

Marilyn Monroe, Posh Spice and Me Personality, Property and Privacy

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The camera – a term first used by the scientist Sir John F.W. Herschel in 1839 - has come a long way since the summer of 1827 when it took Joseph Nicéphore Niépce eight hours to obtain a fixed image. It would take a further 12 years for Louis Jacques Mandé Daguerre to reduce the exposure time to less than thirty minutes and to keep the image from disappearing, ushering in the age of photography. Advancements in the technology since those first tentative steps were taken have resulted in increasingly sophisticated means by which images may be captured and thereafter manipulated. In tandem, a whole host of issues have emerged, from legal questions over ownership of the images to ethical and moral arguments concerning subsequent manipulation.

This paper considers two areas both of which concern the subject and the power that subject has over the image. The first is the extent to which control can be exerted over exploitation, and the second is the extent to which control can extend to digital manipulation. Both may be considered under the much broader head of personality rights.

Personality rights in the UK

Unlike many other jurisdictions, historically the law in the UK has not interfered to prevent the exploitation of the image (or other attributes) of an individual, whether that individual be a dead icon (Marilyn Monroe), a live celebrity (Posh Spice), or a living individual largely unrecognised by the wider community (Me). The laws that have been argued and rejected tend to be the existing intellectual property rights and related laws, notably copyright and performers rights, trade marks and passing off and breach of

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confidence. The arguments are often raised in relation to two types of use: commercial exploitation and freedom of expression.

Commercial exploitation Personality and Property

When categorising the use of an image, often the question arises as to whether the use is commercial or non-commercial. In many jurisdictions courts are more sympathetic in allowing the subject to prevent commercial exploitation by others rather than non-commercial use which itself tends to bring its own questions of freedom of expression. However, this raises the question: what is meant by commercial exploitation given that almost any use can have some commercial connotations? Use for advertising purposes, on mugs and T-shirts are some obvious examples. But also falling under this head could be a wide variety of other artistic purposes, such as the use of images of Marilyn Monroe by Andy Warhol, as well as the use of images in newspapers and magazines such as those of Sharbat Gula, the Afghan girl with green eyes, which no doubt increased the sales of the National Geographic magazine¹. Certainly in the UK, conflicts between the subject of an image and the use of that image in newspapers, magazines and other sections of the media has tended to be categorised in terms of freedom of expression rather than commercial exploitation.

In the US, where the right of publicity has long been recognised and which is to be found in the statutes of a number of states, has recently been called a 'mess'². Commercial exploitation tends to be the preserve of the subject of the image, but that control has been extending into areas that may more properly be described as non-commercial. To try and form a framework, one American commentator has suggested that commercial use should be dictated by the nature of the article in connection with which the image is used. Where an image is used in connection with an article which serves primarily some intrinsic utilitarian function distinct from conveying information, then use of the image is commercial. This, it is argued, would mean that traditional media objects such as books, magazines and newspapers would not be actionable³. Such distinctions seem to raise more questions than answers. What about T-shirts which can

¹ http://news.nationalgeographic.com/news/2002/03/0311_020312_sharbat.html

² Barnett The American Right of Publicity and Visual Art: Solutions for the Growing Conflict Paper Prepared for Congress of International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) New Delhi 6-8 October 2002.

³ McCarthy The Rights of Publicity and Privacy s 7:22 at 7-46 2d ed 2002

both communicate messages and be worn? Or decorative mugs and plates used merely to adorn a sideboard? Or trade magazines which serve no function other than to carry advertisements for retailers?

This notion of commercial use has not, to date, much troubled the courts in the UK. However, the law has recently developed to enable an individual to enjoin use of an image for the purposes of advertising – a commercial application. This occurred under the law of passing-off. Previously this area of the law had little to say in relation to control over the use of images. Thus in *Lyngstrad v Annabas Products*⁴ the pop group ABBA could not obtain relief against traders selling paraphernalia that bore the name and image of the group. The defendants were not doing ‘anything more than catering for a popular demand among teenagers for effigies of their idols’. Similarly in *Halliwell v Panini SpA*⁵ the Spice Girls could not prevent sale of stickers because traders who supplied them were responding to the demand for ‘effigies and quotes of today’s idols’⁶. However, the recent case of *Irvine v Talksport Ltd.*⁷ Mr Eddie Irvine, a racing car driver for Ferrari, was able to prevent a radio station called Talk Sport Radio from using an image they had obtained from a commercial agency for the purposes of endorsing their service. In defining endorsement, the court said: ‘When someone endorses a product or service he tells the relevant public that he approves of the product or service or is happy to be associated with it’. This differs from merchandising which involves exploiting images themes or articles but does not necessarily entail a message to the public that the products are endorsed by the celebrity. However, there are limits on who can bring an action for false endorsement. Firstly, anyone contemplating such a move must, at the time of the acts complained of have a significant reputation or goodwill, and secondly the false message must be given that a not insignificant section of his market that his goods have been endorsed, recommended or are approved of by the claimant⁸. The judgement seems to be in line with common sense. It seems right that an individual should be able to prevent such false messages from being spread. However, it should be noted that parameters were placed on this

⁴ [1977] FSR 62

⁵ 6 June 1997

⁶ Other jurisdictions have been more lenient. In the Australian case of *Henderson v Radio Corporation Pty* (1960) [1969] RPC 218 a picture of the claimants was reproduced by the defendants on a record cover. The claimants were ballroom dancers. This was held to amount to passing off because the defendants had made a misrepresentation that there was a connection between the litigants. Because the people to whom the record was aimed would probably believe that the picture on the front indicated that the dances approved of the record.

⁷ [2002] EWHC 367 (Ch)

⁸ *ibid* para 46.

development by the court. First, it extends only to live celebrities. On Elvis Presley the court said that 'there could be no question of the performer endorsing anything since he had been dead for many years⁹.' Secondly, the individual must, at the time of the acts complained of, have a significant reputation. So looking to the individuals in the title to this paper, the estate of Marilyn Monroe would have no claim, and neither would I as I have no goodwill to protect¹⁰. Posh Spice on the other hand may well be able to bring a successful action. That in turn begs the question as to what amounts to endorsement. In the instant case the picture of Eddy Irvine had been altered to make it look as if he was holding a radio. But what if a picture of Posh Spice were used on a T shirt with the name of the manufacturer also visible? Would that also amount to endorsement? Or a picture of her used in connection with an article on children's clothes in a magazine carrying advertisements for clothes? Where endorsement begins and ends and how it is to be distinguished from merchandising is not at all clear but perhaps an easier test to apply than looking to the function of the article to which the image is applied.

Freedom of Expression Personality and Privacy

Arguments in relation to freedom of expression competing with the desire of the subject to control the use of an image has not historically troubled UK law to any great extent¹¹. In an early case, *Pollard v Photographic Company* a photographer took a photograph of Mrs Pollard and then without her permission used the image on Christmas cards and sold those to the public. The court found for Mrs Pollard, but based on the law of breach of confidence: 'the photographer who uses to negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands'. In a similar vein in *Creation Records v News Group Newspapers*¹² a photographer who took pictures of a scene which had been put together for the purposes of producing an image for the cover of a pop album was found to have taken that photograph in breach of confidence. This was particularly so since there were security measures at the scene to prevent unauthorised photography and the photograph was taken in a surreptitious manner¹³.

⁹ Ibid para 44

¹⁰ Compare the US case of *Pavesich v New England Life Assurance Co.*, 50 S.E. 68, (1905) which established a common law right of privacy in the States for the first time

¹¹ Where a photograph is taken for private and domestic purposes, then the commissioner can prevent further exploitation. Copyright Designs and Patents Act 1988 s

¹² [1997] EMLR 444

¹³ See also *Shelley Films Ltd v Rex Features Limited* [1994] EMLR 134. Performers rights to be found in the Copyright Designs and Patents Act 1988 ss 182A, B and C.

However, this is now changing. The developing jurisprudence under the Human Rights Act 1998 and its interaction with freedom of expression is starting to prove most interesting for the control a subject has over the use of an image. A tension arises in the 1998 Act because of competing values, that of freedom of expression¹⁴ and that of the right to respect for a private and family life¹⁵. Given that the UK courts are now charged with interpreting legislation in a way that is compatible with the Convention¹⁶, and that courts, as public authorities, are required not to act in a way which is incompatible with a Convention right¹⁷ it is unsurprising that it has fallen to the courts to find some path between these values.

They have largely responded by developing the law of breach of confidence.¹⁸ One of the more recent cases, *Theakston v MGN Limited*¹⁹ concerned the visit by Mr Theakston to a brothel and the subsequent sale by the prostitute concerned of that information and photographs to the newspaper (*Sunday People*). The court refused to enjoin publication of the text as particular regard should be had to the freedom of expression of the *Sunday People* and of the prostitute²⁰. However, as regards the photographs, the court found that it was likely that an injunction would be obtained against publication of these. It was recognised that photographs could be particularly intrusive and publication could interfere with private and personal life in a peculiarly humiliating and damaging way. The court found that there was no public interest in publishing the photographs, and no equivalent material had been placed in the public domain²¹. However, that the matter is not yet settled is clear from other decisions that have been made in relation to the use of photographs. On matters of post publication in *Holden v Express Newspapers*²² Eady J granted damages after publication of topless photographs taken of Amanda Holden while in hotel garden in Tuscany²³. Anna Ford was not so lucky. She was unable to claim damages for the publication of images taken of her whilst on holiday on a beach in

¹⁴ Human Rights Act 1998 Article 10

¹⁵ Human Rights Act 1998 Article 8

¹⁶ Human Rights Act 1998 Article 3

¹⁷ Human Rights Act 1998 s 6

¹⁸ *Prince Albert v Strange* (1849)

¹⁹ [2002] EMLR 22

²⁰ Human Rights Act 1998 s12(4)

²¹ *Theakston v MGN Limited* [2002] EMLR 22

²² 7 June 2001

²³ <http://news.bbc.co.uk/1/hi/entertainment/showbiz/1723269.stm>

Majorca²⁴. The court upheld the Press Complaints Findings that the beach was a public place.

A further question arises in relation to this type of exploitation. If the law of breach of confidence develops into a general right of privacy, will that in turn give rise to a recognised right of publicity in the use of an image – as has been the experience in other jurisdictions²⁵? One case which suggests that it might is *Douglas v Hello*²⁶. This case concerned the photographs taken at the wedding of Michael Douglas and Catherine Zeta Jones. All guests and staff at the reception had been asked to sign a confidentiality agreement stating that no photographs would be taken. The purpose in large part was to protect the exclusivity of an agreement they had entered into with the magazine OK! to publish photographs of the wedding. In the event Hello! was permitted to publish the photographs although the case is proceeding to trial to see if damages should be awarded, and if so on what basis. Much has been said about the case, not least of which has been discussion of the basis on which the decision was made. Sedley L.J. favoured an emergent right of privacy as the basis of the claim, whereas the other judges tended rather towards an extension of the breach of confidence claim. What however is clear is that the purpose of the action was in essence to preserve the right of Douglas and Zeta Jones to exploit their image with whomever they chose. In the words of Sedley L.J., ‘the dominant feature of the case was the fact that the greater part of that privacy had already been traded and fell to be protected as a commodity’²⁷.

Image manipulation Personality, Property and Privacy

The second area to be covered is that of image manipulation. Digital photography and advanced software packages mean that it is simple to manipulate an image in almost any way imaginable. Such manipulation or ‘Photofakery’ is of course nothing new²⁸. A recent well-known example concerns the manipulation of a photograph of the late Dodi

²⁴ http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/1469129.stm

²⁵ In the US the right of privacy developed into a right of publicity in *Haelan Laboratories Inc. v Topps Chewing Gum Inc.* 202 F.2d 866 (2d Cir. 1953), cert. denied 346 U.S. 816 (1953).

²⁶ *Douglas v Hello! Ltd* [2001] 2 W.L.R. 992

²⁷ *ibid* per Sedley L.J.

²⁸ *Brower Photography in the Age of Falsification Atlantic Monthly* May 1998 Volume 281 no.5 p.93-94

Al Fayed and Diana, Princess of Wales on a boat looking as if they were about to kiss²⁹.
But to what extent can the subject control such manipulation?

In the case *Irvine v Talk Sport Radio* discussed above that photograph had been manipulated to make it look as if Mr Irvine was holding a radio rather than the telephone that he actually had been. So in endorsement cases – where an image of a person who is well known is manipulated to make it appear as if goods or services are being endorsed, there will be a remedy. However, as has already been pointed out, that extends neither to dead icons nor to live individuals without the requisite goodwill.

One case that does not bode well for litigants in the UK is that of *Charleston v News Group Newspapers*³⁰. In this case a photograph of a man and woman who appeared to be engaged in intercourse was used as part of a pornographic computer game. Superimposed on the bodies were images of the heads of Harold and Madge Bishop who played in the television soap, *Neighbours*. The text underneath the pictures made it clear that the images had been made as part of a pornographic computer game without the consent of the actors. Madge and Harold sued on the basis that the picture was defamatory. The House of Lords disagreed saying that looking to the article as a whole it was clear that images were part of the pornographic game, and that game had been made without consent. The purpose of the text was to castigate the makers of the game. There can be few who would not sympathise with the plight of the actors.

However, another development in the UK has a bearing on this matter, and that is the enactment of the Data Protection Act 1998³¹. Under this Act certain obligations are placed on those who control and process personal data i.e. information about living individuals. Not only are processors required to follow certain procedures in connection with obtaining the data, but they are also to follow certain principles in relation to holding and processing the information. Processing includes manipulation of, for example, photographs. These obligations are increased where the data relates to such matters as the racial or ethnic origin of the subject or her physical or mental health. An individual has a right to prevent the processing of personal data where it would cause

²⁹ Shenk Every Picture Can Tell a Lie <http://www.wired.com/news/culture/0,1284,7815,00.html>

³⁰ [1995] 2 AC 65.

³¹ Data Protection Act 1998 (DPA) gives effect in the UK law to EC Directive 95/46/EC.

substantial distress,³² may require access to stored data, and may be awarded compensation in the event that processing of the data causes distress. Enforcement is generally by way of the Information Commissioners Office: in other words by way of a public body. Individuals can however sue, and this is what occurred in *Campbell v. Mirror Group Newspapers Ltd*³³ where photographs of Naomi Campbell were taken when she was leaving a narcotics clinic. These images were manipulated, one to add the caption 'Therapy: Naomi outside Meeting' and the other to add the headline 'Naomi: I am a drug addict'. The court found that the photographs contained personal sensitive information about Ms Campbell: although not relevant to the instant case, they disclosed her ethnic origin. Importantly, and of relevance, was the information they disclosed in relation to her physical health. The use of the images in the instant case was not excused under the exemption for processing for journalistic purposes³⁴ which is in any event, only of relevance to pre-publication processing. Ms Campbell was awarded damages of £3500³⁵.

It is important to note that the Act does not apply to deceased persons – therefore the use and manipulation of an image of Marilyn Monroe would not be caught. However, the use of an image of Posh Spice or Me could be. As a result, this case raises the intriguing question as to whether, for certain persons, the right of informational privacy³⁶ intended by the scheme of the legislation will in effect become a personality right.

One aspect of the legislation that does cause some concern is that the provisions of the Act do not apply to processing of personal data for domestic purposes³⁷ which seems to be broad. What therefore if a photograph were taken of Posh Spice or of Me in a domestic setting which was then manipulated in a derogatory manner (such as those in the *Charleston* case) and made available over the Internet. Would either of us have any rights? It would appear that if that processing could be said to fall under the head of domestic purposes then, however malicious the intent, there would no remedy under the Act³⁸. It seems very odd that an Act that professes to be concerned with informational

³² DPA s 10.

³³ [2002] H.R.L.R. 28

³⁴ DPA s 32(1)(b). (a) the data protection principles except the seventh data protection principle, (b) section 7, (c) section 10, (d) section 12, and (e) section 14(1) to (3).

³⁵ This case has been appealed. The judgement is due within the next month.

³⁶ See paragraphs (2), (10), (11) and (17) of the preamble to the Directive and article 9 of the Directive itself.

³⁷ DPA s 36

³⁸ See DPA post implementation appraisal Submission to the Home Office by the Data Protection Commissioner 7/12/2001

privacy and which in turn may give right to personality rights, would appear to afford no redress for a violation of personal dignity.

Should the UK develop personality rights?

The arguments for the development of a fully fledged regime of personality rights seem far from clear-cut. Many commentators in those jurisdictions, such as the US, where personality rights have been in existence for a number of years and where there has been ample opportunity to consider the theoretical underpinnings of the right³⁹ are sceptical at the justifications put forwards. Indeed recent literature suggests that far from developing the right, it should in many cases be restricted particularly in those instances where the right of the personality conflicts with the right of an artist who, in the case of photographer, takes the photograph⁴⁰. Many justifications revolve around the economic incentive that is thought to be associated with the grant of personality rights. Individuals will expend effort on increasing social recognition which in turn can be exploited. However, quite apart from the fact that such arguments beg the question as to whether fame in itself is a value that should be encouraged, such renown is generally a by-product of another trait, such as being a model or an actress, in terms of which that individual is already adequately compensated. Others argue that granting personality rights will lead to an efficient allocation of resources. If personality rights are absent, then over use of an image will occur resulting in a fall of the marginal value to zero. However, that is not a sufficient justification for supporting artificial scarcity which may in turn lead to consumer exploitation and rent seeking. Indeed, and perversely the value may increase if 'everybody has one'⁴¹.

Other justifications lean rather towards theories of natural rights, and to the right to control the fruits of labour. On the latter point, it is most often not the individual who has laboured long over the creation of an image as distinct from the underlying profession of the individual. Rather it is the collective input from industrial concerns and indeed the adulation of fans that has created the value attached to the image. It is

³⁹ See in particular *Cardtoons, L.C. v Major League Baseball Players Assn* 95 F.3d 959 (10th Cir. 1996).

⁴⁰ Barnett *The American Right of Publicity and Visual Art: Solutions for the Growing Conflict* Paper Prepared for Congress of International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) New Delhi 6-8 October 2002

⁴¹ Madow *Private Ownership of Public Image: Popular Culture and Publicity Rights* 81 Calif. L. Rev. 125. p. 222.

also noteworthy that in the early stages of a career a would-be celebrity is often only too pleased to obtain as much coverage as possible.

On natural rights some argue that an individual should have a natural right to control an image⁴². It is ironic that if one considers the cases outlined above, most sympathy might attach to the individual in those circumstances where there is no redress and which may cause some distress to the reputation or honour of the individual: areas in which one may argue that an individual should have a natural right to control exploitation. Thus, for instance, an individual with no goodwill would not be able to make out a case of false endorsement; neither would there be redress for an individual where a photograph was taken by another, digitally manipulated and disseminated over the Internet for domestic purposes. These non-commercial uses are termed by some dignitary aspects of personality⁴³ find justification in the general right to be let alone. But how far this justification might extend is far from clear. Would it also encompass the photograph of Phan Thi Kim Phuc taken in 1972?⁴⁴

In terms of the current UK provisions, the outlook for Marilyn Monroe, Posh Spice and Me is mixed. Beyond ownership of the copyright in the image and the moral rights of the photographer (where recognised) few rights discussed above subsist for the estate of Marilyn Monroe. The same cannot be said for Posh Spice. Using her image without permission to endorse products, or in a way that might raise questions over informational privacy, or even where her interests in maintaining a private home and family life outweigh interests of freedom of expression, then she may have a remedy. My rights are more limited notably in the commercial sphere. Should therefore a move towards fully fledged personality rights be supported in the UK? Is it better to have a system which recognises personality rights which are then limited in response to certain situations, as in the US, or is it preferable to have no general personality rights but sufficient flexibility in the law (in most but not all cases) to respond to clear instances of abuse and in consequence be able to afford protection where it is felt most needed?

⁴² McCarthy *The Rights of Publicity and Privacy* 2d ed 2002. One wonders if those who put forwards this justification would also argue for the *droit d'auteur* system of creative works to be found in France with its attendant and extensive system of moral rights.

⁴³ See for example Beverley-Smith *Commercial Appropriation of Personality* Cambridge University Press; ISBN: 0521800145

⁴⁴ Some have questioned whether that photograph was manipulated in the sense of being stage managed. <http://europe.cnn.com/2002/WORLD/asiapcf/southeast/02/28/vietnam.nixon/>

For this writer, in the commercial arena, the second option is infinitely preferable. It is certainly the case that there are lacunae in the law which should be remedied, particularly in those instances where dignitary aspects of personality are implicated. However, granting a general right of personality could easily lead to abuse by those seeking to exercise the right in areas where the right does not, and indeed should not extend. The pressure exerted on the smaller, vulnerable business and on those artists legitimately seeking to ply their trade could ultimately do more to stifle than to encourage innovation. Much better for the small trader to be (reasonably) secure in the knowledge that personality rights are not protected and place the burden of proof on those arguing that they do, than to have the rights exist, but to be uncertain as to their extent and thus have the burden of proving that a particular use does not fall within the protected right.

Suffice it to say that the development of technology in the realm of photographs has given rise to complicated questions concerning the right that the subject of that image should have to control subsequent use. Competing interests of artist and subject, considerations of public and private, questions over commercial and non-commercial use and clashes between control and freedom of expression have all proved relevant in the quest to make some sense of the developments. There is, however, a long way to go.

Public versus private

A word must be said on the public/private distinction that permeates much of the discussion in relation to commercial control over images but more particularly in relation to matters of freedom of expression. For instance, if an image is shot in a private setting, then the subject would seem to have a greater say in the disposition of that image than would be the case if the photograph had been taken in public. The publication of a photograph that discloses private information is more likely to be enjoined than one that does not. In this, different considerations also arise over whether a person is a public or a private figure: public figures being accorded generally less protection than others. Questions over what is and what is not in the 'public interest' are also raised. Judicial views on what constitutes the public interest range from matters which 'right thinking people' regard as dangerous or irresponsible⁴⁵ to matters in which the public are interested⁴⁶. The public private divide also affects the type of regulation in this area.

⁴⁵ Hoffmann L.J. in *R. v. Central Independent Television Plc* [1994] Fam. 192 at 201- 204,

⁴⁶ *A v B & C plc* [2002] E.M.L.R. 21 2002 WL 237087 (CA), [2002] 2 All E.R. 5

Personality rights generally considered as private rights now appear to be affected by public regulation by virtue of the Data Protection Act 1998.

The purpose of highlighting this debate is to illustrate the extent to which these considerations affect this area of the law, and to question the extent to which they contribute to the development of coherent principles in this area. Regulation apart, the dividing line between the paradigms is not easy to state with any precision. On regulation it must be questionable as to whether what is essentially a private right should be affected by public enforcement. But if the distinctions are to be discarded, then some other means must be found to distinguish what might be a legitimate claim for control over an image from one which seeks to exert control in an area to which the law does not extend. The question then is what should that mechanism be?