



Privacy, Copyright and Human Rights

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What rights?



- Categories of Interests in Personality Rights and their Commercial Exploitation
- Dignity
- Reputation
- Goodwill – Advertising Value
- Name
- Images
- Likeness
- “Star Image”

Examples



- US
 - Privacy – right to be let alone – emerged from technology as a natural law concept (Warren/Brandeis article)
 - Publicity Rights – covers all aspects of personality that may be commercially exploited
 - Fully transferable (“IP style”)
- Germany:
 - Privacy – part of right to human dignity and self determination
 - “Publicity”? Personality right encapsulates commercial interests
 - Debate on “IP style” transferability

UK Starting Points



- No right to privacy/personality as such (Kaye v Robertson (1991))
- Copyright – moral rights (cf. right to object to derogatory treatment)
- Trade Marks and Passing Off
- Breach of Confidence
- Trespass to Persons
- Malicious Falsehood
- Defamation....

Important causes of action



- Rights to control commercial appropriation and exploitation of personality aspects
 - Copyright
 - Trade Marks
 - Passing Off
 - Breach of Confidence
 - Privacy
 - Commercial Confidentiality

Trade Mark law



- Distinctiveness → criteria (cf. Elvis Presley TM [1999] RPC 543)
- Famous name as word mark
- Signs such as signatures
- Background: TM Act 1938 → strict reliance on origin function (cf. development of UK TM law from passing off)
- Memorabilia: no registration possible (Tarzan TM [1970] RPC 450)

Trade Marks



- No monopolisation of famous names:
Diana TM [2001] ETMR 254
- Especially, where for typical merchandise:
Linkin Park TM [2006] ETMR
- But: appears to be based on very
traditional thinking



Registered Personality TMs

- See OHIM Practice
- Consequences of registration
- Typically, double identity cases (especially where for memorabilia)
- Consequential Problems: meaning of “trade mark use” vis-à-vis other forms of use

Personality Marks and product Description

- Product description cases → sign denoting nature of product (R v Johnstone [2003] UKHL 28 → “Bon Jovi” bootlegs
- Daimler Chrysler v Alavi t/a Merc [2001] ETMR 98

The Role of Defences



- Commercial speech arguments → sharing the monopoly and allowing secondary markets (note overlap with Art 82 EC)
- Not as such recognised
- Note Comparative Advertising cases
- See Bellure decision → use of lists showing matching perfume replicas
- See Johann Sebastian Bach decision (OLG Dresden)
 - TM registered for local souvenir articles (sweets, china etc.)
 - Claimant wishes to prevent use of JSB image for high quality china manufacturer
 - Sign not distinctive
 - And even if: conflict with communication guarantees under constitutional law

Confidence



Confidence



- Complex and wide ranging cause of action
- Equitable relief
- Typical elements
 - Information having a certain confidential quality (i.e. trade secrets; intimate details; government secrets; etc.)
 - Information must not be in the public domain
 - That was received under circumstances imposing an obligation of confidence →
 - What is protected? Value as such or mutual trust? Note overlap with contract law.
- public interest defence may apply
- NOTE: more specific protection in other jurisdictions → “proper” trade secrets

Confidence

A decorative graphic at the top of the slide consists of two groups of three circles. The first group on the left has a solid light purple circle on the left, a white circle with a light purple outline in the middle, and a solid light purple circle on the right. The second group on the right has a solid light purple circle on the left, a white circle with a light purple outline in the middle, and a solid light purple circle on the right.

- Two strands of action →
- Commercial confidentiality
- + other constellations
- Where commercial →
- a) no public interest defence (generally)
- b) and potential liability of third party recipient – why?
- (i) because information = property?
- (ii) because of nature of information?
- Conclusion → no need to show typical element of equity
→ the obligation owed to claimant as an equitable relief
for a wrong

Confidence



Privacy



- Balance between Art 8 and Art 10
- German approach: three sphere doctrine (Intimate/social/public)
- Caroline von Hanover v Germany: privacy in the public
- Conduct of celebrities in the media/ celebrities as role models?
- The real problem:
- Prior restraint
- Damages → Campbell awarded £ 3500 for mental distress
 - AND legal fees of around £ 1.1 Mio.
 - ECHR: breach of freedom of press under Article 10 ECHR

Privacy – see also...



Confidence



- Protection of the Douglas couple
- Images → confidential because of privacy intrusion?
- Can trivial images be confidential?
- Does it depend solely on the will of claimant?
- Or were they protected under commercial confidentiality strand?
- What was protected here?

Confidence



- Note → Günter Jauch decision (OLG Hamburg)
- Images taken at wedding
- No intention of GJ to commercialise
- Claim failed because of overriding public interest → press freedom prevails because of presence of political celebrities

Confidence



- Consequences and open issues:
- Effectively, image rights may be transferred with in rem effect (though no such doctrine)
- However, HL was not concerned with Douglas claim
- Alternatives:
- Celebrities → Art 8
- → OR commercial confidence
- Licensee: commercial confidence
- Problem: this dilutes the structure of the classic confidentiality claims
- obligation/relationship?
- Public interest?

Consequential Problems in UK?

- Freedom of Speech
- Freedom of commercial speech?
- Example: parody-satirical uses etc.
Lafontaine decision (“Sixt leases cars to staff on probation as well”)



Parody – Criticism – Media Freedom

May be covered under copyright and/or personality rights

- UK – no parody defence in copyright
- US – fair use
- Germany – applicability of “person of contemporary history”

Oh, Pretty Woman" -*by Roy Orbison and William Dees*

Pretty Woman, walking down the street, Pretty
 Woman, the kind I like to meet,
 Pretty Woman, I don't believe you, you're not the
 truth,
 No one could look as good as you
 Mercy

Pretty Woman, won't you pardon me, Pretty Woman,
 I couldn't help but see,
 Pretty Woman, that you look as lovely as can be ,
 Are you lonely just like me?

Pretty Woman, stop a while, Pretty Woman, talk a
 while,
 Pretty Woman, give your smile to me, Pretty
 Woman, yeah, yeah, yeah
 Pretty Woman, look my way, Pretty Woman, say
 you'll stay with me
 'Cause I need you, I'll treat you right, Come to me
 baby, Be mine tonight

Pretty Woman, don't walk on by, Pretty Woman,
 don't make me cry,
 Pretty Woman, don't walk away, Hey, O.K.
 If that's the way it must be, O.K., I guess I'll go home
 now it's late
 There'll be tomorrow night, but wait!

What do I see
 Is she walking back to me?
 Yeah, she's walking back to me!
 Oh, Pretty Woman.

"Pretty Woman" -*as Recorded by 2 Live Crew*

Pretty Woman, walking down the street, Pretty
 Woman, girl you look so sweet,
 Pretty Woman, you bring me down to that knee,
 Pretty Woman, you make me wanna beg please,
 Oh, Pretty Woman

Big hairy woman, you need to shave that stuff, Big
 hairy woman, you know I bet it's tough
 Big hairy woman, all that hair ain't legit, 'Cause you
 look like Cousin It
 Big hairy woman

Bald headed woman, girl your hair won't grow, Bald
 headed woman, you got a teeny weeny afro
 Bald headed woman, you know your hair could look
 nice, Bald headed woman, first you got to roll it with
 rice
 Bald headed woman here, let me get this hunk of biz
 for ya, Ya know what I'm saying, you look better than
 Rice a Roni
 Oh, Bald headed woman

Big hairy woman, come on in, And don't forget your
 bald headed friend
 Hey Pretty Woman, let the boys
 Jump in

Two timin' woman, girl you know it ain't right, Two
 timin' woman, you's out with my boy last night
 Two timin' woman, that takes a load off my mind,
 Two timin' woman, now I know the baby ain't mine
 Oh, Two timin' woman
 Oh, Pretty Woman.

Freedom of Speech – Public Interest

- UK: CDPA 1988 mentions public interest in s. 178
- Patchy recognition
- Applicable as „meta norm“?
- Copyright vs. Confidentiality vs. Self-determination
- General: public interest is more than an interested public

Fair dealing

- Other types of dealing are not permitted no matter how "fair" they may be.
- → "It is fair dealing directed to and consequently limited to and to be judged in relation to the approved purposes. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general", [Beloff v Pressdram \[1973\] 1 All E.R 241](#);
- "The provisions are not to be regarded as mere examples of a general wide discretion vested in the courts to refuse to enforce copyright where they believe such refusal to be fair and reasonable", *per* Laddie J. in [Pro Sieban Media AG v Carlton UK Television Ltd \[1998\] F.S.R. 43](#); [\[1999\] 1 W.L.R. 605](#); [\[1999\] F.S.R. 610](#)
 - Reading: Griffiths "Preserving Judicial Freedom of Movement--Interpreting **Fair Dealing** in Copyright Law" [2000] I.P.Q. 164.]
- US law, [Copyright Act 1976, 17 U.S.C., s.107.] provides guidelines as to what amounts to fair use
- → Sony Corporation of America v Universal City Studios (1984) 464 U.S. 417.

Fair dealing

- InfoSoc 2001/29/EC Article 5(2) and Article 5(3) → list of limitations and exceptions member states may choose to maintain or implement
- Human Rights Act 1998
- The Human Rights Act.
 - [Ashdown v Telegraph Group Ltd \[2001\] EWCA Civ 1142 \[2002\]](#)
- Article 10 ECHR PROVIDES ‘freedom of expression’ (to some extent the ‘spirit’ of the ECHR may be incorporated into the test of what amounts to fairness or substantial taking

Fair dealing



- Fair dealing provisions involve a number of factors.
- "for the purpose of". ("for the purpose of non-commercial research" ; "for the purpose of private study", etc.)
- precise mental element on the part of the user ceases to be of great importance.
- “



Synopsis

- Different rules between statutory and common law
 - No general conceptualisation of free speech/free commercial speech
 - Note Sec. 12(3) HRA
 - Public interest depends on cause of action
 - Broader in privacy
 - Narrower in “commercial confidentiality”
 - Opening up in copyright
 - Chaos in trade mark law