

Image is Everything™: The New Image Right of Guernsey

Dr. Angela Adrian¹

Abstract: Image rights involve the commercial appropriation or exploitation of a person’s identity and associated images linked to that person. They are related to the distinctive expressions, characteristics or attributes of, or associated with, a personality made available to public perception. Image rights are an integral part of artistic expression and a product of celebrity or sporting achievement in the twenty-first century. Image Rights (Bailiwick of Guernsey) Ordinance establishes a new form of intellectual property, previously unrecognized in a registrable form. Two key concepts anchor the legislation: (1) the “registered personality”, and (2) “images” which are associated with or registered against that registered personality. The core right is the registered personality.

1 Introduction

Never has the world of media been so pervasive and accessible in almost every facet of modern life. Visual image, sound bites and the cult of the celebrity are powerful forces, which can determine success or failure in nearly every aspect of public life, be it politics, performing arts or social communication. The commoditization of image has real value, both directly - for the individual concerned – and indirectly, in terms of generating income for firms specializing in hosting social media.

Image rights involve the commercial appropriation or exploitation of a person’s identity and associated images linked to that person. They are related to the distinctive expressions, characteristics or attributes of, or associated with, a personality made available to public perception. Image rights are an integral part of artistic expression and a product of celebrity or sporting achievement in the twenty-first century. Sportsmen, film stars, pop stars, television personalities, and many other well-known people successfully commercialize their images and enjoy large incomes from such exploitation. For example, by allowing their images to be associated with goods which are being sold or services being rendered, many

¹ Angela Adrian, B.B.A., M.I.M., L.L.M., J.D., PhD, would like to thank Keith Laker and Gerry Morrissey for their input and support for this article.

modern celebrities earn more from this exploitation than from the “performance” fees in the activity which initially brought them to general notice. Further, there can be value in the fame of a celebrity long after that person’s death. Therefore, the value of image rights is such that they are already being actively managed and traded, despite the lack of clear legal recognition and the lack of clarity as to the extent of the rights. There are several similarities between the infringement principles for image rights and those surrounding trade marks. This will be very useful from a case law perspective. As such, image rights are commercially valuable and build upon international standards for intellectual property.

The Image Rights (Bailiwick of Guernsey) Ordinance 2012 (IRO) establishes a new form of intellectual property, previously unrecognized in a registrable form anywhere else in the world. Two key concepts anchor the legislation: (1) the “registered personality”, and (2) “images” which are associated with or registered against that registered personality. The core right is the registered personality.

On 3 December 2012, the Bailiwick of Guernsey was the first jurisdiction anywhere in the world to introduce a registration system for image rights. The Image Rights (Bailiwick of Guernsey) Ordinance 2012 facilitates for the first time the registration of personality and any image rights (including rights in characteristics, mannerisms or traits) unique to that personality. The ability to carry out such a registration and obtain a property right in one’s image is a watershed and allows one to effectively register and protect one’s personality and image rights as a matter of public record for the first time. With this registration, the appropriation by others of a Registered Personality or associated characteristics, for unauthorized economic benefit may give rise to statutory infringement proceedings under the IRO.

Hitherto, there has been no means for the legal registration of personality and image rights anywhere. The ability to publicly assert, exploit and protect image rights has instead depended on the use of a number of laws that seek to protect specific types of intellectual property, but where none are specifically designed for protecting such rights. In contrast to the existing legal concepts, ‘personality’ has now become a property right – i.e. not just something that happens to a person, but something that can be commercially exploited by, but also stolen from, a person. The IRO provides a legal framework which protects both economic and dignitary interests, without having to sacrifice one for the other.

The benefits are numerous: any person, be they a natural person or a legal entity, can register their personality as a unique and exploitable asset. Moreover, the term ‘personality’ includes fictional personalities or the personalities of persons who have died within the last 100 years. It also permits joint and group registrations. Accordingly, Walt Disney Studios, for example, could choose to register Mickey Mouse as a personality, or the estate of Albert Einstein could choose to register Einstein’s personality. The registration of a personality immediately captures all present, historic and future images associated with that personality. In the context of the law, ‘image’ is framed extremely widely and means the name of the person and includes:

“...the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage, or...

...any photograph, illustration, image, picture, moving image or electronic or other representation (‘picture’) of a personage and of no other person ...”²

Therefore, if the personality concerned is capable of expressing something unique by any means, it can be protected as a ‘registered image’ under the law. Moreover, as registered, protected intellectual property, a registered image (or the entire registered personality) can be sold or licensed for the authorized use by others recognizing the value that was hitherto difficult to clearly define and capture.

2 History of Image Rights Protection

The perception of our own person is what imbues us with ‘personality’ in the eyes of others.³ This personality is inevitably unique and therefore distinctive to the individual concerned. If that person is a recognized celebrity then, almost certainly, there is value to others in being associated with that personality. This value, and the rights associated with it, is generally what are known as “image rights”.

Traditionally, there are two aspects of image rights that a celebrity is concerned with, namely:

² *The Image Rights (Bailiwick of Guernsey) Ordinance 2012*, s3(1)(b) and (c)

³ Adrian, A (2010) *Law and Order in Virtual Worlds: Exploring Avatars, their Ownership and Rights*. Hershey, PA: IGI Global

exploitation of image rights through sale and transfer (e.g. licensing arrangements); and protection of the image rights (and therefore their inherent value) through possible registration and (if necessary) infringement proceedings.

Inevitably, the ability to record one's legal property in an image right through registration aids both the economic exploitation of the right and also its protection. Historically, copyright and trade mark legislation has been used by celebrities to try and carry out this function. These tools, which are described in greater detail below, are purpose-specific and therefore ultimately limited in their application. For those attempting to stop another person actually trading on their image or personal goodwill without consent, a combination of the legal remedies have often been used together to build a less than perfect case to restrain an offending party and account for profits earned. In short, there has been a demonstrable void in the law prior to the IRO to enable a person to adequately exploit and protect distinctive attributes of a person's character, or personality.

In the United Kingdom, while not specifically recognized by statute, image rights are conceptually recognized and dealt with by the legal system on a daily basis. The standard Premier League Football Players Contract specifically defines and deals with the ownership and commercial exploitation of a club footballer's image rights in great detail. However, because there is no public registration creating a property right like a trade mark for image rights in the United Kingdom, only the parties to an image rights contract will be aware of the ownership rights created and dealt with therein. This may be desirable in some cases, but in others the owner of such a valuable right by way of assignment or license may want to publicly record and protect that ownership interest.

Until now, anyone wanting to try and protect their image rights from unauthorized infringement in the UK and elsewhere had to rely on a collection of statutory and common law causes of action, which are often not entirely suitable for the job at hand.

2.1 Copyright

Copyright law is effectively limited in its application to the protection of creative works including pictures and literary works, and will only then protect the specific pictures in which the copyright exists, not an "image" in the more general sense of the word.⁴ Worse still from an image rights perspective; it is the person taking the picture that enjoys

⁴ Copyright, Designs and Patents Act 1988 s 1

protection at law, not the person who may be the subject of the picture.⁵ Copyright, therefore, confers no ability on a person to control the use of his or her image taken by another person.⁶ It is also established that there is no copyright in a name.⁷

2.2 Trade Marks

The oft-attempted use of Trade Mark legislation to protect personality is littered with conflicting historical case law and subsequent appeals, all of which ultimately serve to illustrate that Trade Marks were designed to do just that – to serve as a recognizable indicator of the origin (i.e. the manufacturer) of goods or services, not one’s personality or image.⁸ Turning your name into a trademark is an increasingly common legal move for celebrities seeking to protect the commercial use of their name to sell goods and services. By way of recent example, in 2012 singers Beyoncé and Jay-Z attempted to register the name of their daughter, Blue Ivy, as a trade mark. Initially, the application failed. However, after negotiations with other rights holders, they were able to secure the registration. Registrations relating to famous people often fall into the trap of being more descriptive of the person themselves rather than denoting origin. For example, the mark “DAVID BECKHAM” as applied to a poster may simply describe the image depicted on that poster, rather than indicate the commercial source from which it originates. It is arguable that the more famous the celebrity, the more likely that use of his name or likeness will be deemed descriptive and so not amount to trade mark use.⁹

2.3 Passing Off

The laws pertaining to the tort of Passing Off (misrepresenting goods or services as being associated with those of a claimant when, in fact, they are not) have also been used in some jurisdictions with varying degrees of success to restrict the unauthorized use of image by others. However, to be effective a claim for passing off must satisfy three criteria: ‘reputation’, ‘misrepresentation’ and ‘damage’.¹⁰ For parties with no competing commercial activities, the element of misrepresentation, which requires the conduct, complained of, to be such that it leads or is likely to lead the public to believe the goods or services offered by

⁵ Copyright, Designs and Patents Act 1988 s 1(1)(a) and s 4(2)

⁶ This must be claimed under a right to privacy. See generally, Human Rights Act 1998 sections 2 & 3; Human Rights Act 1998 Schedule 1, Part 1, Article 8; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; *Murray v Express Newspapers Plc* [2008] EWCA Civ 446

⁷ Fact sheet P-18: Rules dealing with names, titles and phrases (2006) available at http://www.copyrightservice.co.uk/copyright/p18_copyright_names

⁸ Trade Marks Act 1994

⁹ G Davies (2004) *The Cult of Celebrity and Trade Marks: the next installment*, 1:2 *SCRIPTed* 230 at <http://www.law.ed.ac.uk/ahrc/script-ed/docs/agents.asp>

¹⁰ *Reckitt & Colman Products Ltd v Borden Inc.* [1990] 1 All E.R. 873

the defendant are the goods or services of the complainant, is often missing, thus negating any possible protection via this route.

2.4 Breach of Confidence

There is no stand-alone law of privacy under English law, although confidence in personal matters may be protected under certain circumstances. If the use of one's image is used in breach of confidence, then the law may afford protection; however, it is only very limited protection that will be highly limited in its practical application, because of the need for a duty of confidence to exist. Lord Nicholls in *Campbell v MGN Ltd* summarized the law of confidence as "[the imposition] of a duty of confidence whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential"¹¹

2.5 Defamation

Derogatory use of an image may be defamatory if it is likely to lower the subject in the estimation of 'right thinking' members of society generally. However, this specific requirement in effect limits the protection to cases involving some form of derogatory treatment. There is a new bill being presented to Parliament on this issue currently. The aim of the Bill is to reform the law of defamation to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation. The Bill makes a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute.

Key areas include:

includes a requirement for claimants to show that they have suffered serious harm before suing for defamation

removes the current presumption in favor of a jury trial

introduces a defense of "responsible publication on matters of public interest"

provides increased protection to operators of websites that host user-generated content, providing they comply with the procedure to enable the complainant to resolve disputes directly with the author of the material concerned

¹¹ *Campbell v MGN Ltd* [2004] A.C.457 at 464-5

introduces new statutory defenses of truth and honest opinion to replace the common law defenses of justification and fair comment.¹²

2.6 Data Protection

Under the UK Data Protection Act 1998, photographs of a person constitute personal data. Use of images of a living person may therefore amount to processing of that personal data and so must be handled according to data protection principles, i.e. fairly and lawfully. Use of the image without consent will only be permitted where it is done in the pursuit of legitimate interests (e.g. journalistic exemption where publication is in the public interest).¹³

2.7 Other regulatory mechanisms – ASA¹⁴

In the UK, under the CAP (Committee of Advertising Practice) code, advertisers must obtain permission before referring to a celebrity in an advertisement or implying personal approval of the marketed goods. The ASA (Advertising Standards Authority) has also recently seen its remit extended to the online sphere, including social networking platforms. If the image rights in question are being misappropriated in an advertisement then there may be some redress for the complainant through this forum, however, financial recompense may be limited and, as seen in the David Bedford case above, often the damage is already done before a complaint is upheld.

3 Limitations of Current Laws

Most of the existing laws described above deal with consequences of infringement. They provide a degree of redress in certain specific situations. They do not provide a pro-active means to register, exploit and protect one's image rights. Further, the problem often arises that infringement is not necessarily deliberate. Celebrity 'A' may have entered into a contract with manufacturer 'B' to allow 'B' to endorse its products by association with 'A', but how does third party 'C' know this? 'C' may assume they can gain some benefit by using reference to 'A' but in doing so will unwittingly infringe 'A's agreement with 'B'. A key feature of the IRO is that it is linked to an on-line, publically searchable database¹⁵ of Registered Images maintained by the Guernsey Intellectual Property Office.

¹² Defamation Bill 2012-13

¹³ UK Data Protection Act 1998

¹⁴ ASA home page: <http://www.asa.org.uk/>

¹⁵ Subject to creating a simple user account.

None of the laws described above approach the scope and flexibility of the IRO, which has been drafted from a clean slate and in a bespoke manner to specifically fill the existing legal void and cater for the registration, exploitation and protection of image rights. However, the Guernsey law relates to, and is compatible with, elements of the laws of each of the above jurisdictions and this may be seen as further confirmation that the world will be receptive to the protection offered by the Image Rights Ordinance. No other jurisdiction does what Guernsey does now. Currently, there is patchwork protection based on whether or not the plaintiff can dress a grievance up as a particular cause of action cobbled from a variety of ill-fitting protections. There is no clarity, consistency or continuity. Sometimes, a person will have to pursue a claim on offended dignity and a right to privacy. Alternatively, they will have to claim on a violated economic interest (publicity), but if there is no economic loss, then they will lose. Protecting celebrity status is precarious. Registration under the IRO is aimed to make this easier.

More than anything else, the overwhelming reason for an aspirant customer to register on the Image Rights Register (IRR) is believed to be the 'catch all' nature of the law as described in more detail in the following section. Unlike other laws that address specific aspects and are effectively fixed as a snapshot in time, by virtue of one simple registration, the IRO protects all current, historic and future characteristics of the registered personality – no matter how they evolve during their lifetime. Although not an insurance product, the analogy of 'insurance for future successes conveys something of what an early registration can provide.

4 The Image Rights Ordinance ('IRO')

The registration of a personality immediately captures all present, historic and future images associated with that personality. Therefore if the personality concerned is capable of expressing something unique by any means, it can be a protected image under the IRO. Moreover, as registered intellectual property, a registered image (or the entire registered personality) can be sold or licensed for the authorized use by others recognizing the value that was hitherto difficult to clearly define and capture.

Not only will the image rights register list key details of the registered personality and associated registered images, but it may also list key details of any licensing agreements entered into regarding the registered personality and associated images. Consequently by choosing to register, a customer is effectively asserting to the world that their personality and any associated images are already registered and therefore potentially protected by law, thus helping to ensure that unintentional infringements do not occur.

Furthermore, there are some lessons that have been usefully learned from the way other IPR's have historically operated: a registered patent or trade mark will take priority over an earlier, but unregistered process or product. Consequently there is no latitude for someone to subsequently argue in court that his or her image pre-dated one already registered. To a certain extent therefore, registration on the IRR will be fuelled by positive feedback: as more people choose to register, the pressure on those who have not yet registered will increase through a fear of missing out to someone else.¹⁶

4.1 The Image Rights Register (IRR)

The IRO is intended to operate in conjunction with a searchable database, – the IRR. This is operated and maintained by the Guernsey Intellectual Property Office and public access to it can be obtained subject to the creation of a simple username and password account.¹⁷ The viewable information is limited to details concerning the registered personality and any associated registered images, the registered agent, whether any licenses have been granted and registered, whether the moral rights of the personality have been asserted and the renewal dates of the registration. Importantly, details of the proprietor (i.e. the registered owner) are not viewable on this database. Applications for registration on the IRR are published weekly on the 'Journal' section of the Register website¹⁸ and are viewable for twenty working days, during which any objections to the proposed registration can be lodged with the Registrar. If no objections are received during this period, the application for registration should then be automatically approved.

4.2 Registered Personality

According to Section 2(1) IRO, "A registered personality is a property right obtained by the registration of a personality in the Register in accordance with the provisions of this Ordinance." Personality refers to the personality of the following types of person or subject which is described in the Image Rights Ordinance as the "personnage". Section 1(1) IRO describes a "personnage" as follows:

- (a) a natural person,
- (b) a legal person,

¹⁶ In practice this is more likely to drive the registration of registered images (i.e. specific characteristics or mannerisms) than the registration of personality. When dealing with real person registrations (as opposed to fictional characters) then each personality is of course unique.

¹⁷ See <http://ipo.guernseyregistry.com/article/103845/Login?returnarticleid=104530>

¹⁸ See <http://ipo.guernseyregistry.com/article/104630/Image-Rights-Journal>

(c) two or more natural persons or legal persons who are or who are publicly perceived to be intrinsically linked and who together have a joint personality ("joint personality"),

(d) two or more natural persons or legal persons who are or who are publicly perceived to be linked in common purpose and who together form a collective group or team ("group"),
or

(e) a fictional character of a human or non-human ("fictional character"),

Whose personality –

(i) is registered under this Ordinance (and is accordingly a "registered personality" for the purposes of this Ordinance), or

(ii) is the subject of an application to be so registered.

“Personality” is defined in Section 1(2) IRO as “the personality of the person, two or more persons or character referred to in subsections (1) (a) to (e).” Section 1(5) IRO defines a "natural person" as a human being who - (a) is alive, or (b) has died within the period of 100 years preceding the date of filing the application for the registration of the personality. So, Robert Downey, Jr. would be a natural person, and so would, the deceased, Charlie Chaplin. Moreover, Section 1(6) IRO defines a "legal person" as a body corporate or other body having legal personality that – (a) is currently in existence, registered or incorporated, or (b) has ceased to be in existence, registered or incorporated, for example by reason of having been liquidated, dissolved, wound up or struck off, within the period of 100 years preceding the date of filing the application for the registration of the personality. Joint personalities and groups are also accounted for; for example, Laurel & Hardy may be joint personalities; whereas, Van Halen may be both joint personalities and a group. Section 1(3) IRO clarifies this: “(3) A person who forms part of a - (a) joint personality, cannot be replaced by another person, (b) group, can be replaced by another person. (4) The persons forming a - (a) joint personality, may not change from time to time, (b) group, may change from time to time.” Finally, examples of human fictional characters would be James Bond and Tintin, and examples of non-human fictional character would be Shrek, Snoopy and Mickey Mouse.

“Image rights” are defined in s 5(1) IRO as “exclusive rights in the images associated with or registered against the registered personality.” Section 3(1) IRO defines “image” as:

(a) the name of a personage or any other name by which a personage is known,

(b) the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage, or

(c) any photograph, illustration, image, picture, moving image or electronic or other representation ('picture') of a personage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture.

Note that there is no requirement to register specific images associated with the registered personality beyond the personality's name itself. However, for there to be a benefit in registering and for easier enforcement, specific images are useful. A registered image is presumed to be distinctive and of value, which are requirements for infringement, whereas these qualities must be specifically proven in order to enforce rights in an unregistered image. Further, infringement damages or an account of profits will not be awarded where the defendant proves that at the date of infringement he did not know and had no reasonable grounds for knowing that the image was a registered personality's image. These conditions do not apply where the image infringed is registered. In this respect, think of Usain Bolt's pose after he has won a race, the expression "Go ahead. Make my day." or the ever changing images of Madonna.

4.2.1 Who can register?

As seen above, there is provision made in the Image Rights Ordinance for the register to be publicly searchable. The main details that will be recorded on the Register of Personalities and Images are the name and address of the proprietor of the personality and image rights, together with date of registration.¹⁹ The date of application will be the date upon which all of the appropriate paperwork for an application has been received by the Registry.²⁰ This may be important as the ultimate registration date will be the application date - if there is a late filing of certain requirements this will affect when a proprietor can back date any claim for damages for infringement.

The starting point is therefore to be registered as the proprietor of a registered personality. That proprietor has the image rights and other rights and remedies provided by the Image Rights Ordinance s 2(2). The person registered as the proprietor is, by reason of the fact of registration alone, the legal owner of the registered personality and the image rights and

¹⁹ Part III IRO

²⁰ s 17(2) IRO

other rights in that registered personality. Further, “the name of a personality does not have to be the same as the name of the personage.”²¹ Lady Gaga would be a good example of this.

Under Image Rights Ordinance s 2(3), the proprietor of the registered personality and associated image(s) can be different from the actual personage. In many cases the personage will have assigned the rights to exploit their image to a third party. Hence, the application process under the Image Rights Ordinance allows for the registered proprietor and the personage to be different persons. As such, the legal owner of the rights to exploit the personality’s images is the person entitled to be registered as the proprietor of the registered personality; if the personage has retained rights in their image, they (or their personal representative) are entitled to be registered as the proprietor.

As to fictional characters, the creator of the fictional character is, generally, the prospective proprietor of the fictional character’s personality, together with any image rights therein. A legal person’s personality can be registered, so arguably therefore, Disney could be a registered personality, thereby getting protection for cartoon characters associated with Disney, such as Mickey Mouse, Donald Duck and Winnie the Pooh, and/or these characters could be registered personalities in their own right.

4.2.2 What can be registered:

Also entered on the register will be a list of any registrable transactions against a particular personality or image.²² Such transactions would be:

- license;
- assignment;
- assent by a representative;
- order of court; or
- other transactions as may be prescribed (such as security granted over the image rights).

4.3 Why an image may not be registered

²¹ s 1(7) IRO

²² ss 51 – 64 IRO

Image Rights Ordinance ss 6 -10 set out various grounds for refusal of registration of a personality or an image. These effectively either complement or mirror existing trade mark laws and rules and fall into two categories – absolute grounds for refusal and relative grounds for refusal. It should be noted that the Image Rights Ordinance additionally allows for grounds which may be determined by the Registrar.²³

4.3.1 Absolute Grounds

An absolute ground is one where the Registry itself fundamentally objects to the registration of the right. Such an objection may be raised on the following grounds:

what is applied for does not satisfy the definition of a personality or image;²⁴

contrary to public policy or morality (e.g. Jesus);²⁵

deceptive to the public;²⁶

the image or personality includes a representation of a protected emblem, such as a national flag, the Olympic symbol, image of the Queen;²⁷

use prohibited by Guernsey law;²⁸

bad faith application;²⁹

the application includes any statement, information, or document which constitutes an intellectual property offence under Guernsey law³⁰; and/or

the image has, or in the case of a personality, the images associated with the personality have, become so customary or generic as to no longer identify a specific personality.³¹

Section 6(h) IRO may be a difficult concept in relation to image rights. For example, registering XXXL for clothing would not be possible. However, how this applies to images is not so obvious.

²³ s 6(g) IRO

²⁴ s6(a) IRO

²⁵ s6(b) IRO

²⁶ s6(d) IRO

²⁷ ss 6(d)(i) & 7 IRO

²⁸ s6(e) IRO

²⁹ s6(f) IRO

³⁰ s6(g) IRO

³¹ s 6(h) IRO

4.3.2 Relative Grounds

A relative ground, according to sections 8 & 9 IRO, for refusal is where the personality or image applied for is deemed to be identical or confusingly similar to an existing registered personality or registered image, or similar to an existing registered personality or registered image where use without due cause would take unfair advantage or be detrimental.

The notion of what is identical or similar is much more difficult than it seems. Trade mark courts have been struggling for decades over what “confusingly similar” and “likelihood of association” may mean in practice. Would Stig’s eyes through a visor be similar to his face on its own? Would any two people wearing a crash helmet look the same if photographed from the same angle? If so, would it cause confusion?

Another relative ground for refusal is where there is an earlier right in relation to the personality or image applied for, whether this be trade mark rights, copyright, design rights or otherwise. In practice, it is likely that the Registrar will not examine applications for relative grounds but will rely on the declaration that the applicant is required to make that the registration of the personality or image applied for is not, to the best of its knowledge, prohibited by virtue of any existing registered personalities, existing registered images or other earlier rights.³²

4.4 What do you get?

As explained above, the registration of a personality gives the registered proprietor exclusive rights in the images associated with or registered against the registered personality. This is a step forward in intellectual property rights from the more amorphous right of publicity. The right of publicity has lacked the analytical support of most intellectual property rationales. Those who oppose a right of publicity say it is a threat to a robust public domain, creative outputs, and freedom of expression. The digital image right granted in Guernsey avoids these issues by substantiating the recognition of personhood interests of a dignitary nature.³³ This new right will assist artists who find their performance undervalued and appropriated without redress as well as assisting non-celebrities who have found themselves with a right but no remedy for the misappropriation of their image.

³² S 10 IRO

³³ Greene, K J (2008) *From Second Life to the Afterlife: Intellectual Property Expansion*, 11 Chap. L. Rev. 521

Further, this new law allows these rights to be transferable. A registered personality and the image rights in it are personal or movable property.³⁴ As such, it is transmissible by assignment provided that certain requirements are met, namely that an assignment is not effective unless it is in writing signed by or on behalf of the registered proprietor.³⁵ There are provisions requiring registration of certain transactions affecting registered personalities and image rights. These include, most importantly, assignment and granting of a license.³⁶

The registration of a personality lasts for a period of ten years from the date of registration and may be renewed for further periods of ten years in perpetuity. Where a specific image has been registered against the registered personality, the registration of that image lasts for three years and may be renewed for further periods of three years.³⁷

Until the application has been made for registration of the registrable transaction, the transaction is ineffective as against a person acquiring a conflicting interest. This is subject to the provision that there are no reasonable grounds of knowledge. The 'licensee' has no rights or remedies in relation to infringement.³⁸ Upon registration, the licensee acquires certain rights to call on the proprietor to bring infringement proceedings and/or bring infringement proceedings itself. This is a very important step in the protection of image rights. As they currently only relate to the individual and are currently drafted on a purely contractual basis, the licensee has to rely on the individual themselves to enforce the right. With registered image rights the club or the brand as licensee will be able to enforce directly under certain circumstances. This mirrors trade mark principles.

4.4.1 Infringing the Image Right

The similarities to the infringement principles surrounding trademarks are very useful from a case law perspective. There is an additional layer of complication to the infringement provisions. Only a "protected image" can be infringed.³⁹ To be a protected image, at the time of the alleged infringement the image has to be "distinctive"⁴⁰, have "actual or potential value"⁴¹ and satisfy the registrability requirements of an image (whether or not it is in fact registered).⁴²

³⁴ s 51 IRO

³⁵ s 52 IRO

³⁶ ss 61 – 64 IRO

³⁷ ss 18 & 19 IRO

³⁸ s 63 IRO

³⁹ s 27(2) IRO

⁴⁰ s 28 IRO

⁴¹ s 29 IRO

⁴² s 27 (2) (c) IRO

An image is “distinctive” if it is recognized as being associated with the registered personality by a wide or relevant sector of the public in any part of the world, and various factors are provided for determining whether an image is distinctive. Notably, a registered image is presumed to be distinctive. This presumption can be rebutted. An image has “actual or potential value” if it can or has the potential to be exploited for valuable consideration. Again, a registered image is presumed to have actual or potential value; likewise, this can be rebutted.

A registered personality’s image rights are infringed by the use for a commercial purpose or a financial or economic benefit, without the consent of the proprietor of the image rights, of an image:

- (a) Which is identical or similar to a protected image and because of that there exists a likelihood of confusion on the part of the public (which includes the likelihood of association with the registered personality); or
- (b) Which is identical or similar to a protected image and the use without due cause
 - (i) takes unfair advantage of the distinctive character or repute of the personage, or
 - (ii) is detrimental to the distinctive character or repute of the personage, or the value of the registered personality or its images.⁴³

4.4.2 Unauthorized Use

The Image Rights Ordinance s 27(3) provides a wide and non-exhaustive definition of what constitutes unauthorized use of an image, including:

use of the image in a communication to the public (communication being broadly defined as any form of communication including without limitation, personal appearances, exhibitions, artistic works, drawings, documents, photographs, pictures, recordings, motion pictures, films, broadcasts, publications, websites and electronic communications);

use of the image in connection with sponsorship or for the purposes of marketing or endorsing goods, services, activities or events;

use of the image in relation to goods or image carriers; and

use of the image as a domain name or as a company name.

⁴³ s 27(1) IRO

The Guernsey Court may analogize to English copyright and trade mark law in the interpretation of the concepts of “use” and “communication to the public”. These are wide ranging definitions for infringement and they do not limit the use to particular goods or services as with a trade mark. As a result, this is a powerful right which is particularly attractive to brand owners.

4.4.3 Defenses

The IRO recognizes that there are circumstances in which it is of a wider benefit to all to permit limited use of a registered personality or image without seeking consent from the registered proprietor in question. Fair dealing for parody, satire and responsible news reporting is permitted. For example, as the law deals with matters of economic benefit rather than privacy, it is likely that the controversial photographs of the Duchess of Cambridge published in 2012 would have been permitted initially – as being of “...general or public interest”, but the subsequent twenty-eight page special supplement published by an Italian newspaper would almost certainly have infringed the Duchess’s Image Rights (had these been available at the time) on the basis of ‘unauthorized economic benefit’.

Similarly the use of a registered personality or image for the purposes of comparative advertising or inclusion in works of art (including theatre & film) is not, of itself, an infringement, provided that the work or material is not in itself marketing or endorsing goods or services. There are some additional provisions including the incidental inclusion of a person’s image in material that may be broadcast or otherwise distributed – such as a photograph, which incidentally includes the image of a person in the background.

There are provisions in the Image Rights Ordinance dealing with invalidity and revocation of registrations.⁴⁴ Sections 31 – 40 IRO detail a number of public interest defenses or exceptions to infringement, including:

comparative advertising, provided the use is in accordance with honest practices in trade, industrial, commercial or not for profit matters;

incidental use;

merely descriptive use where used fairly and in good faith only to identify something other than the personage;

⁴⁴ ss 23 & 24 IRO

fair dealing for the purposes of research;

fair dealing for the purposes of news reporting, commentary and satire;

fair dealing for the purposes of the arts;

things done for the purposes of education;

fair dealing for any other purpose;

acts of public administration and law enforcement or done under statutory authority;

making of temporary copies (internet);

subject to any agreement to the contrary, use of an image by the personage, or a person's use of their own image; and

exhaustion of rights in goods put on the market.

These fair dealing provisions are important, not just because they are intrinsically reasonable, but because they help to ensure that the IRO is fully compliant with various international agreements regarding Intellectual Property, and this enhances the likelihood that the law will be internationally recognized and upheld.

5. Image Rights Worldwide

Prior to the advent of the IRO, there has been no facility to publicly register image rights in any part of the world. However, image or personality rights are still a well-recognized concept globally.

5.1 Enforceability

Given that the potential use of an image is global, and the most lucrative markets for exploitation are outside of Guernsey, the effectiveness of protection through registration under the IRO outside Guernsey is germane. The legislation is primarily designed to prevent unauthorized economic benefit by others using the registered images of the owner. In most cases, the process of enforcement will start with, and may never proceed beyond, the issue of a "cease and desist" type of letter and, possibly, some form of compromise or settlement for the unauthorized use of an image. However, if further action is needed, then a plaintiff may look to obtain a judgment in the Guernsey Courts. In doing so there may be important questions of jurisdiction to consider, for example, where the actual infringement occurred or if the defendant is located outside of Guernsey.

In the first instance, one could approach the Guernsey Court on the basis of an infringement of a registered Image Right with claims including an order to cease and desist, for delivery up of the infringing goods, together with a claim for damages. The plaintiff would then have to approach the foreign court and seek to have the Order recognized in the foreign jurisdiction. Until there is further certainty, it may be prudent to combine this with the common law action of passing off, a claim for an infringement of right to privacy or defamation or if relevant a claim for infringement of a registered trade mark in the foreign jurisdiction.

In the context of an international infringement a prospective plaintiff will need to consider issues such as whether to bring proceedings on an ex parte (without notice) basis (for the most serious infringements which need swift action) or to seek leave to serve proceedings outside of the jurisdiction. In any event, the plaintiff is likely to reach a point where it is necessary to have the IRO recognised in a foreign jurisdiction, either through enforcing overseas a judgment obtained in the Guernsey Courts, or having an overseas court recognise proceedings commenced in the Guernsey Courts.

There may be, an albeit limited element of certainty in that, should the plaintiff seek to enforce a purely monetary judgment, Guernsey has several reciprocal enforcement agreements in place with the following countries: England and Wales, Scotland, Northern Ireland, Italy, the Isle of Man, the Netherlands, the Netherlands Antilles, Surinam, Israel and Jersey. The enforcement is pursuant to the Judgment (Reciprocal Enforcement) (Guernsey) Law 1957 which states that a judgment may be registered if: A sum of money is payable under the judgment;

The original Court is deemed to have jurisdiction to grant the judgment;

The judgment is final and conclusive;

The judgment is from a superior court of a reciprocating country.

Judgments of the Guernsey court may also be enforceable in the reciprocating countries, provided they meet the qualifying criteria of the relevant local legislation.

In some cases, it may be possible to plead an infringement of Guernsey image rights in an action brought directly in the foreign jurisdiction albeit, most probably, in conjunction with

other proceedings already in existence to protect unauthorized use, such as passing off or trade mark infringement. Looking at recent intellectual property case law, the *Star Wars Stormtroopers*⁴⁵ case merits further discussion. The Supreme Court of England and Wales delivered a notable judgment on 27 July 2011 which may help to develop this argument.

The brief facts of this case center on Mr Andrew Ainsworth, a British designer who was a member of the team responsible for the assembly and design of the “Star Wars Stormtroopers” costume. Mr Ainsworth ran into difficulties, when in 2004, he placed replicas of the Stormtroopers helmets on sale. The helmets were advertised and sold through a website in the United Kingdom with additional sales in the United States.⁴⁶

An interesting point emanating from the judgment was that the Court confirmed that a defendant domiciled in the United Kingdom can be sued in England for foreign copyright infringement and not just copyright infringement which occurs in the United Kingdom. A prospective claimant will need to provide the English Court with expert evidence to prove the existence of a foreign right and the infringement of this right. This may be an indication that the English Courts’ will, in time, be prepared to create a precedent for intellectual property rights owners to sue UK domiciled defendants for infringing foreign rights.⁴⁷

Ultimately, it remains to be seen whether, on grounds of public policy, the courts of a foreign jurisdiction will be prepared to recognize Guernsey’s image rights laws. Much will depend on the jurisdiction in question. Some jurisdictions, which have more developed image rights laws that specifically recognize a similar concept (albeit not in a registered form), may be more willing to recognize the IRO. On the other hand, some jurisdictions may not recognize image rights as such, but view them as non-transferable personal rights (i.e. not a transferable property right in the same way as the IRO does). Recognition and enforcement in these jurisdictions will be more difficult.

However, that the fact that a person has taken the trouble to assert his or her image rights and register them on a publicly available register should provide significant strength to any claim to protect such rights globally, irrespective of the jurisdiction. In assessing whether legal rights should be upheld and what value should be placed on them, the courts will often look to the claimant’s prior conduct and use of the rights. For example, in the Eddie Irvine case against Talksport, the court relied on the fact that Mr Irvine had historically entered

⁴⁵ *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39, [2012] 1 AC 208

⁴⁶ *Id.*

⁴⁷ *Id.*

into endorsement arrangements with associated royalty fees in finding that Talksport had traded on his valuable reputation and goodwill and awarding him damages equivalent to what have been the value of royalty fees Talksport would have been obliged to pay had it entered into a proper and formal contract with Mr Irvine.⁴⁸ A person registering their image rights under the IRO and entering into associated licensing and royalty arrangements will be showing a similar history of placing a significant value and trading history on their image rights. Courts in other jurisdictions, even if not deciding a case based directly on the IRO itself but rather one of the other existing legal rights already outlined, will be unlikely to ignore this evidence

In summary, it is clear that image rights and their inherent value are becoming more commonly recognised around the world, which will progressively strengthen the effectiveness of enforcing IRO registered images internationally. The multiplicity of different causes of action across different jurisdictions, all of them limited in application and effectiveness, should be seen not as alternatives to the IRO, but rather as a clear indication that there is a universal desire to provide legal protection in these matters. The IRO is the first law to create an in rem property right applicable to anyone who cares to register their personality on the Image Rights Register.

5.2 Europe

The crux of the issue is that existing causes of action do not focus on an individual's privacy of image, and this may soon be problematic under the European Convention of Human Rights. Article 8 protects an individual's "right to respect for his private and family life", and the European Court of Human Rights has recently suggested this encompasses a right to image. In *Reklos v Greece*, the Court stated "the right to protection of one's image is...one of the essential components of personal development and presupposes the right to control the use of that image."⁴⁹

In Germany, personality rights are protected under the German civil code. The concepts of an "absolute person of contemporary history" allow the depiction of individuals who are part history but still provide them some protection of their rights of privacy outside the public sphere. A succinct statement of the German law can be found in the following judicial statement from the *Marlene Dietrich* case:

⁴⁸ *Irvine v Talksport Ltd* [2003] 2 All ER 881.

⁴⁹ 1234/05 [2009] ECHR 200 (15 January 2009)

“Sec. II; para. 1. The general right of personality has been recognized in the case law of the Bundesgerichtshof since 1954 as a basic right constitutionally guaranteed by Arts 1 and 2 of the Basic Law and at the same time as an "other right" protected in civil law under § 823 (1) of the BGB (constant case law since BGHZ 13, 334, 338 - readers' letters). It guarantees as against all the world the protection of human dignity and the right to free development of the personality. Special forms of manifestation of the general right of personality are the right to one's own picture (§§ 22 ff. of the KUG) and the right to one's name (§ 12 of the BGB). They guarantee protection of the personality for the sphere regulated by them.”⁵⁰

Recently, national goalkeeper Oliver Kahn used the action to prevent EA sports using his image on their new FIFA game.⁵¹ Electronic Arts, the California-based games company, used the names and likenesses of real players and teams in the game. According to Gamesindustry.biz, it had obtained a license for this use from both the European football players' federation (FIFPro) and the German Bundesliga. However, the Bayern Munich goalkeeper does not belong to either organization, and did not give permission for his likeness to be used. The game was withdrawn from sale in Germany.

In France, Personality rights are protected under article 9 of the French civil code: “Everyone has the right to respect for his private life.” While publicly known facts and images of public figures are not generally protected, use of someone's image or personal history has been held actionable under French law. Here lies the conflict between on the one hand the right of information and the freedom of press and on the other hand, the respect for private life which comprises image rights. The courts have a case by case approach and their decisions sometimes favor freedom of press and other times privacy. The scope of protection is quite broad. Currently, privacy is winning over the press.⁵²

In Denmark, the Danish Penal Code provides certain personality rights. The governmental Data Protection Agency has made a declaration regarding publication on the internet of pictures taken of persons in a public area:

“The predominant point of reference is that any publication of a portrait photograph requires consent [of the person depicted]. The reasoning for this is that such a publication might provide the depicted person with discomfort, possibly with other information such as

⁵⁰ *Marlene Dietrich case* BGH 1 ZR 49/97 (1 December 1999)

⁵¹ *Kahn, Oliver vs. EA Electronics Arts*, 324. O 381/02 Landgericht Hamburg 25.04.2003

⁵² Bloch, P & Cermolacce, A (2005) *Property, Privacy and Personality Research Stream: Comparative Aspects of Personality Rights (France)*, AHRC Research Centre in Intellectual Property and Technology Law, Edinburgh, Scotland

name, of the publication for all with access to the internet, and the considerations of this discomfort is judged as more important than a possible interest in publication.”⁵³

In the Netherlands, Dutch law provides elaborate protection against unauthorised use of an individual's image. The Auteurswet protects the individual against unauthorised publication of his or her portrait. The explanatory memorandum to the Auteurswet explains that the concept "portrait" can be defined as any depiction of a person's face with or without any other parts of the body, irrespective of how the depiction was made. Section 21 of the Auteurswet provides that publication of the portrait is not authorised if the subject or, after demise of the subject, one of his or her surviving dependants has a reasonable interest in opposing publication.

Further, Dutch law recognises the fact that the image of a famous person has become a commodity.⁵⁴ In the *'t Schaep met de Vijf Pooten* case, the Hoge Raad laid down two requirements before an individual could claim a commercial interest.⁵⁵ Firstly, the individual concerned must already have obtained some fame from practising his or her profession. The concept "profession" is interpreted broadly, so that even amateur sports people, who do not strictly speaking practise sport as their profession, are included here if they have gained some fame from participation in their sports.⁵⁶ Secondly, there must be a commercial exploitation of such fame. This aspect was clearly explained in the *De slag om het voetbalgoud* case.⁵⁷ A book, entitled *De slag om het voetbalgoud*, filled with photographs of the players in the Dutch football team which played in the final of the 1974 World Cup tournament, was published. This in itself did not violate any of the players' rights as it merely amounted to a factual report on a contemporary matter of public interest. However, the publishers sold the entire print run of the book to a company which used the book as part of its marketing campaign. The Rechtbank Haarlem held that this latter aspect amounted to commercial exploitation, with the result that it infringed on the players' portrait rights.⁵⁸

5.3 Elsewhere in the world

5.3.1 Australia

⁵³ Danish Penal Code, Chapters 26 & 27

⁵⁴ *Teddy Scholten* 1961 NJ 160

⁵⁵ *'t Schaep met de Vijf Pooten* 1979 NJ 383

⁵⁶ *Arnold Vanderlijde* 1994 NJ 658

⁵⁷ *De slag om het voetbalgoud* 1974 NJ 415

⁵⁸ *Id.*

In Australia, the courts have been prepared to extend the tort of “passing off” to allow celebrities to prevent others trading on their celebrity image. An example is the leading case of *Henderson v Radio Corporation*.⁵⁹file:///C:/Users/Tatiana/Downloads/Article proposing Image Rights legislation in Ireland for website.doc - _ftn24 The New South Wales Supreme Court found that there was passing off in a case where the defendant’s use of a suggestive image of a dancing band amounted to a misrepresentation of sponsorship or approval by the plaintiffs, who were professional entertainers. The Court held that it did not matter that the plaintiffs did not have their own licensing program. There was no need for a field of common activity. Witness evidence of confusion in the case helped to establish that the offending pictures were an indication of approval or recommendation which induced consumer purchase.⁶⁰

The willingness of Australian courts to make a finding of misrepresentation of sponsorship or approval in cases involving celebrities can lead one to conclude that there is a de facto publicity right in Australia. The leading case in this regard is *Hogan v Pacific Dunlop Limited*.⁶¹ This was an action brought by the well-known Australian actor Paul Hogan against the producers of an unauthorized television advertisement that played on Hogan’s film ‘*Crocodile Dundee*’. Hogan was aggrieved that the television advertisement used a lookalike actor, a similar setting (the ‘that’s not a knife’ scene) and same name as the ‘*Crocodile Dundee*’ character (‘Mick’). The Australian Federal Court found that there had been a misrepresentation despite the defendant arguing that the advertisement was merely parody.⁶²

Nevertheless, the law is still based on traditional concepts (i.e. common law causes of action) and consequently fails to recognize the modern reality of digital personality and the cult of celebrity. There is no facility to register image rights as there is under the IRO.

5.3.2 Canada

In Canada, it can be reasonably argued that a tort of ‘appropriation of personality’ has been developed as a result of the decision by the Ontario Court of Appeal in *Krouse v Chrysler Canada Ltd.*⁶³ The case involved the well-known Canadian football player, Robert Krouse, who played as No. 14 with a team called the ‘Hamilton Tiger Cats’. The defendants had contracted with an advertising firm to come up with an advertising promotion whereby a

⁵⁹ [1960] SR (NSW) 576

⁶⁰ Id.

⁶¹ (1989) 14 IPR 398

⁶² Id.

⁶³ (1974) 1 O.R 2d (C.A).

cardboard cutout likeness of Krouse was distributed to members of the public. The purpose of the card was to allow fans to track football scores. Krause sued Chrysler Canada for ‘invasion of privacy’, ‘breach of confidence’, ‘unjust enrichment’, ‘passing off’ and ‘appropriation of personality’. At first instance it was held that Krouse had the right to protect the commercial advertising power in his image. On appeal, it was held that, while Canadian law contemplated the tort of ‘appropriation of personality’, the elements of the cause of action had not been made out in Krouse’s case.⁶⁴ Unfortunately, the Appeal Court was not very clear in what precisely were the elements of an action in ‘appropriation of personality’. Greater clarity was provided in the case of Athans v Canadian Adventure Camps where the court recognized ‘an invasion of proprietary rights’ and ‘liability for commercial use of one’s likeness’ as grounds for an action in ‘appropriation of personality’. The court held that ‘personality’ included both image and name.⁶⁵

5.3.3 Quebec

There are certain provisions on rights in the new Civil Code of Quebec that enshrines the right to privacy as an attribute of personality. This right is set forth Article 3: “Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable.”

The chapter in the new Code dealing with respect of reputation and privacy defines the invasion of privacy in article 36: “The following acts, in particular, may be considered as invasions of the privacy of a person:

- (1) entering or taking anything in his dwelling;
- (2) intentionally intercepting or using his private communications;
- (3) appropriating or using his image or voice while he is in private premises;
- (4) keeping his private life under observation by any means;
- (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) using his correspondence, manuscripts or other personal documents.”

⁶⁴ Id.

⁶⁵ (1977) 17 O.R 2d 425

5.3.4 United States

The rationale underlying the right of publicity is rooted in both privacy and economic exploitation. The right of publicity is a state-based right, as opposed to federal, although it interacts closely with 1st Amendment rights. In most state jurisdictions without a specific right of publicity statute, the right of publicity may still be recognized via common law. The rights are based in tort law, and the four causes of action are:

intrusion upon physical solitude;

public disclosure of private facts;

depiction in a false light; and

appropriation of name and likeness.

On the most basic level, the right of publicity is an individual's right to prevent others from commercially exploiting his or her identity (voice, name, likeness, etc.) without permission. Given the way that this area of law has been trending, that right is available to virtually everyone, not just to A-list celebrities. If you violate someone's right of publicity, you can be forced to take down the content in question and/or pay monetary damages to that individual.

One of the most intriguing recent right of publicity cases, *Fraley v. Facebook, Inc.*, is a class action lawsuit against Facebook over its "Sponsored Stories" advertising services.⁶⁶ This lawsuit arose because certain Facebook users were dismayed upon finding out that their names and user profile photographs were arranged by Facebook in the perimeter of newsfeeds viewed by their friends based on their "likes" of various branded products. Interestingly, Facebook's own admissions that such advertising has approximately double the value of an advertisement without an accompanying "testimonial" allowed the case to survive a motion to dismiss. Given that the plaintiffs in *Fraley* were able to show a "direct, linear relationship between the value of their endorsements of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook," they have been allowed to continue their right of publicity case.⁶⁷

5.4 The Right to be Forgotten

In the case of established celebrities, a news story regarding them is generally considered to be newsworthy for a matter of days, or weeks at best, and yet all too often an adverse

⁶⁶ 11-CV-01726 (N.D. Cal., filed Apr. 4, 2011)

⁶⁷ *Id.*

publication regarding an individual may be found on the internet years later. In a similar vein, an individual may regret posting an unguarded or ill-considered remark via a social networking site and may wish to have that post removed almost immediately. In both cases the celebrity and individual alike may find it extremely difficult to ensure that the offending material is removed from public view on the internet. This desire for published material to be easily removed has been widely recognised and has been referred to as the 'Right to be Forgotten'.⁶⁸

In January 2012 the European Commission issued new data-protection rules, which include a provision for individuals to insist on the removal of information that they no longer wish to be in the public domain. Individual EU member states have yet to adopt these rules within their respective national legislative frameworks, and it is anticipated that the process of adoption will take at least two years. Even when enacted, the various national laws are likely to be an evolution of existing data protection laws, and will only control how firms can use personal data and will specify what obligations they are under if an individual asks them to remove data.⁶⁹

Conversely, by registering their personality on the IRR, a Proprietor (or licensee) controls the intellectual property rights to how their personality is used. Notwithstanding the fair usage provisions within the IRO which allow the publication of a newsworthy image, once the image can no longer be considered newsworthy the person concerned could insist that an offending website or host remove the image(s) or article(s) concerned. As with the other infringement scenarios, it would be reasonable to initially issue a Cease & Desist notice before considering obtaining an injunction from the Guernsey Courts and then seeking to enforce this in the appropriate overseas court.

It seems logical to conclude that the IRO will be an attractive weapon in the arsenal of anyone wishing to exercise the Right to be Forgotten, creating as it does a personal property right, albeit one that may need to be enforced or recognised in other jurisdictions.

6. Is this law really a good idea?

⁶⁸ Tirtea, R. (2011) *The right to be forgotten – between expectations and practice*, European Network and Information Security Agency (ENISA)

⁶⁹ European Commission, Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, 25 January 2012, available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

A society defines itself by a limited number of stories. These stories have their own icons and are particular to that society. In ancient Greece, it was the Iliad and the Odyssey; in modern America, it is Fantasia and Pirates of the Caribbean. “There is currently a strong trend to ‘propertize’ everything in the realm of information. Intellectual property law is expanding on an almost daily basis as new rights are created or existing rights are applied to give intellectual property owners rights that they never would have had in an earlier time.”⁷⁰ Some feel that this is not a good idea. “If a man has any natural rights, not the least must be a right to imitate his fellows, and thus reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and progress, if it is not entirely an illusion, depends on a generous indulgence of copyright.”⁷¹

When your image is used, the harm is twofold. Firstly, in this consumerist age where individuals often have their own brand, the harm can also be financial. Celebrities now make significant income from allowing companies to use their image to sell products, and if companies can freely use celebrity images it can deprive the celebrity of income. Secondly, it can be emotionally harmful if you are misrepresented. Part of human experience is deciding what information about ourselves we tell others, how we act with different people, and how we present ourselves to the world. Control over the way a personality is portrayed is lost when a stranger takes a story about someone else's life, without permission, to the big screen. When a life story takes on a fictional dimension, reality becomes distorted and an individual's reputation is threatened by the potential that an audience will confuse fact and make believe.

Nowadays, our cultural icons are privately produced and privately owned by large corporations, like Disney. There is an impulse to fight against this. To not want Disney to be allowed to sue people for using Mickey Mouse in social satire occasionally. Likewise, we want to protect the moral rights of artists to ensure their artistic integrity against corporate rapacity.⁷² This impulse should be fought against. It is not a bad thing that Disney still owns the rights to Mickey Mouse; nor is it a bad thing that the Guernsey Image Rights Ordinance will allow them to extend this ownership. It will give Disney the incentive to preserve their icon. Without these new forms of intellectual property protection, there would be nothing

⁷⁰ Lemley, M (1997) *Romantic Authorship and the Rhetoric of Property*, 75 Tex. L. Rev. 873

⁷¹ Kaplan, B (1967) *An Unhurried View of Copyright*, New York: LexisNexis

⁷² Baird, D (2001) *Does Bogart still get scale? Rights of Publicity in the Digital Age*, 4 Green Bag 2d 357

to stop dilution, tarnishing and cheap reproductions of these icons. Our world is not a better place if anyone can show Mickey Mouse shooting heroin.⁷³

Private property rights in intellectual property goods are a simple result of changes in economic value that stem from the development of new technology and the opening of new markets. In providing for ownership of personas, it should be remembered why this is being done. For example, a producer should not be able to cast a young Sean Connery in a new James Bond film without having contracted for the right, either in the past or in the present with the Sean Connery of today. This is not about moral rights, artistic integrity or Sean's sensibilities; it is about markets.

The world of artistic expression is a marketplace in which resources are scarce. The right question to ask about image rights is whether crafting this law has made the world a better place.

This note is only intended to give a brief summary and general overview of this area of law. It is not intended to be, nor does it constitute, legal advice and should not be relied upon as doing so.

Dr Angela Adrian, BBA, MIM, JD, LLM, PhD

Angela is a dual-qualified lawyer (US Attorney and English Solicitor). She is a leading authority on Intellectual Property and is the editor of the International Journal of Intellectual Property Management. Angela is respected academic, having published numerous papers and books and having taught IP at several international universities. Angela is a director and Chief Knowledge Officer of Icondia

Icondia comprises a team of experts that focus exclusively on the registration and management of image rights for an international customer base.

For further information visit www.icondia.com

© A. Adrian 2013

⁷³ *Walt Disney Productions v Air Pirates*, 581 F.2d 751 (9th Cir 1978)