeness', respectively.³⁷

Models Of Protection

The major jurisdictions of European common law and civil law countries analyzed the economic aspects of personality rights from two different points of view: (1) 'the unfair competition or intellectual property perspective' and (2) 'the privacy and personality perspective'.³⁸ The resulting fundamental models aim at creating a balance between commercial and non-commercial parts of personality rights.³⁹

Model No 1 focuses on an exclusively 'defensive protection', preferentially under tort law, and has not to be based on rights.⁴⁰ Whereas licensing and bequeathing conceptually can only refer to positive rights and are therefore excluded under this model, someone's reputation can be protected *post mortem* therein.⁴⁰

The second model has been realized by the dualistic U.S. approach and distinguishes between non-commercial interests on the one hand, covered by 'the torts of defamation and invasion of privacy', and commercial interests on the other hand under protection of 'the right of publicity' as completely matured IP right.⁴⁰ Transferability and licensability do not cause any problems under this model.⁴⁰

According to model No 3, which has been accepted by German courts and is closely analogous to copyright law, personality rights are to cover commercial as well as ideal aspects. Under these prerequisites, however, a total alienability of personality rights is restricted, but licensing is basically possible.^{40,41} 'A *sui generis* approach to publicity rights in general' may help to overcome this legal inconsistency.⁴¹

³⁷ Biene [2005], p. 510-513

³⁸ Beverley-Smith [2005], p. 206

³⁹ Beverley-Smith [2005], p. 10

⁴⁰ Beverley-Smith [2005], p. 212-214

⁴¹ Welkowitz [2010], p. 72

Spain: Learning From Other Systems

Scope of protection

The right of publicity referring to the inherent right of every human being to control the commercial use of his/her identity has not been developed by Spanish Courts and it does not have a translation in the Spanish Law, because all legislations refer to and regulate the 'right to one's own picture' as a personal right. All rights referred to commercial exploitation of the image, although they are worthy of protection, are not part of the content of the fundamental right of one's own picture established in article 18.1 of the Spanish Constitution.⁴²

Although Spain considered the right of one's own picture as a sign of the right of privacy, which its legally-protected interest was the private sphere of a person, but referred to his/her corporal aspect; this perception has changed, and now it is seen as an independent fundamental right, separated from the right of privacy and the right of honour. That is due to the fact that the appearance of a person is protected even though it might not be private or affect their reputation. In contrast to this perception, the European Court of Human Rights alleges that it is not an independent right, because the image will only be protected in so far as in a concrete case.

The Constitutional Court has defined the right of one's own picture as a personality right referred to human dignity and addressed to protect people's moral dimension, which gives the holder a right to establish the graphic information given by its personal physical traits that may have a public dimension (positive aspect). The faculty given by this right, as a fundamental right, is essentially to prevent the downloading, reproduction or publication of the image itself by a third party, whatever the purpose (informational, commercial, scientific and cultural) persecuted for is (negative aspect).⁴³ So it is essentially the right to externalize and make visible a certain image that it identifies the person in accordance with its own aesthetic.⁴⁴ In its negative area, the right of one's own picture, as most if not all the personality rights, is a deterrent right, a right of exclusion of outside activity without the owner's consent.

⁴² Constitucional Court decision 26 March 2001

⁴³ Constitucional Court decisions 81/2001 26 of March, 14/2003 28 of January and 127/2003 30 June

⁴⁴ Blasco Gascó, Francisco de P, 'Algunas cuestiones del derecho a la propia imagen', 10

In the positive area, however, it is a sort of exclusive reserve of the control of the capture and playback, onerous or gratuitous, 'self-image'.⁴⁵

Hence, the image is the object protected by the right of one's own picture. That is the reason why it is a right referred to natural persons and not legal persons. As Montés Penadés states, through the right of one's own picture body image is protected, but not the spiritual or social image whose distortion affects the honour and is protected by this right. Legal persons will have their publicity rights protected by other Intellectual Property rights as trade marks, domain names...⁴⁶

Legislation

The right to one's own picture is regulated in article 18.1 of the Spanish Constitution of 1978 under the Chapter referred to Fundamental Rights and Civil Liberties, which warrants the right of honour, the right of privacy and the right to one's own picture.

Regarding the economical or commercial exploitation of the right to one's own picture (even though there is not a specific law of the right of publicity), as well as the scope of protection, the legal actions, etc. the Fundamental Law of Civil Protection 1/1982 5 May of the right of honour, right of privacy and the right to one's own picture, which develops the previous constitutional rule, may be used. The right of publicity as such (like in the common law countries) is regulated in articles 7.5 and 7.6, which treat as illegitimate interference.

- *The recruitment, reproduction or publication by photography, film or any other procedure of the image of a person in places or times in their private lives or out of them, except if those persons are public figures and they are in duty.*
- *The use of the name, voice or image of a person in order to advertise or commercialize with them.*

⁴⁵ Blasco Gascó, Francisco de P, 'Algunas cuestiones del derecho a la propia imagen', 8

⁴⁶ Montés Penadés, V. L. (eds) [1998] Los derechos fundamentales, en *Derecho civil. Parte General*, 276

There is no need to prove any kind of harm in order to exercise this claims, but the illegitimate interference. Article 9.3 establishes that *‘the indemnity shall extend to moral damages that will be assessed according to the circumstances and seriousness of the injury produced, considering the dissemination or hearing means by which it occurred’*.

Case Law

There are two important decisions regarding the right to one’s own image. The first one deals with the publication in a tourist guide of a man’s picture wearing the typical dress who seemed to be a famous actor who had given the inaugural speech of the city’s festival. The decision stated that the image’s reproduction should not be necessarily accurate, but enough to be objectively recognizable. However, the lawsuit was rejected because, whereas the right of one’s image is the right to reproduce or represent the figure of a particular person and no one may spread through illustrations the figure of a person without being authorized, in this case, the factions or the figure of the applicant were not recognizable.⁴⁷

The other one considered illegitimate intrusion regarding the publication (without authorization) of the picture of a naked woman, whose face was partially covered, but who was identified because of her anatomical features, the ring and the watch she was wearing. The picture was taken by her doctor with her permission, because he needed women’s pictures for his medical activity. The photograph appeared in a magazine which showed a story about the abuses committed by him. The Supreme Court said that the published picture could have no more than an erotic purpose and that the publication of the story without the women’s permission was an excuse to show the naked bodies.⁴⁸

⁴⁷ Decision of the Court of Appeal of Zaragoza of 9 June 1967

⁴⁸ Decision of the Supreme Court of 17 June 2004

The European Union: A Multi-Dimensional Approach To Publicity Rights

A right of publicity, the right of a person to control the commercial value of his or her persona, indicia of personality, is not recognized as a full-fledged intellectual property right in the EU today. While Europe's legal tradition considers persona and business essentially incompatible⁴⁹ and conceptual 'rapprochement' between the common law and civil law remains outstanding,⁵⁰ European law has generally evolved to enable increased commercialization of such rights.⁵¹ In the absence of the Community-wide protection of publicity rights, a 'multiple viewpoints rendering' approach may be useful to capture the image of the current EU legal framework. Each of the following paragraphs briefly sketches relevant EU legislation and cases from various dimensions, including privacy vs. freedom of expression, trademarks, copyright and design, unfair competition, and rules on applicable law.

A signal of a possibly emerging European consensus is given at the primary level,⁵² i.e. Articles 8 and 10 of the European Convention on Human Rights (the ECHR). Mainly concerned with intrusion into an individual's right to privacy or private life, Article 8 can conflict with Article 10, the right to freedom of expression, to hold opinions and receive and impart information and ideas, subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society'. In *Von Hannover v. Germany*, the European Court of Human Rights found that the decisive factor in balancing the protection of private life with freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.⁵³ Hence, cases involving 'statements made in the field of commercial competition which have been held to fall outside the "basic nucleus protected by freedom of expression" receive a lower level of protection than other ideas or information.'⁵⁴

⁴⁹ See e.g. Daniel Biene, 'Celebrity Culture, Individuality, and Right of Publicity as a European Legal Issue', IIC 505 [2005] (criticizing that the traditional European approach is 'not only out of touch with economic and social reality' but also creates 'a right so weak and unstable that only a fraction of its value can be converted into assets')

⁵⁰ See e.g. Eric Engle, 'Harmonisation of Rights of Privacy and Personality in the European Union', London Law Review, Vol. 1, No. 2, pp. [2005]

⁵¹ Cf. Isabel Davies and Tom Scourfield, 'Europe's patchwork approach to image rights', Managing Intellectual Property [July/August 2007]

⁵² Beverley-Smith, *supra* note 1

⁵³ *Von Hannover v. Germany* (Application No. 59320/00), European Court of Human Rights

⁵⁴ See e.g. Beverley-Smith, *supra* note 1 (citing *Markt Intern and Beermann v. Germany* (1990) 12 EHRR 161 and others)

Approximation of national laws is necessary when the differences between the EU Member States hinders *intra*-Community trade, *i.e.* free movement of goods and services, and any restrictive measures are justifiable only if the so-called proportionality test (necessary, appropriate, proportionate) is satisfied. Here, divergences clearly exist in the legal traditions concerning publicity rights. In the absence of case law by the European Court of Justice (ECJ), scholarly opinion makes various observations about the way forward, e.g. whether harmonization is needed and, if so, how it can be achieved.⁵⁵

Because of the multi-dimensional nature of publicity rights, different areas of intellectual property law can to some degree assist the enforcement of such rights, e.g. trademark,⁵⁶ design and copyright law. Under Article 4 of the Community Trademark Regulation (CTMR), personal names and likenesses that are capable of being represented graphically and distinguishing one's goods or services from others' can be registered as a Community trademark. In the *Picasso v. Picarro* case the Court of First Instance found that clear differences as to meaning could outweigh the visual or phonetic similarities.

If a senior mark acquired a reputation, the application of an identical or similar junior mark that may take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark may be refused (Article 8(5) CTMR). Such protection is available for personal names and the like which are extensively used by celebrities for merchandising purposes. So-called 'namesquatting', the illegal practice of registering a domain name or opening a social network site in the name of famous figures without legitimate reasons, is an emerging example of concern to such rightholders.

Copyright law can be used for the protection of publicity rights. Stemming from the traditional natural law theory, Article 6*bis* of the Berne Convention records respect for moral rights of the author against unauthorized divulgation, modification and other derogatory action. Although moral rights as such have not been harmonized in the EU, other key areas in copyright law, for example, exceptions and limitations to copyright have been largely harmonized by the Information Society

⁵⁵ See e.g. Engle, *supra* note 47 (concluding that 'national legislators have reached divergence that would be too great to be harmonised merely by judicial approximation' and thus 'harmonisation will require an E.U. Civil Code.');

⁵⁶ See generally, Stacey L. Dogan and Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 [February 2006]

Directive. It is still under discussion whether the public interest/disclosure defence under Article 10 of the ECHR is compatible with the EU jurisprudence on exceptions and limitations to copyright.⁵⁷

Design law can make an enforcement contribution where celebrities who are often identified with specific designs successfully secure their design rights by showing novelty and individual character.⁵⁸

Beyond the reach of intellectual property law, unfair competition law can be used to enforce publicity rights against passing-off, breach of confidence, misappropriation of reputation, or any other unfair commercial practices. EU law on unfair competition among business entities is harmonized in relation to misleading and comparative advertising.⁵⁹

In practice, a party wishing to exploit a celebrity's publicity rights, for example by making a movie based on the public figure, would normally sign an agreement with him or her not to sue each other.⁶⁰

Although substantive rules concerning tort or contracts have not been harmonized in the EU, the rules on applicable law have been aligned under the Rome I Regulation for contractual obligations and the Rome II Regulation for non-contractual obligations. In Rome II, Article 4 deals with the general rule on the law applicable to a non-contractual obligation arising out of a tort/delict and Article 6 deals with acts of unfair competition.

⁵⁷ See e.g. ECJ – Infopaq [2009]

⁵⁸ See e.g. Articles 4, 5, 6 and 7 of the Council Regulation (EC) No 6/2002 on Community designs

⁵⁹ See e.g. Directive 2006/114/EC concerning misleading and comparative advertising

⁶⁰ See e.g. Kerstin Schmitt, 'Commercial Exploitation of "Publicity" Rights in German Law', presented at the 11th EIPIN Congress 'Intellectual Property, Privacy and Publicity' [February 26-28, 2010]

Concluding Remarks

The European Union encourages harmonisation between member states. However, in the field of publicity rights, the European Union has yet to directly address the subject, which has led to a diverse approach at the national law level. On the one hand, in civil law systems, legislators tend to grant strong protection to one's privacy, and the concept of exploiting the economic value of a persona gives broad protection and is strictly enforced. On the other hand, common law systems do not recognise rights in a mere persona and seek to protect individuals against breaches of confidentiality and misrepresentation of their endorsement through passing off. The only piece of legislation which has influenced all the member states to some extent is the ECHR. Its principles must be respected by all signatories, which has led member states to assess their position on publicity rights.

There is a debate as to the scope of what the concept of privacy includes, with the main question: where are the boundaries between one's right to publicise their own life for commercial exploitation and their right to maintain their privacy in other aspects of their lives?

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