

Cambridge University Press
0521800145 - The Commercial Appropriation of Personality
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Part I

A framework

1 The problem of appropriation of personality

Introduction

The essence of the problem of appropriation of personality may be put very simply: if one person (A) uses in advertising or merchandising the name, voice or likeness of another person (B) without his or her consent, to what extent will that person (B) have a remedy to prevent such an unauthorised exploitation? The practice of using valuable attributes of personality such as name, likeness and voice in advertising and merchandising is common. In many cases B might be a famous person, although this is not invariably the case, since the images of people with no obvious public profile have often been used in advertising. Ordinarity does not necessarily confer immunity from unauthorised commercial exploitation, although those most likely to seek legal redress are the famous and the well-to-do.

The practice of appropriating personality has a long history. As early as 1843 the *Edinburgh Review* noted that Mr Cockle's Antibilious Pills were recommended by, amongst others, ten dukes, five marquesses, seventeen earls, sixteen lords, an archbishop, fifteen bishops and the advocate general, before it went on to castigate advertisers for fabricating most of their product endorsements.¹ Ironically many of these figures were comparatively unknown until the advertisers conferred an enhanced measure of celebrity upon them, leading the public to identify with them solely in their capacity as endorsers of the advertisers' products.² With the advent of the Industrial Revolution and the proliferation of consumer products, manufacturers and advertisers sought new ways to market and differentiate their wares from those of their rivals. Queen Victoria seems to

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¹ Cited by T. Richards, *The Commodity Culture of Victorian England* (London, 1990), 22 and 84. See, also, J. P. Wood, *The Story of Advertising* (New York, 1958), 123.

² *Ibid.*, 84.

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have enjoyed the dubious distinction of being one of the first people whose image was commercially exploited on a grand scale in England. During her Jubilee celebrations of 1887 hundreds of advertisers flooded the market with one of several forms of the Queen's image in order to sell such items as perfumes, powders, pills, lotions, soap, jewellery and cocoa.³ Since then the practice of using celebrity as a commodity has become an enduring feature of the business of advertising and merchandising.⁴ Fame, celebrity, or what modern gurus of advertising and promotion refer to as 'high visibility' has developed into an asset which can be used to sell products, attract audiences, generate charity donations and promote political or social causes.⁵

Various jurisdictions have developed markedly different solutions to the problem and there has been comparatively little uniformity in approach. The roots of this study lie in the English common law which has been reluctant to provide a remedy for appropriation of personality, and over the years a broad range of plaintiffs have failed to secure redress for the unauthorised use of indicia of their identity.⁶ Other jurisdictions have, to varying degrees, rejected the rigid English approach, employing a number of different legal concepts to provide redress for the multifarious aspects of appropriation of personality. At various points, in the several systems, causes of action based on misrepresentation, misappropriation, defamation and invasion of privacy have all been employed to protect underlying interests in property, reputation and privacy. The discrete patterns of development in the major common law and civil law jurisdictions⁷ reflect quite different attitudes towards commercial exploitation of personality which, in turn, reflect the relative importance attached to underlying values such as personal dignity and property rights. Moreover, the separate developments in various jurisdictions reveal significant differences in the dynamics and methods of legal change.

³ *Ibid.*, 86.

⁴ See, e.g., W. Wernick, *Promotional Culture* (London, 1991), 106 et seq.; J. Marconi, *Image Marketing* (Chicago, 1997), Ch. 4.

⁵ See I. J. Rein et al., *High Visibility* (London, 1987), 7.

⁶ See, e.g., *Clark v. Freeman* (1848) 11 Beav 112; *Williams v. Hodge* (1887) 4 TLR 175; *Dockrell v. Dougall* (1899) 15 TLR 333 (surgeons); *Corelli v. Wall* (1906) 22 TLR 532 (author); *McCulloch v. Lewis A. May (Produce Distributors) Ltd* (1948) 65 RPC 58 (broadcaster); *Sim v. H.J. Heinz & Co. Ltd* [1959] 1 WLR 313 (actor); *Lyngstad v. Anabas Products Ltd* [1977] FSR 62; *Hallivell v. Panini* (Unreported, High Court, Chancery Division, 6 June 1997) (pop groups); *ELVIS PRESLEY Trade Marks* [1999] RPC 567 (estate of deceased singer); *Douglas v. Hello! Ltd* [2001] 2 WLR 992 (actors).

⁷ Although reference is made, where appropriate, to civil law jurisdictions, they are not the book's primary concern. See, generally, H. P. Götting, *Persönlichkeitsrechte als Vermögensrechte* (Tübingen, 1995); J. C. S. Pinckaers, *From Privacy Towards a New Intellectual Property Right in Persona* (The Hague, 1996); M. Isgour and B. Vinçotte, *Le Droit à l'image* (Brussels, 1998); H. Beverley-Smith, A. Ohly and A. Lucas-Schloetter, *Privacy, Property and Personality* (Cambridge, forthcoming, 2003).

Interests in personality

Appropriation of personality

The problem of appropriation of personality is commonly discussed as an aspect of ‘character merchandising’, with a distinction usually being drawn between real persons and fictitious characters, although the problem is also commonly referred to as ‘personality merchandising’, or endorsement.⁸ Without dwelling too long on the semantics, it should be noted that each of these phrases is somewhat misleading.

First, a human being is not a ‘character’, other than in a colloquial sense. Second, the underlying basis for legal liability is substantially different in each case. Character merchandising is a compendious term covering a variety of activities⁹ and underlying rights such as copyright, trade marks and business goodwill. In most systems, protection for a fictitious character can often be secured through copyright law which is based on some degree of original creative effort or investment on the part of the creator, or through unfair competition law in its various forms. A ‘real’ person’s image does not usually result from such original mental or physical effort, and the underlying basis of, and justifications for, legal protection are not the same. A third and related point is that while the unauthorised exploitation of fictitious characters usually results in damage to the creator’s purely economic interests, appropriation of personality can affect non-pecuniary or dignitary interests, in addition to any injury to economic interests. This is a crucial distinction, elaborated upon in the text below. Use of the terms ‘character merchandising’ or ‘personality merchandising’ reinforces the perception that a person’s image is purely an asset, when, in truth, there is a complex interaction between economic and dignitary interests. The fourth point relates to the use of the term ‘endorsement’. As will become apparent, the legal notion of an endorsement is rather nebulous and uncertain. Moreover, many unauthorised uses of a person’s name or image are made in circumstances which do not imply that the plaintiff has endorsed a product or service, but merely suggests some loose connection or association.¹⁰ Consequently, reliance on the term ‘endorsement’ is unhelpful and liable to be misleading. Finally, it is rare to describe a legal wrong in terms of a particular commercial practice. It is more common to describe a wrong by reference to the interest protected or the nature of a particular kind of conduct such as trespass, negligence, deceit or appropriation

⁸ See, generally, J. Adams, *Character Merchandising*, 2nd edn (London, 1996).

⁹ See H. E. Ruijsenaars, ‘The WIPO Report on Character Merchandising’ (1994) 25 IIC 532; ‘Legal Aspects of Merchandising: The AIPPI Resolution’ [1996] EIPR 330.

¹⁰ See text accompanying note 23 below.

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of personality. One does not, generally, speak of an infringement of a person's right to merchandise his character.¹¹

Since appropriation of personality is better viewed as an autonomous problem and cause of action, it is important to draw a clear distinction between appropriation of personality and the business of character merchandising. Talk of 'character merchandising' does little to help one understand the problem of appropriation of personality and the phrase may as well be jettisoned at the outset.

The broader picture

The problem of appropriation of personality, and the underlying interests in personality that may be damaged by unauthorised commercial exploitation, cannot be understood without an appreciation of the wider context.¹² It is natural that any legal system should give priority to claims for physical injury and in earlier times these injuries were the law's primary concern. As society and modern living conditions change, however, plaintiffs inevitably claim redress for other kinds of harm. Although interests in physical well-being still probably rank highest in any hierarchy of claims, interests in reputation, personal privacy, and interests in freedom from mental distress become increasingly important.¹³ Usually, violations of individual personality are of a non-pecuniary nature, not only because they cannot be assessed in money terms with any mathematical accuracy, but also because they are usually of inherently non-economic value.¹⁴ Nevertheless, the increasing commodification of the human image demands that any modern classification of interests in personality¹⁵

¹¹ Cf. P. Jaffey, 'Merchandising and the Law of Trade Marks' [1998] IPQ 240, 263 et seq.

¹² See, e.g., R. Pound, 'Interests of Personality' (1914) 28 HarvLRev 343, 445, setting out the well-known taxonomy of interests in personality consisting of five main groups: (i) interests in the physical person; (ii) interests in freedom of will; (iii) interests in honour and reputation; (iv) interests in privacy and sensibilities; and (v) interests in belief and opinion. Cf. P. D. Ollier and J. P. Le Gall, 'Various Damages' in A. Tunc (ed.) *International Encyclopaedia of Comparative Law* (Tübingen, 1981), Vol. XI: *Torts*, Ch. 10, 63, defining interests in personality as 'the collection of values enjoyed by an individual within the society of which he is a member: injury to honour or reputation, deprivation of liberty, invasion of privacy, injury to feelings, convictions, beliefs'.

¹³ Cf. the reluctance to recognise liability for nervous shock in the tort of negligence, where the courts' restrictive approach to claims for psychiatric illness tends to reflect the view that injury to the mind is less worthy of community and legal support than physical injury to the body. See, e.g., Law Commission Consultation Paper No. 137, 'Liability for Psychiatric Illness' (London, 1995), para. 4.11, citing N. J. Mullany and P. R. Handford, *Tort Liability for Psychiatric Damage* (Sydney, 1993), 309, and see 241–8 below.

¹⁴ Ollier and Le Gall, 'Various Damages', 63.

¹⁵ See, e.g., E. Veitch, 'Interests in Personality' (1972) 23 NILQ 423, suggesting that the English law may be rationalised according to a single general principle providing that:

should take account of the fact that a person's name or features are also valuable economic assets. These de facto values are often commercially exploited in advertising and merchandising, although the precise legal status of such arrangements differs from country to country and rests on very slender foundations in English law.

Although pecuniary loss and non-pecuniary harm are often inextricably intertwined, the two aspects need to be separated since in some jurisdictions compensation for material losses caused by an injury to interests in personality encounters no obstacles, whereas compensation for non-pecuniary harm is subject to restrictions.¹⁶ For example, the French Civil Code does not draw a distinction between material and 'moral' harm, and protects both aspects under the general principle, contained in articles 1382 and 1383 of the Code Civil, that everyone must pay for the harm caused by his *faute*.¹⁷ In English law, on the other hand, damage to interests in personality is generally not actionable unless it also affects some interests of substance. Although the law of defamation takes cognisance of the damage to a plaintiff's non-pecuniary interests,¹⁸ the action is, theoretically at least, grounded on the economic or social damage done to the plaintiff as third parties withdraw from their relationships with him.¹⁹ Despite the fact that American law shares the same heritage as English law, it has broken away from its historical roots, and one area where a marked difference can be seen between English and American law is in the greater protection in the United States for interests in personality, through torts of invasion of privacy and intentional infliction of mental distress.²⁰ Similarly, in Germany, although the general clause in §823 para. I BGB (the German Civil Code) limits protection to the physical aspects of a person – body, health, life or freedom – the general provision has been expanded through judicial development to embrace interests in personality.²¹ These patterns of developments, and their relevance to the problem of appropriation of personality, are examined in detail in Part III.

'whosoever acts in such a manner as foreseeably to cause injury to another either in the tranquillity of his mind or in the assets of his personality may either be restrained or made to repair that damage'.

¹⁶ *Ibid.* See, generally, K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, 1998), 685 et seq.

¹⁷ See 144 below.

¹⁸ *John v. MGN* [1996] 3 WLR 593, 608 per Bingham MR; *McCarey v. Associated Newspapers Ltd* [1965] 2 QB 86, 104 per Pearson LJ; *Fielding v. Variety Inc.* [1967] 2 QB 841, 855 per Salmon LJ.

¹⁹ See Chapter 9.

²⁰ See *Restatement, Second, Torts* (1977) §652A et seq., and §46 et seq., respectively.

²¹ See 227–33 below.

Economic and dignitary interests

Markedly different solutions to the problem of appropriation of personality have been developed in various jurisdictions. With a number of doctrinal bases competing for pre-eminence, the nature of the problem itself often tends to become obscured. It is essential to gain a firm grasp of the concrete problem of appropriation of personality which an interest-based classification tends to promote. The following scheme, intended as an aid to a clearer understanding of the problem, rather than an end in itself, sets out the main interests that might be injured as a result of an unauthorised appropriation of personality. A broad division may be made between first, economic or pecuniary interests in personality, and second, non-pecuniary or dignitary interests.

- (1) Economic interests:
 - (i) existing trading or licensing interests
 - (ii) other intangible recognition values
- (2) Dignitary interests:
 - (i) interests in reputation
 - (ii) interests in personal privacy
 - (iii) interests in freedom from mental distress

Economic interests

An economic interest, strictly defined, might have the following features:²² (i) a finite sum of money can provide complete recompense for an invasion of such an interest and (ii) a plaintiff should feel no further sense of loss, having received a sum of money which accurately reflects the value of what has been lost; if the plaintiff does feel a sense of unsatisfied loss, then his interest is not purely economic or, rather, the plaintiff has some non-economic interest in addition to his economic interest. Furthermore, (iii) an economic interest is capable of objective valuation, and cannot be a purely economic interest if it has a subjective value for its owner, and (iv) it is an interest based on exchange; if there is no market in what a person has lost, that person has not suffered damage to an economic interest strictly defined. The fact that many people have valuable *de facto* economic interests in their personality is well known, although it is often difficult to reconcile such interests with the types of damage to economic interests which are actionable injuries.

Existing trading or licensing interests This first category covers the interests of those who might have a *de facto* economic interest in their

²² See, e.g., P. Cane, *Tort Law and Economic Interests*, 2nd edn (Oxford, 1996), 5.

name, voice or likeness and who might be actively involved in exploiting their fame for money. Obvious examples are musicians, sportsmen or performers and it is quite usual to find the images of such people being used in advertising and merchandising. Sportsmen, for example, often endorse products which might be within their field of expertise such as sports equipment and clothing and an endorsement of this kind will often be an effective way of boosting sales of such goods. On the other hand, a sportsman's image might be used in connection with goods or services that are totally un-related to the sportsman's sporting activity, for example, jewellery, cars, restaurant and telecommunications services. Companies frequently wish to associate their products or services with the image of a famous person in a way which falls short of endorsement of any particular product. Indeed, in the advertising business, a distinction is often drawn between (i) 'tools of the trade' endorsements, a term which is largely self-explanatory; (ii) 'non-tools' endorsements, involving products on which celebrities do not depend in their primary field of activity, and (iii) 'attention grabbing devices' which involve using the names or images of celebrities on, or in connection with, goods or services without suggesting any endorsement.²³

Other intangible recognition values Fame is a rather peculiar commodity and it seems to be a fact of advertising practice that manufacturers of goods and suppliers of services can find the use of the images of a vast range of people beneficial to them in some way. The benefit might result from a suggestion of endorsement or merely by a more vague association. Apart from the more common cases such as pop-stars and sportsmen, people of high professional standing,²⁴ holders of public office and politicians are often desirable people with whom to associate products or services. Although such people would not normally be actively trading in their image by granting licences or entering into endorsement deals,²⁵ they may still have what might be referred to as 'recognition value'. Their names or images are familiar to the public, but their potential for endorsing or being associated with products remains latent and unrealised, until an ingenious advertiser, with or without seeking prior permission, finds a suitable use for them. Often the link between the subject and the product is extremely tenuous and might only occur to those working in

²³ See Rein *et al.*, *High Visibility*, 59.

²⁴ Some of the earliest (English) authorities concerned with unauthorised commercial exploitation of personality involved the use of the names of leading members of the medical profession, e.g., *Clark v. Freeman* (1848) 11 Beav 112; *Williams v. Hodge* (1887) 4 TLR 175; *Dockrell v. Dougall* (1899) 15 TLR 333. Cf. *Edison v. Edison Polyform Mfg Co.* 67 A. 392 (1907) (inventor).

²⁵ Cf. Rein *et al.*, *High Visibility*, 49.

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advertising circles. The significance of the distinction between these two categories will become apparent in examining the role played by unfair competition law in its various forms.²⁶ While English law has adhered to a fairly orthodox approach, insisting on the existence of some business goodwill or trading activity which might be the subject of a misrepresentation, other jurisdictions, most notably the United States²⁷ and Canada,²⁸ have been willing to protect intangible recognition value un-related to any conventional business or trading activity.

Dignitary interests

No ready definition of the term 'dignitary interests' can be found in the legal literature, reflecting the fact that there is no coherent notion of human dignity as a legal value.²⁹ In one sense, dignitary interests might be regarded as coterminous with 'interests in personality' in the broadest sense identified above, although this is obviously tautologous, and useless for the present purposes of identifying a blanket term for non-pecuniary or non-economic interests in name, voice and likeness. Consequently, it must suffice to define dignitary interests negatively in relation to economic interests. Accordingly, (i) a finite sum of money might not provide complete recompense for the invasion of a dignitary interest, and (ii) a plaintiff might remain unsatisfied after an award of damages. Moreover, (iii) dignitary interests cannot be objectively valued but, rather, are inherently subjectively valued interests, since (iv) there is no market by which to value such interests since they are not normally exchanged. Taking an injury to reputation as an obvious example, it is clear that a sum of money might not provide complete recompense, and even an award of damages that would seem very generous, if not excessive, to an objective observer might not give a plaintiff complete satisfaction. The difficulty in placing any objective value on a dignitary interest such as reputation is reflected in the widely divergent awards of damages for defamation,³⁰ which have caused some concern, although this has more to do with the fact that assessment lies in the hands of the jury.³¹ This, in turn, reflects the fact that there is

²⁶ See Chapter 2 and text accompanying note 43 below.

²⁷ See Chapters 2 and 7. ²⁸ See Chapter 5.

²⁹ See, generally, D. Feldman, 'Human Dignity as a Legal Value' [1999] PL 682 and [2000] PL 61.

³⁰ See, e.g., *Sutcliffe v. Pressdram* [1991] 1 QB 153; *Rantzen v. Mirror Group Newspapers* [1994] QB 670, and see, generally, H. McGregor, *McGregor on Damages*, 17th edn (London, 1997), paras. 1889–92.

³¹ Since *John v. MGN* [1996] 3 WLR 593, it is permissible to draw the attention of libel juries to levels of awards in personal injury cases, although there is, in turn, no precise correlation between personal injury and a specific sum of money (*ibid.*, 614 *per* Bingham MR).

no market in which a person may trade his reputation for money; the notion that a person might sell the right to defame him to another is plainly absurd. Although a market exists for the use of the images of celebrities in advertising, this market relates to those celebrities' 'recognition value'. Their reputation, privacy or dignity are not, as such, traded.

Interests in reputation Everyone has an interest in their personal reputation, be they famous celebrities or ordinary people. Interests in reputation are troublesome in that they defy the broad division between economic and dignitary interests.³² For present purposes, it must suffice to note that an injury to a person's reputation can cause financial harm, and can also cause harm which cannot be expressed in money terms. For example, assume that a well-known surgeon's name or image is used without his consent in an advertisement for a dubious and possibly harmful medicinal product.³³ This might well injure his reputation and disclose a cause of action for defamation. The damage to his interests might take a number of forms. He might, for example, suffer financial loss as a result of being lowered in the estimation of right-thinking members of society, as potential patients, clients and other third parties withdraw from their business and social relationships with him. Equally, he might suffer from the hurt feelings, distress, humiliation and injured dignity that might result from the association with a quack medicine.

Interests in personal privacy The notion of privacy is difficult to define and, for the purposes of outlining the various de facto interests, a simple dictionary definition such as 'freedom from intrusion or public attention' or 'avoidance of publicity' will suffice.³⁴ A central problem is that of reconciling a person's claim to privacy with the person's status as a public figure. There is nothing incongruous about an unknown person claiming that his privacy has been invaded by unauthorised commercial exploitation. Nevertheless, it is difficult to reconcile a celebrity's claim that his privacy has been invaded as a result of unauthorised commercial exploitation of personality with that celebrity's exploitation of his image either personally, or vicariously through licensed merchandisers and advertisers. On the other hand, some people do not actively seek celebrity but find that it is thrust upon them, without having done anything to

³² See, further, Chapter 9.

³³ Cf. *Clark v. Freeman* (1848) 11 Beav 112; *Williams v. Hodge* (1887) 4 TLR 175; *Dockrell v. Dougall* (1899) 15 TLR 333.

³⁴ *Concise Oxford Dictionary*, 8th edn (Oxford, 1990). See, further, 160 below.