

Exploitation of Image Rights in the UK

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Image rights evolved in c19. One of the earliest cases in France concerns a portrait painted by the artist Whistler¹. In England it was held in 1848 that Prince Albert's drawing of the royal children (and of the royal dogs) could not be published without his consent², and in 1888 that a more modest portrait photographer could not advertise his skills by displaying a portrait of a lady without her consent³. These were cases in contract and in confidence.

In France, image rights were famously developed by judges during c20, until they were formally incorporated into Code Civil by the enactment of ECHR Art 8 as CC art 9. Similar developments took place in Germany. In both cases the right was recognised independently of contract or other intellectual property rights.

In England there were various unrelated pieces of legislation protecting image rights in special circumstances (portraits that were commissioned and performers' rights). But there was very little judicial development, despite attempts by lawyers to expand the torts of defamation and passing off.

One reason for the lack of development in England is the principle of freedom of expression. There is a strong argument that it is wrong to stop the publication of what is true. Images generally are true. Intellectual property rights are, of course, an encroachment on freedom of expression. The justification for intellectual property rights is that they benefit the public by encouraging artistic and economic activity. Image rights have been resisted because they benefit individuals to the detriment of the public, and it is difficult to see what corresponding benefit the public gains from image rights.

¹ *Eden c/ Whistler*

² *Prince Albert v Strange* (1848) 64 ER 293

³ *Pollard v Photographic Company* (1888) 40 Ch D 345

The justification for image rights has to be based on the notions of human dignity and unjust enrichment. Individuals should not be exploited even if the exploitation costs them nothing, and even the image right gives individuals a personal gain with no corresponding economic benefit to the public. English law has been slow to see the implications of the need for respect for human dignity and private life.

This has changed in the last two decades, almost entirely as a result of influences from France, Germany and other European legal systems. The need for change has come partly from the internationalisation of sport, in particular football. Another influence has been treaties, in particular those reflecting the civil law legal principles protecting artists and performers. A third influence is the need to protect the worst criminals from mob violence. The publication of a criminal's image can expose that person to physical attack or death. The most famous example in England was that of the child murderess Mary Bell. But at the time the legal protection given to her in 1984⁴ it was based on the fact that she was an 11 year old child, and it was not thought that similar protection could have been given to an adult.

In the case of performing artists, English law was compelled to develop by international treaty. When Peter Sellers died in 1980 he was famous for the role of the French Detective Inspector Clouseau. There were five films in the Pink Panther series. United Artists made a sixth film after his death using unused footage shot for the earlier films. They did not have consent from Peter Sellers during his life, or from his personal representatives after his death. In 1986 it was held in⁵ that the 1961 Rome Convention⁶ meant that the estate Peter Sellers could claim compensation for the use of the old footage in the new film. Over \$1m compensation was awarded by the court.

⁴ [1984] 1 WLR 1422

⁵ *Rickless v United Artists* [1988] QB 40

⁶ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

By the 1990s image rights of sportsmen and other celebrities were a commercial reality in countries other than the UK. Sport is an international activity. In the 1990s world class footballers were playing outside their home countries on a regular basis. When they became famous in France, Germany, Spain and Italy, they were accustomed to exploiting the image rights that the laws of these countries recognised. Every kind of product, not just sportswear, is sold by endorsement of famous sportsmen and women. When sporting celebrities moved to the UK to play for English teams, they expected the same legal protection for their valuable images, and the same income from endorsements.

The fact that in the 1990s English law did not yet recognise image rights was not fatal to the sporting stars' ambitions. There were practical means of protecting images, even if there were few legal means. In practice, the commercial exploitation of an image is more effective if it is done with the consent of the subject. So the stars could protect their images by keeping out of the public eye and only permitting good photographs to be taken with their consent. And there has long been a system of self-regulation of the advertising industry by the Advertising Standards Authority. Their Code of Standards and Practice prohibits the use of images without the subject's consent. This Code does not give a right to compensation, but it has in general been well respected. So on this practical basis, the agents of sports personalities were increasingly able to enter into valuable contracts for the use of their clients' images even though there was no recognised legal basis for the right.

Meanwhile, also during the 1990s, English law was forced again to develop as a result of treaty obligations – the European Convention on Human Rights. In a series of cases⁷ the Court at Strasbourg has recognised that the taking of photos without consent was an interference with Art 8 rights. This was held to be so, even if the photographs were taken for police purposes, or for journalistic purposes⁸. Where there was a legitimate police purpose, or a sufficient reason for disclosure to the public, it was held that this had to be justified. There had to be a defence under one of the exceptions to the right to private life

⁷ *Friedl v Austria, Murray v UK, P&G v UK*

⁸ *News Verlag v Austria, Krone Verlag v Austria.*

provided for in Art 8(2) of the Convention, such as the prevention of crime or the right of freedom of expression.

Meanwhile, as a result of the Treaty of Rome Art 8 of ECHR became the subject of the EU Data Protection Directive⁹. In the UK that was enacted in part by the Data Protection Acts in 1984 and 1998. As a result, there is a limited right of image in respect of images kept on computer, such as CCTV photographs.

In 2000 two major judicial developments occurred in the law, entirely independently of each other.

First, by a decision made in June 2000¹⁰ the Special Commissioners, the UK tax court, decided that the money paid under contracts for the promotion of image rights of international footballers should be recognised as reflecting their image rights. The Inland Revenue had argued, unsuccessfully, that, since English law did not recognise image rights, the contracts should not be treated as genuine commercial deals, but were merely salary in disguise. As a result, image rights now provide a major part of the income of sporting and other celebrities.

Next, by a decision in December 2000 the Court of Appeal recognised that publication in Hello! magazine of photographs taken of the wedding of Michael Douglas and Catherine Zeta-Jones, without their consent, might give rise to a claim for substantial compensation¹¹. That case is due to come to trial in January 2003. But meanwhile there have been a number of similar cases of photographs published by newspapers without the consent of the subjects. Newspaper publishers have paid out tens of thousands of pounds in settlement of such claims for compensation.

⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 [1995] OJ L281/31

¹⁰ *Sport Club plc v Inspector of Taxes* [2000] STC (SCD) 443.

¹¹ *Douglas v Hello!* [2001] QB 967

In January 2001, applying the principles discussed in the *Douglas* case, the Court gave protection to the images of two criminals, who are now adults, but whose notoriety comes from the fact that they were children when they committed murder¹².

In 2002 two further important developments occurred.

First, an award of compensation under the Data Protection Act was made this year, a modest £3,500 to Naomi Campbell for a publication of her photograph in a story about her drug therapy. The decision of the Court of Appeal is expected in a matter of weeks¹³. Meanwhile similar claims by other claimants have been settled for much higher figures on a confidential basis.

Second, a successful formula 1 driver, Edmund Irvine, saw his image used without his consent in an advertisement for a radio station. The court held that he had a property right in the goodwill attached to his image, and he was entitled to compensation on the basis of a reasonable endorsement fee¹⁴.

In another recent case a newspaper was proposing to publish a story of the visit to a brothel by a celebrity TV presenter. The Court allowed the story to be published in text form, on the grounds that it was in the public interest. But the newspaper also claimed to have photographs taken at the brothel. The court refused to allow the publication of images which, it said, were excessively intrusive.

Unless the Court of Appeal in Naomi Campbell's case calls a halt to these developments, the recognition of a general image right in the UK now seems established.

¹² *Venables v News Group Newspapers Ltd* [2001] Fam 430.

¹³ *Campbell v Mirror Group Newspapers*

¹⁴ *Irvine v Talksport* (2002) EMLR 32, LTL 29/4/2002