

Image rights



► Inside

- What are image rights?
- How are they protected?
- How are they exploited?
- Image rights companies
- Tax efficiency
- The watchful eye of the Inland Revenue



Introduction

Famous sportspeople, entertainers and other celebrities derive substantial incomes from allowing themselves to be commercially associated with brands. It is big business, very big business, and because of this celebrities are faced with two very different problems. Firstly, how to stop brands from linking themselves with the celebrity without paying a licence fee. Secondly, how to avoid paying the taxman a sizeable chunk of that licence fee.

Passing off

This cause of action is the closest the UK has to a personality right. To bring a successful action for passing off a celebrity must be able to demonstrate that:

- a) they have the requisite reputation amongst the UK public;
- b) a third party has made (or intends to make) use of their 'image rights' in a manner that is likely to lead the public to believe that the celebrity is, for example, endorsing a product; and
- c) the misrepresentation has caused or is likely to cause the celebrity harm (generally through the loss of the fee they would have charged).

In such circumstances the court will usually grant an injunction preventing further use and award the celebrity damages and recovery of their legal costs.

A textbook example of passing off occurred when Formula 1 driver Eddie Irvine brought an action against Talksport Radio. Talksport sourced a photo of Eddie Irvine listening to a mobile phone and altered it so that the phone was replaced with a Talksport branded radio pressed to his ear. This photo was then distributed by Talksport as part of a marketing campaign. Eddie Irvine successfully claimed that recipients would naturally assume he was endorsing the station and he recovered damages equivalent to what he would have charged had they approached him for permission.

Trade marks

Many celebrities register trade marks in order to try to prevent unwanted commercial exploitation. Trade marks that have been registered include celebrities' names, faces, catchphrases, nicknames and signatures - there is even a registration of the silhouette of Jonny Wilkinson in his distinct kicking stance!

Copyright

Copyright protects original literary, dramatic and artistic works as well as certain rights in sound recordings, films, broadcasts and cable

programmes. It is of limited use since there is no copyright in a face or name and the copyright in a photograph belongs to the photographer, not the subject. It will however protect signatures and diaries.

Advertising Codes

The advertising industry's self regulatory codes contain provisions that provide some protection against the unauthorised use of individuals in advertising without their consent. These can often represent a cost effective way of dealing with unauthorised use, particularly in broadcast advertising where such use of living people without their consent is generally prohibited.

Defamation

The law of defamation does not prevent unauthorised use, it protects reputation. A celebrity may have a cause of action where the defendant's actions has meant that the celebrity has been 'lowered' in the estimation of reasonable, right thinking members of society, or the defendant has caused such persons to shun or avoid the celebrity. Given that most people will not think less of a celebrity for endorsing a product, this cause of action will be most appropriate where the celebrity is linked to a wholly inappropriate product. For example, many Muslim celebrities would be viewed as hypocrites if they appeared in alcohol advertising. Also, if a football player has an exclusive deal to appear in adverts for one sports clothing company and a rival company then features him without his consent, he would have an argument that the public would think that he is not honouring his contract.

Confidentiality/Privacy

The high profile Douglas -v- Hello case has kept this area of law firmly in the spotlight for a number of years. This is likely to be of limited use unless the information, photographs or other recordings have been obtained improperly.



Data Protection

Strange but true. The court's view in cases such as *Naomi Campbell v MGN*, where the newspaper printed a picture of the model outside an addiction clinic, was that a photograph of a person can constitute 'personal data' which can be 'processed' by its reproduction in a newspaper. There are many specific exceptions where processing is permitted, however these will not always apply when a celebrity is featured without consent.

Other possible angles to consider include the Human Rights Act 1998, which provides that "everyone has the right to respect for his private and family life, his home and his correspondence", the laws of malicious falsehood and under the Trade Descriptions Act 1968.

Image rights structures

Given the amounts earned, it is perhaps unsurprising that lawyers and accountants have dedicated much effort to finding the most tax efficient treatments for image rights related earnings.

The creation and exploitation of image rights vehicles is viewed by many as a complex field, combining legal contracts, tax wizardry and companies operating out of small islands enjoying sunnier climes than the UK. There is some truth in this, but the reality is that the appropriate treatment of image rights is important for the financial health of both players and clubs.

Given the upward pressure on salaries in many sports, and indeed a potential wage explosion should challenges to salary caps come to fruition, the tax breaks are likely to become increasingly attractive and image rights vehicles will therefore continue to grow in terms of financial relevance.

Benefits for players

Historically, the main driver for setting up image rights companies has come from players wishing to avoid National Insurance payments relating to both non-playing promotional work for their clubs and non-club promotional work. There are further benefits to be gained from those payments made to image rights companies being charged

at corporate tax rates rather than the higher rate of income tax paid by the vast majority of professional players, and also from being able to defer payment of that tax.

For the many non-domiciled players playing professional rugby in the UK, the benefits are even greater as payments made to off-shore image rights companies are capable of being completely exempt from UK tax.

Benefits for clubs

The obvious benefit to the club is that it may be able to avoid employer's NI in respect of the payment to the image rights company. Whilst some clubs have behaved reactively to individual image rights agreements when they have been proposed by a player, it is clear that clubs can derive a greater benefit from taking a concerted approach towards all their players' payment arrangements. There are a number of potential advantages from this approach. Firstly, it may be possible to negotiate a lower headline wage with a player if that player knows that he will in effect be better off due to a more advantageous tax treatment. Secondly, employer's NI payment savings across the team may be substantial.

Setting up Image Rights Companies

There has been resistance to the use of image rights corporate structures due to their perceived complexity. However, once the structure has been carefully explained and examples worked through to show the financial benefits, then commercially astute clubs and players generally come to see these as important parts of their financial planning. An important consideration from a club's perspective is that once a club has been through the process once with a player, then it will be largely possible to recycle the same documentation for subsequent arrangements with relatively low levels of legal and tax advice.

The basic structure is that a player assigns his personality/image rights (this will include the player's name, likeness, image and relevant trade marks) to a dedicated image rights company. The image rights company then holds these rights and then licences them to the club, sponsors, or as

part of an endorsement or other rights deal.

If the player is UK resident and domiciled, and the image rights work relates to the UK, then the image rights company should be based in the UK. If the image rights company is based offshore then the Inland Revenue will treat the amounts due to the player for UK work as UK earnings and subject to income tax. However if the player is able to exploit his personality overseas then that portion of his earnings might be capable of being paid into an offshore structure.

Non-domiciled players benefit significantly from also being able to pay their UK image earnings into an offshore company.

From a practical perspective, setting these structures up is fairly straightforward and the companies are usually administered by a management company for a fee. The difficulty often lies in correctly assessing what proportion of a player's earnings can rightfully be deemed to be made in respect of a club's ability to use his image as opposed to payment for his actual on-field activities. An assessment that can be complicated by the fact that the proportion may change depending on whether the player wins or loses a place in the national team, drops out of the public spotlight through injury or conducts himself in a way that significantly damages his public image.

Inland Revenue concerns

The press takes great pleasure from running stories on the earnings of leading football players, and often infers that image rights structures are tax avoidance scams helping feed their insatiable appetite for fast cars and expensive bars. However it is common knowledge that the Inland Revenue has examined a number of image rights arrangements in order to determine whether the payments made to the image rights companies are legitimate, or whether they should properly be treated as an employee payment and subject to NI. The findings are consistent. Provided that they are properly structured the Inland Revenue considers these to be tax compliant.

The increased professionalism and commercialisation within both union and league mean that the protection of image rights and their tax efficient exploitation are going to remain

an important part of the financial planning for leading clubs and players for the foreseeable future.

Our expertise

Our team has a wealth of experience advising on image rights, licences and other forms of commercial exploitation. We also fight the corner of those whose images have been used without consent or who have been defamed.

Our Sports Business Group advises many players, image rights companies and clubs on image rights issues.

For further information on this subject please contact:

Dominic Farnsworth

Partner

T + 44 (0) 20 7074 8088

dominic.farnsworth@lewissilkin.com

Iain McDonald

Senior Associate

T + 44 (0) 20 7074 8432

iain.mcdonald@lewissilkin.com