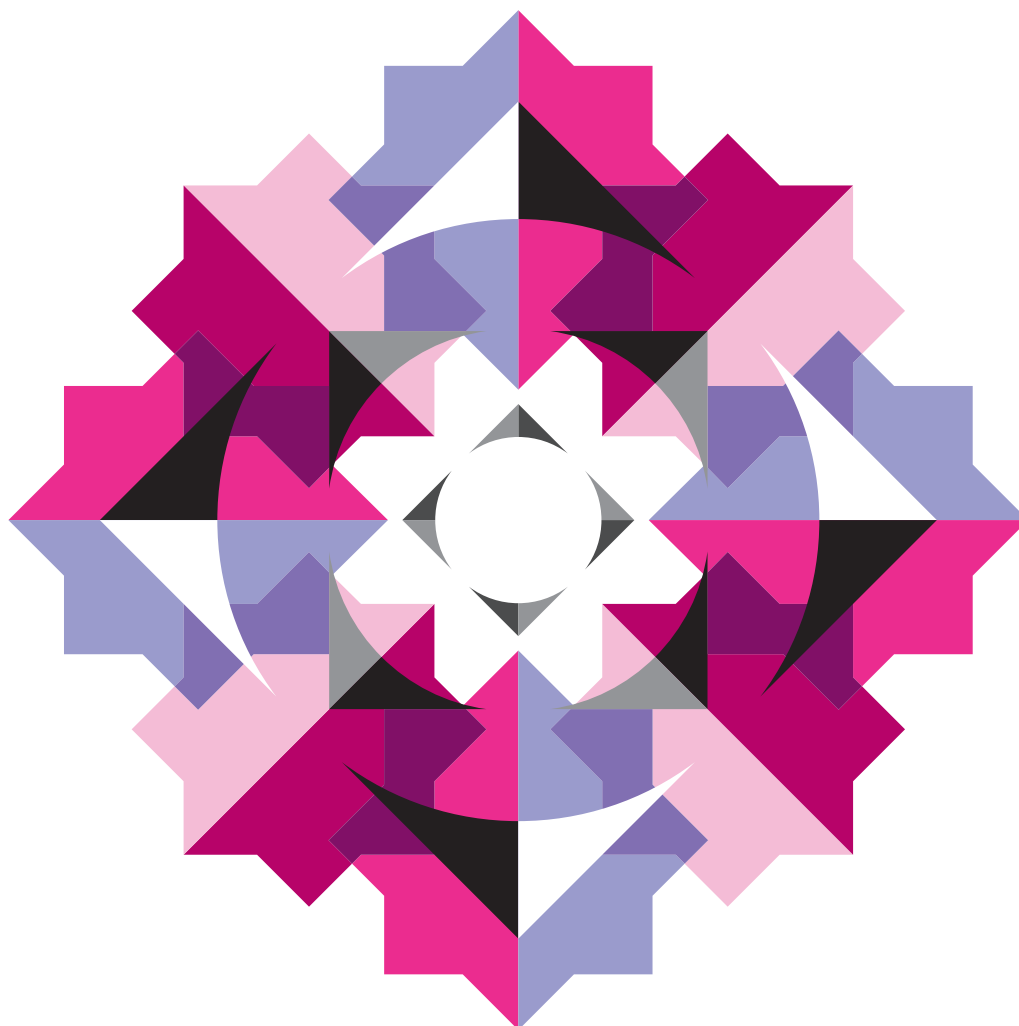


Using celebrities in advertising



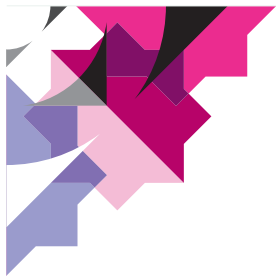
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Introduction

Advertising often uses a reference to celebrity to create an impact. Sometimes this is done by agreement, and in return for a substantial fee, but sometimes, it is done without permission. Although this may not breach any laws or regulations, it should only be done after a careful analysis of all the risks.

The United Kingdom does not have statutory privacy or personality laws. Privacy rights need little explanation. Personality rights (also known as publicity rights) protect living individuals (and sometimes their estates) from unauthorised commercial exploitation of their celebrity, whether by means of references to their name, likeness, voice, signature or any other reference to them. Instead, the law in the UK comprises of a plethora of different common law and statutory rights which combine to create a complex matrix. In recent years, these laws have been supplemented by new additions such as the Human Rights Act 1998 and the Data Protection Act 1998. Furthermore, there are additional controls laid down by various self-regulatory codes.

How does the law of “passing off” apply?

Passing off is the closest that English law gets to preventing the unauthorised commercial exploitation of celebrity, whether by name, likeness, voice, signature or other reference. Passing off is a ‘tort’, i.e. an act which is wrong in civil law, rather than criminal law. There are three elements to passing off: goodwill, misrepresentation and damage.

For these purposes, “goodwill” is something commercially valuable and which should therefore be protected, but is not easily defined. In this context, it is something associated with reputation or public standing. The man in the street will struggle to prove that there is any goodwill attaching to his name or image, but this is not the case for a celebrity.

Many are paid large amounts of money to have their names and images associated with particular products. Passing off enables celebrities to stop advertisers from taking advantage of their goodwill without paying for it.

“Misrepresentation” means that the advertisement makes a false statement, often a suggestion that a celebrity is endorsing a particular product when he never agreed to do so. The celebrity will argue that people will look at the advertisement and believe that they have been paid to endorse the product.

“Damage” is the last of the three elements necessary in passing off. A celebrity might argue his damage is the amount of the fee he would have been paid if the advertiser had asked permission. But damage can also be less direct, such as damage to the celebrity’s reputation or image by being associated with a shabby or downmarket product.

In 2002, a landmark case established beyond doubt that celebrities can use passing off to protect the goodwill in their celebrity. Racing driver Eddie Irvine successfully sued TalkSport over a direct mailing piece which featured a photograph of him holding a portable radio which had the TalkSport name and logo on it. In fact, Irvine had been holding a mobile phone at the time the photo had been taken, but it had been digitally manipulated to replace the phone with the radio. The judge decided that the advertisement clearly gave rise to a false impression of endorsement of the radio station by Irvine, and that the law of passing off should protect him from this infringement of his goodwill.

Can “defamation” laws be an issue?

The law of defamation protects both personal and corporate reputations and includes both libel which is a written statement, and slander, which is a purely verbal statement.

The first question is whether the statement which was made was untrue.

Secondly, do the words complained of relate to a living individual? Finally, is the meaning of the words defamatory?

The commonly asked question is whether the words used would tend to lower the Claimant in the estimation of right thinking members of society generally. Alternatively, has the Claimant been exposed to ridicule or contempt?

In the past, before developments in the law of passing off, defamation was often used as the remedy by celebrities who were unhappy about unauthorised references to them.

It is unusual for a defamatory statement in an advertisement to take the form of straightforward abuse. More often it will take the form of an



innuendo and it can arise from the juxtaposition of words and pictures, and may not have been intentional.

Fictitious names are often used in advertising to create an air of reality. This invariably gives rise to certain risks that can be reduced through trade mark searches and common law searches, but problems may still arise if a name is not found for any reason. If a defamatory statement is made by someone that shares the same or a very similar name as the character in the advertisement, then they may be able to sue for defamation.

Do celebrities have trade marks?

It is increasingly common for celebrities to protect their name and/or likeness through trade mark registrations. They must apply for a trade mark before they reach super-stardom, because if his name or photograph appears on t-shirts, posters and mugs etc from a range of different suppliers, then it will no longer serve as a 'badge or origin' for such goods, and will not function as a trade mark. This was why Princess Diana's name and likeness could not be registered as a trade mark.

If a celebrity has a trade mark in relation to a particular product, such as a perfume, then she has a monopoly over the use of her name in relation to perfumes. If another perfume manufacturer makes an unauthorised reference to her in an advertisement, she will have strong grounds for a claim of trade mark infringement. If so, she could quickly and easily get a court order requiring the advertisement to be withdrawn. A trade mark search is often a wise precaution before making an unauthorised reference to a celebrity.

Is there a law of privacy?

In the UK, it used to be clear that there was no law of privacy as such. In some European countries such as France and Germany, there is a general right of privacy. Conversely, in some states of America there is a right of publicity. Therefore, if advertising may find its way to other countries, such as via the internet or by the distribution of magazines to Europe or the USA, consideration must be given to the laws of those countries. In the USA, the situation is especially difficult.

UK law has now been changed by the introduction of the Human Rights Act 1998 which implements the European Convention on Human Rights into English law. Article 8 of the ECHR states "everyone has the right to respect for his private and family life, his home and his correspondence". Nevertheless, the case brought by Michael Douglas, Catherine Zeta Jones and OK! Magazine against Hello Magazine over various wedding photographs suggests that English law is still some way from accepting the existence of a right of privacy per se.

What other forms of protection exist for celebrities?

Malicious falsehood can be used if a false comment is made by someone who knows it to be false.

There is no copyright in your likeness and under English law, copyright in a photograph initially belongs to the photographer, not the subject. However, it has been suggested that copyright may protect a signature as a graphic work. So if a celebrity's signature was used without permission that may be a copyright infringement.

"Moral rights" include the right to object to false attribution of a copyright work (the "paternity right") and the right to object to derogatory treatment of a copyright work (the "integrity right"). Alan Clarke successfully sued Associated Newspapers over its "Secret Political Diaries of Alan Clarke" in the Evening Standard, because despite a disclaimer, the headline falsely attributed the articles to Clarke.

Data protection laws can be used by 'the man in the street' to stop unauthorised uses of photographs, but the limit on compensation is currently £5,000 so most celebrities will prefer to rely on other legal remedies.

What are the self-regulatory rules for television advertising?

In addition to purely legal considerations, there also the various self-regulatory codes to consider. Section 6.5 of the Television Advertising Standards Code (the "Code") issued by the Broadcast Committee of Advertising Practice states that with limited exceptions, living people must

not be portrayed, caricatured or referred to in advertisements without their permission.

The only exceptions being:

- advertisements for specific publications (books, films or specific editions of radio or television programmes, newspapers, magazines etc) which feature the person referred to in the advertisement, provided the reference or portrayal is neither offensive nor defamatory;
- generic advertising for news media, in which case prior permission is not required, if it is reasonable to expect that the individuals concerned would not object, but if they do, however, the advertising must be suspended immediately pending resolution of their complaint; and
- advertisements where the appearance is brief and incidental, for example in a crowd scene.

What are the rules for radio advertising?

The Radio Code says that advertising must not claim or imply an endorsement where none exists and urges advertisers to obtain written permission in advance if they portray, refer or allude to living individuals in any advertisement. This is not an absolute requirement, but any clearance given will be on the basis that it is recommended that such permission is sought. Advertisers who have not obtained prior permission from those featured should ensure that they are not portrayed in an offensive, adverse or defamatory way.

In addition, any portrayal or reference should not interfere with individual's private or family life. The Code also warns that references to dead people should be handled with particular care to avoid causing offence or distress.

The Radio Code also says that "sound-alikes" are only permissible where they are instantly recognisable as such and where it could be reasonably expected that the persons concerned had no reason to object. The Code also highlights the dangers of referring to the names of fictional characters without permission.

What are the self-regulatory rules for non-broadcast advertising?

The CAP Code for non-broadcast advertising states that advertising should not unfairly portray or refer to people in an adverse or offensive way.

The Code urges (but does not require) advertisers to obtain written permission before:

- referring to or portraying members of the public or their identifiable possessions. (Although the use of crowd scenes or general public locations may be acceptable without permission, sometimes it is difficult to decide when a member of a crowd has been singled out, and may have grounds for complaint.)
- referring to people with a public profile, although references that accurately reflect the contents of books, articles or films may be acceptable without permission;
- implying any personal endorsement.

The Code also expressly states that prior permission may not be needed when advertising contains nothing inconsistent with the position or views of the person featured. Like the Radio Code, the CAP Code warns that references to dead people should be handled with particular care to avoid causing offence or distress.

What does the CAP Code say about references to royalty?

The CAP Code has special rules about references to royalty. It says that they should not normally be referred to in advertising without permission, although incidental references unconnected with the advertised product, or references to material such as books, articles or films about members of the Royal Family, may be acceptable.

Conclusions

In the UK, it is difficult if not impossible to make unauthorised references to living celebrities in broadcast media, but this can be achieved in non-broadcast media without infringing any of the existing UK laws or regulations.

The decision in the Eddie Irvine case is important because it establishes a clear precedent where an advertisement falsely implies an endorsement. This could well give rise to liability for passing off, in any media. References which do not falsely imply an endorsement are still feasible, without permission.

If an advertisement is going to be used on the Internet, or a media which will be distributed overseas, the laws of the countries where it appears may well be infringed. In the case of the United States, it appears that Courts there are willing to take action over commercials which feature American citizens without their permission, even if those advertisements only appear outside the United States.

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