

Image rights—protection, exploitation and taxation

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This Practice Note focuses on the commercial protection, exploitation and taxation of image rights in the UK. While it covers some laws which can be employed to protect an individual's privacy (including breach of confidence, data protection, and defamation), it does so within the context of commercial exploitation and protection of a celebrity's image. For detailed guidance on misuse of private information, see Practice Note: [Privacy law—misuse of private information](#).

Famous sportspeople, entertainers and other celebrities derive substantial income from allowing themselves to be commercially associated with brands. It is big business, very big business, and because of this, celebrities and athletes are faced with three very different problems.

Firstly, how to stop brands from linking themselves with the celebrity without paying a licence fee. Secondly, how to derive the most commercial income from exploitation of their image rights while maintaining control, exclusivity and value. And thirdly, how to ensure that the income is taxed fairly.

What are image rights?

The term 'image rights' is used to refer to an individual's proprietary rights in their personality and the ability to exploit, and to prevent unauthorised third parties from making use of, an individual's persona, including their name, nickname, image, likeness, signature and other indicia that are inextricably connected with that individual.

A number of jurisdictions have specific laws preventing the use of a person's personality for commercial purposes, including the US, France and Germany. Guernsey has even taken the unique step of establishing a registered image right. The UK, however, does not have any codified or consolidated legislation that confers such protection. Under English law, an aggrieved celebrity will have to piece together a cause of action to prevent the unauthorised use of their image from a patchwork of statutes, common law, IP rights and regulatory protections.

How are image rights protected in the UK?

IP rights

Registered trade marks

Registered trade marks provide an important practical means of protecting image rights.

A trade mark is any type of symbol that indicates the origin of goods and services. Any sign capable of being represented in the register in a manner which enables the registrar and other competent authorities and the public to determine the clear and precise subject matter

of the protection afforded to the proprietor, and which is capable of distinguishing the goods or services of one party from those of another party, can be registered as a trade mark in the UK. The [Trade Marks Act 1994 \(TMA 1994\)](#) governs UK trade marks and [Regulation \(EU\) 2017/1001](#) governs EU trade mark (EUTM) registrations.

Names; logos developed to identify a celebrity (eg Roger Federer's 'RF' logo); signatures; nicknames; or graphical representations of a celebrity (eg the silhouette of Usain Bolt's 'lightning bolt' pose), are among the many trade marks registered by or in relation to celebrities with a view to protecting and exploiting their image.

Other examples include David Beckham, who has registered his name as an EUTM in relation to a range of goods, including perfumes, hair care cosmetics, key rings, figurines and jewellery (see EUTM registration number [001796721](#)). Heston Blumenthal holds a UK trade mark for HESTON BLUMENTHAL'S TRIPLE COOKED CHIPS in his own name (see UK trade mark [UK00002463320](#)). Jose Mourinho famously ran into problems when he became manager of Manchester United in 2016—his name and signature being registered trade marks belonging to his previous employers, Chelsea. See 'Retaining control' section below.

However, famous names and images of celebrities are not capable of trade mark protection for all goods and services. The UK Intellectual Property Office (IPO) has refused registrations of marks in respect of 'mere image carriers' such as posters, photographs and other similar goods, on the grounds that the public does not necessarily believe all goods bearing a name or image to emanate from one 'official' source.

The US rock band Linkin Park famously failed in an attempt to register its name as a trade mark in respect of the sale of posters. It was held by Richard Arnold QC (sitting in his capacity of Lord Chancellor's Appointed Person) on 7 February 2005 that the word mark had acquired such well-established meaning in the eyes of the average consumer that a reference to 'Linkin Park' in the case of posters would be more likely to refer to the subject matter of the goods, rather than their origin. He pointed out that a consumer who wanted to ask a shop assistant whether the shop stocked posters depicting the group would most likely ask 'Do you have any LINKIN PARK posters?'. In this question, the mark would clearly be used to describe a characteristic of the goods being sought, namely their subject matter, not their origin.

References:
[Linkin Park, Application No. 2313504](#)

In September 2005, in a decision consistent with the *Linkin Park* case, the Trade Marks Registry refused an application by well-known football manager Sir Alex Ferguson to register his name in relation to 'image carrier' goods in class 16, namely posters, photographs, transfers, stickers, decalcomanias, stickers relating to football, and any other image-bearing printed matter. The refusal was made on the basis that a trade mark cannot be registered if it has no distinctive character ([TMA 1994, s 3\(1\)\(b\)](#)) or if it consists exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services for which registration is sought ([TMA 1994, s 3\(1\)\(c\)](#)).

References:
[Alex Ferguson, Application No. 2323092B](#)

The IPO's manual of trade marks practice contains useful guidance on the registrability of famous names, names of deceased individuals, and images of famous persons and famous fictional characters, not all of which may be registrable. Specifically, the 'Famous names' subsection provides an indication as to how attempts by third parties to register the name of a famous living individual will be assessed by the Registry, particularly in 'bad faith' scenarios.

References:
[Manual of trade marks practice](#)

A prime example of a trade mark being declared invalid under [Article 52\(1\)\(b\)](#) of Regulation (EC) 207/2009 (now superseded by [Article 59\(1\)\(b\)](#) of Regulation (EU) 2017/1001) on grounds that its registration was in 'bad faith' was that of the *Neymar* case in 2019. In this

case, the footballer Neymar successfully filed an application for a declaration of invalidity against the word mark 'Neymar' registered by a Mr Carlos Moreira back in 2012. Despite Mr Moreira's claim that Neymar was not yet known in Europe when the contested mark was registered, the EU General Court concluded Neymar was already highly publicised before 2012 because of his performance with the Brazilian national football team, especially in France, Spain and in the UK. It was held that the original application for registration was filed deliberately with the purpose of creating an association with the footballer's name in order to benefit from its attractive force, and thus declared invalid on ground of bad faith. For more information about this case, see News Analysis: [General Court agrees NEYMAR trade mark applicant acted in bad faith \(Moreira v EUIPO\)](#).

In practice, a celebrity is likely to seek to register their name or image in relation to specific categories of goods in relation to which they are exploiting their image or intend to exploit their image in the future. The nature of these goods will depend on the celebrity in question—for example, an athlete will likely consider registering their name and/or image for categories of goods which include merchandise, sportswear and sporting articles in classes 25 and 28.

Specific rules apply in relation to signs relating to the Royal family, the Royal crown, flags or arms, concerning both registrability and criminal offences relating to unauthorised use. Published guidance from the Lord Chamberlain's office is relevant and the IPO's manual contains a section on the examination of Royal marks.

For more information about registering trade marks, see Practice Note: [Absolute and relative grounds for refusal to register a trade mark](#).

Passing off

The tort of 'passing off' is the cause of action which is perhaps the closest the UK has to a personality right. It is perceived by many to be a more suitable basis for protecting image rights than the law of privacy, due to the fact that privacy is a personal right (which affords relief for distress and/or harm caused) whereas passing off, by its very nature, protects the commercial value of an individual's reputation/image.

Passing off is an established cause of action in cases where the name or image of a famous person has been used without permission to endorse or advertise a particular product. The principle underlying the tort of passing off is that 'A man is not to sell his own goods under the pretence that they are the goods of another man' (*Perry v Truefitt* at [73]).

To bring a successful action for passing off, a celebrity must be able to demonstrate that:

- they have the requisite reputation or 'goodwill' among the UK public
- 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 goods/services are offered or endorsed by the celebrity, and
- the misrepresentation has caused or is likely to cause the celebrity harm (generally through the loss of the fee they would otherwise have charged)

If each of the factors above can be established, the court will usually grant the aggrieved celebrity an injunction preventing further use by the defendant of their image and award the celebrity damages and recovery of their legal costs.

References:

[Trade Marks Act 1994, ss 4, 9](#)

[Use of Royal Arms, Names and Images](#)

[Manual of trade marks practice](#)

References:

[Perry v Truefitt \(1842\) 49 ER 749](#)

References:

[Reckitt & Colman Products Ltd v Borden Inc \[1990\] 1 All ER 873](#)

In order to demonstrate the necessary goodwill, it is generally accepted that the person should be in the position of typically commanding fees for other product endorsements.

The leading case in respect of commercial passing off in the UK is *Irvine v Talksport*, which involved Formula 1 driver Eddie Irvine bringing 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 altered image 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 was therefore able to recover damages equivalent to the amount he would have charged had Talksport formally approached him for permission.

References:
***Irvine v Talksport Ltd* [2003]
EWCA Civ 423**

Use of celebrity names and images on products will not necessarily always involve passing off. In 1977, use of the name of ABBA on transfers and badges was not found to be passing off on the basis that there was no real possibility that the public would be confused into thinking that ABBA had approved the goods merely because their name or photograph appeared on them. See *Lyngstad v Anabas Products* [1977] FSR 62 (not reported by LexisNexis®).

In *Fenty v Arcadia*, pop star and fashion designer Rihanna succeeded in a passing off claim against Topshop, who used her image on a t-shirt without her permission (Topshop did have a licence from a third party to use the particular image, which ruled out a copyright claim). In the judgment, the High Court recognised that merchandise may be created to simply 'celebrate' a person and didn't automatically indicate that the goods to which the name/image is applied were endorsed by or originated from the celebrity. However, the High Court acknowledged that consumers are used to celebrity endorsed merchandise and, on the particular facts (especially given her previous association with Topshop), found that a sufficient proportion of consumers would believe Rihanna had authorised the t-shirt. The claim for passing off therefore succeeded. The judgment was affirmed on appeal. See News Analysis: [Umbrella of merchandising offers no shelter for Topshop](#).

References:
***Fenty v Arcadia Group
Brands Ltd* [2015] EWCA Civ
3, [2015] All ER (D) 157 (Jan)**

For more information about IP and competition law issues which may arise in the context of character merchandising, see Practice Note: [Character merchandising—IP and competition law issues](#).

For more information about passing off, see Practice Notes: [Elements of passing off—goodwill](#), [Elements of passing off—misrepresentation](#) and [Elements of passing off—damage](#).

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 in protecting image rights since there is no intrinsic copyright in a face or name, and the copyright in a photograph belongs to the photographer, not the subject. It may however protect signatures, diaries and designs/logos developed by/for celebrities.

Copyright may offer some protection for image rights where the celebrity has copyright in the photographs or film themselves (which contains images of the celebrity). Hence, one way for a celebrity to protect their image is to attempt to obtain the copyright in such footage, which they can then exploit by way of a licence.

A topic of hot debate that has emerged in recent years is whether it's possible to copyright dance moves. There have been a number of recent law suits launched by

individuals against video game companies (mostly in the US), accusing the developers of stealing signature dance moves developed and danced by celebrities, either in sporting celebrations, music videos or TV shows. Choreography is a form of dramatic work protected by copyright so the use of the dance moves in-game without permission of the original dance creator is arguably copyright infringement. Whether these US law suits will succeed and the potential impact they could have on UK copyright law remains to be seen, but it's certainly worth paying close attention to the issue.

For more information about copyright, see Practice Note: [Copyright—subsistence and qualification](#).

Performers' rights

Performers' rights provide a method whereby a person can control the dissemination or exploitation of their performances. Under [Part II](#) of the Copyright, Designs and Patents Act 1988 ([CDPA 1988](#)), performers are granted certain property and non-property rights in performances, independent of any copyright or moral rights that may subsist in the performed work (or a film or sound recording of it).

Pursuant to [CDPA 1988](#), a 'performance' includes a dramatic or musical performance, or a reading or recitation of a literary work, which is a live performance. By way of example, performers' rights may enable a performer to prevent the issue of copies of unauthorised recordings of a recording of a performance, or otherwise prevent such a recording being made available via the internet.

As such, performance rights are more relevant for celebrities in a theatrical/dramatic/musical context, rather than in relation to athletes within a sporting context. Sport and sporting moves are not generally dramatic works and therefore there is no 'performance' for the purposes of performers' rights. The exception is in ice dancing, artistic (synchronised) swimming and other similar sports that may benefit as a result of being choreographed dramatic works of 'dance'.

For more information about performers' rights, see Practice Note: [Performance rights](#).

Registered 'image rights'

Finally, although not part of the 'UK' (and therefore not technically within the remit of this note) to provide a comprehensive overview of how IP can be used to protect image rights, it is worth mentioning that Guernsey has created a statutory regime under which image rights can be registered. The legislation centres around the legal concept of a 'personnage', being the person or character behind a personality. The personality of a personnage is registered to create a 'registered personality' under the legislation.

There has been limited take up of registrations but for those with image rights companies (see 'Image rights structures' section) based on the island and/or who are looking at innovative ways of protecting their persona, this may be of interest. For further information, see this [guidance](#) issued by the Guernsey IPO.

Advertising standards codes

The Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) Codes form part of the self-regulatory regime of controls over advertising in the UK. These codes contain specific measures regarding the use of images of individuals and that can be invoked by both members of the public and celebrities where they have been portrayed or referred to in advertisements without permission.

References:

[Copyright, Designs and Patents Act 1988, s 180\(4\)](#)

References:

[CDPA 1988, ss 180, 182B, 182C](#)

Although breaches of the codes don't give the featured individual any direct cause of action or remedy, they do provide an avenue for complaint which can result in a demand from the regulators to withdraw the offending advert.

For more information about the law governing advertising, marketing and sponsorship, see the section 'Regulatory issues' below.

CAP code

The CAP Code applies to a wide range of non-broadcast advertising, including advertisements in posters, magazines, brochures, newspapers, text transmissions, online advertising, cinema and video commercials, and marketing communications on an organisation's own website/social networking sites.

Advertisers must not unfairly portray or refer to anyone in an adverse or offensive way without written permission. Advertisers are strongly encouraged to obtain written permission before:

- referring to or portraying a member of the public or their identifiable possessions (except for crowd scenes or general public locations, depiction of which may be acceptable without permission)
- referring to a person with a public profile (although references that accurately reflect the contents of a book, article or a film might be acceptable without permission), or
- implying any personal approval of the advertised product

Prior permission may not be needed if the advertisement contains nothing inconsistent with the position or views of the featured person.

Rule 4.3 of the CAP Code states that references to anyone who is dead must be handled with particular care to avoid causing offence or distress.

The CAP Code also provides that members of the Royal Family should not normally be shown or mentioned in a marketing communication without their prior permission but an incidental reference unconnected with the advertised product, or a reference to material such as a book, article or film about a member of the Royal Family, may be acceptable.

BCAP code

The BCAP Code regulates broadcast television and radio advertising in the UK.

In relation to television advertisements, with limited exceptions, living persons must not be featured, caricatured or referred to in advertisements without their permission. Exceptions are made only for brief and incidental appearances, such as crowd scenes, and advertisements that refer to a person featured in publications, programmes, films and the like, providing that the reference to or portrayal of that person is neither offensive nor defamatory.

With regard to radio, rule 6.2 of the BCAP Code states that broadcasters must ensure that, if an advertiser has not sought their prior permission, a person featured in an advertisement must not be featured in an offensive, adverse or defamatory way. Impersonations, soundalikes, parodies or similar take-offs of celebrities on TV and radio are permissible only if those devices are instantly recognisable, and if it could be reasonably expected that the person concerned has no reason to object.

References:
CAP Code

References:
CAP Code, rule 6

References:
CAP Code, rule 4.3

References:
CAP Code, rule 6

References:
BCAP Code

References:
BCAP Code, rule 6.2

In 2003, a 1970s runner (named David Bedford) complained about the use of his image in a television advertisement for 118 118 directory enquiries services, in which actors had appeared to caricature him and thereby exploit his image. The advertisements were found to be in breach of the predecessor to the BCAP Code but were not banned, partly because it was doubted that he had suffered any financial loss.

Privacy and breach of confidence

The seminal case which focused on the law of privacy and the extent to which it can be used to protect commercial image rights in the UK was that of *Douglas v Hello!*

The case involved unauthorised photographs taken by a photographer for *Hello!* magazine at the wedding of Michael Douglas and Catherine Zeta-Jones (the 'Douglases'). The Douglases had granted exclusive publishing rights of their wedding photos to *OK!* magazine. At the wedding and reception photography was prohibited; employees signed agreements not to take photographs and guests were searched for cameras. Shortly after the wedding however, the claimants became aware that *Hello!* magazine was planning to publish covertly taken photographs (it was not known who exactly had taken the photographs). Both the 'Douglases' and *OK!* claimed for breach of confidence.

The case led to a recognition of what might be termed 'commercial confidence'—a right to sell private information for commercial gain. The courts acknowledged that an obligation of confidence arose because *OK!* had paid a sum of £1m to the Douglases so that anyone admitted to the wedding was not permitted to make or communicate photographic images. That obligation of confidence was imposed for the benefit of both *OK!* and the Douglases. The courts recognised that the law of confidence will afford some degree of protection to those who have entered into exclusive arrangements with celebrities regarding the publication of otherwise confidential or private information.

However, the House of Lords expressly commented in *Douglas v Hello!* that there was 'no question of creating an 'image right' or any other unorthodox form of intellectual property'; the key was that the claimants had sufficient control over the images (and the guests at the wedding) to enable them to impose confidentiality obligations.

At EU level, the European Court of Human Rights (ECtHR) was given the delicate task in *Von Hannover v Germany* (59320/00) of balancing the right to private and family life against the right to freedom of expression under the European Convention of Human Rights (ECHR). Ultimately, the ECtHR found in favour of Princess Caroline of Monaco and imposed a high watermark of protection for the individual, taking a wide view of the notion of 'private life' and prohibiting the publication of a photograph taken of the Princess. The court took the view that photographs of Princess Caroline in her daily life, either on her own or with other people, fell within the scope of her 'private life' and as such were not disclosable unless they could be shown to make a contribution to a debate of general interest.

This approach, however, has not been followed consistently by English courts. It is also worth noting that Princess Caroline of Monaco failed in further privacy cases in the ECtHR in early 2012 (*Von Hannover v Germany* (no 2) (40660/08 and 60641/08)). Here, the ECtHR held that publication of a photograph of Princess Caroline on holiday was justified under Article 10 of the ECHR as it was accompanied by an article about the illness of her father, which did constitute a matter of public interest.

References:

***OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young* [2007] 4 All ER 545**

References:

Von Hannover v Germany, Application no 59320/00

References:

Von Hannover v Germany (no 2), Application nos 40660/08 and 60641/08

In 2004, the case of *Campbell v Mirror Group* saw Naomi Campbell successfully object to the publication of photographs of her emerging from a Narcotics Anonymous meeting. The House of Lords confirmed that information about an individual could be protected by the tort of 'breach of confidence' if:

- it was obviously private, or
- disclosure of the information about the individual concerned would give substantial offence to a person of ordinary sensibilities placed in similar circumstances to that individual

It is worth noting that in *Campbell v Mirror Group* it was found also that there was a breach of data protection rights under the (old) [Data Protection Act 1998](#). See 'Data protection' section.

In *Mosley v News Group*, Max Mosley (the President of the Fédération Internationale de l'Automobile at the time) was awarded damages of £60,000 following publication by News of the World of material relating to his engagement in sadomasochistic sexual practices with a Nazi theme. Despite News Group's argument that Mr Mosley's right to privacy was outweighed by a greater public interest in disclosure, the High Court found that Mr Mosley had a reasonable expectation of privacy in relation to sexual activities carried on by consenting adults on private property and that, on the facts, disclosure was not in the public interest.

Interestingly, the High Court refused to grant an interim injunction to restrain News Group from publishing the clip of Mr Mosley on its website. The footage had been viewed more than 1.4 million times online, which in the eyes of the High Court meant that it had entered the public domain to such an extent that there was 'nothing left for the law to protect'.

In May 2011, in *Mosley v United Kingdom, Application no 48009/08*, the ECHR rejected Max Mosley's application to impose a positive 'pre-notification' obligation on UK media to warn people in advance that they intend to publish material affecting that person's right to privacy.

For more information about misuse of private information, see Practice Note: [Privacy law—misuse of private information](#).

For more information about breach of confidence, see Practice Notes: [Trade secrets and confidential information—protection and enforcement](#) and [Confidential information, privacy and injunctions](#).

Privacy injunctions

So-called 'super-injunctions' refer to court orders which prohibit reporting the fact of the order (ie that an injunction exists at all). They gained particular notoriety in the media between 2010 and 2011, although only a small handful were ever actually granted by the courts in that time. 'Anonymised injunctions' were generally more common, although since 2011 applications for injunctions (anonymised or otherwise) have been few and far between in English courts.

The case of *CTB v News Group and Imogen Thomas* famously dealt with an anonymity order protecting a footballer, who sought an interim injunction to prevent disclosure of an alleged sexual relationship. This was despite the footballer's name having been openly disclosed on Twitter and in Parliament.

References:
***Campbell v Mirror Group Newspapers Limited* [2004] UKHL 22**

References:
***Mosley v News Group Newspapers Ltd* [2008] All ER (D) 322 (Jul), [2008] EWHC 1777 (QB)**

References:
Mosley v United Kingdom, Application no 48009/08

References:
***CTB v News Group Newspapers Ltd & Imogen Thomas* [2011] EWHC 1232 (QB)**

The court ultimately held that, despite the footballer's name having been revealed on the internet, an injunction could still prevent intrusion and distress to the claimant and his family. The case differed from *Mosley* in that the video footage in *Mosley* had already been viewed by hundreds of thousands of people at the time of the application, whereas the internet allegations here surfaced after the footballer's application was submitted.

Privacy injunctions fell out of the limelight for a number of years, but interest in the issue was re-ignited by the landmark case of *PJS v News Group Newspapers Ltd*. It is the first case since 2011 to have gone to the Court of Appeal and the first of its kind to reach the Supreme Court.

In *PJS*, the Supreme Court reinstated an interim injunction that had previously been set aside by the Court of Appeal preventing a newspaper from publishing details of extramarital sexual activities of a renowned person in the entertainment industry. The court took a strong view on the lack of public interest in 'kiss and tell' stories, questioning whether the mere reporting of sexual encounters with a view to criticising those involved falls within the concept of 'freedom of expression' under [section 12](#) of the Human Rights Act 1998 at all. The fact that the identity of the claimant and the information about them had circulated on social media and could be found on the internet did not prevent the court from ruling to continue the injunction in order to protect the subject and their family from further unlawful intrusions into their private lives.

Generally, courts are more likely to restrict the use of images than text due to the intrusive nature of photographs, and afford more protection to children than to adults. On balance, injunctions are less likely to be awarded if the images are already widespread in the public domain, although cases like *PJS* demonstrate that courts are still willing to uphold injunctions if they can provide a means of protecting the privacy of the individual and their family.

For more information, see News Analysis: [Examining the effectiveness of celebrity injunctions](#).

Data protection

The EU's General Data Protection Regulation, [Regulation \(EU\) 2016/679](#) (GDPR), which has been implemented in the UK by the [Data Protection Act 2018](#), imposes broad obligations on those who collect and process personal data about individuals in the context of their EU activities and/or where they are offering goods or services to, or monitoring the behaviour of, individuals that are in the EU.

The GDPR also grants individuals significant rights in respect of an organisation's processing of their personal data, including rights to object to the processing and to obtain erasure of their personal data. Celebrities and other individuals seeking to protect their image may be able to rely on these rights to prevent the unauthorised publication of photographs or film bearing their image.

Personal data is defined in the GDPR as 'any information relating to an identified or identifiable living individual'. Given that most celebrities and athletes (ie those who might typically seek to protect their image rights) are readily identifiable, so long as the photograph or film is sufficiently clear, there is unlikely to be a question about whether images or footage featuring their likenesses comprise their personal data.

In some cases, a photograph or film might be categorised as 'special category data' (previously known as 'sensitive personal data'), which is 'data consisting of racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic data, biometric data, data concerning health or data concerning a natural person's

References:
***PJS v News Group Newspapers* [2016] UKSC 26, [2016] UKSC 26, [2016] All ER (D) 135 (May)**

References:
Human Rights Act 1998, s 12

sex life or sexual orientation'. Much will depend on the purpose for which the material in question was created (for example, a photograph of an individual wearing a crucifix necklace will not likely be special category data unless it was taken to identify the individual as a Christian). However, if the material in question does constitute special category data, a publication will only be entitled to publish the material if certain grounds can be met (for example, the special category data has already been put into the public domain by the individual or where the publication is in the substantial public interest).

Where a particular photo or film constitutes personal data, the individual in question may seek to exercise the rights referred to above in respect of that material, including the right to object to the processing of, or to obtain erasure of, their personal data. 'Processing' is an extremely broad concept under the GDPR, and would encapsulate the publication and almost any conceivable use of the material. However, most rights granted by the GDPR are not absolute and organisations can refuse to give effect to them in certain circumstances.

For example, where a publication publishes a particular photograph of an individual, and that individual objects to its publication, the publication can seek to argue that its own interests or the public interest overrides the interests of the data subject. Assuming the publication is relying on legitimate interests as its lawful basis for processing, a careful balancing exercise in respect of the respective interests would need to be undertaken. In particular, the publication would need to consider why the data subject has objected to the processing and the potential for that processing to cause the data subject damage or distress. The onus will be on the publication to demonstrate that its interests are overriding.

The exercise will be fact-specific each time—different grounds on which processing could be justified might apply where photographs or footage are being processed for different purposes, and in some cases there may be exemptions, such as the journalistic purposes exemption, that might apply. However, the use of an exemption also requires an assessment as to their applicability.

For more information about the GDPR, see Practice Note: [The General Data Protection Regulation \(GDPR\)](#).

Defamation and malicious falsehood

If the name or image of an individual is used without permission in a manner which is false or misleading or may bring them into disrepute, a claim for defamation or malicious falsehood is possible. This is a danger even when it is obvious the publication is intended to be humorous or not taken seriously.

In an action for defamation, a claimant must show that the statements complained of:

- are defamatory (that is, they tend to lower the claimant in the estimation of right-thinking members of society generally)
- identify or refer to the claimant, and
- are published by the defendant to a third party

The [Defamation Act 2013 \(DA 2013\)](#) introduced a requirement that a statement must have caused, or be likely to cause, serious harm to the claimant's reputation for it to be classified as defamatory. This is intended to discourage trivial claims.

References:
Sim v Stretch [1936] 2 All ER 1237

Once the claimant has proved these requirements, it is for the defendant to prove the truth of the statement or that they can benefit from one of the defamation defences, such as the statutory defence of 'honest opinion'.

A celebrity might consider a defamation claim in the specific situation where their name or likeness has been used in a manner which suggests that they endorse a certain product that lowers or harms their reputation in the opinion of society. However, the serious harm requirement introduced by [DA 2013](#) is likely to reduce the circumstances in which bringing a defamation case in relation to false endorsement is a worthwhile option.

For further information, see Practice Notes: [Defamation](#) and [Malicious falsehood](#).

What are image rights?

Types of exploitation

Celebrities exploit their image rights in a multitude of ways including through:

- sponsorship
- endorsement/ambassador/influencer deals
- merchandising deals
- product lines, and
- exclusive access/photo shoots

There are often no clear boundaries between these types of deals and the grant of image rights is often combined with the provisions of services.

For example, an international football or rugby player will sign an agreement with their national federation to play the sport, provide services (such as attending appearances or delivering motivational speeches) and at the same time will grant the federation rights to use their 'image rights' on team merchandise, in advertising, and in broadcasts/films (with a right to sub-license those image rights to the team's sponsors, licensees, broadcasters and other commercial partners). See 'Setting up image rights companies' section.

Likewise, a celebrity TV presenter may do a deal with a show's producers to appear on the show, and perhaps in spin-off live events, and/or to create exclusive content to promote the show. The relevant agreement will also grant the presenter's image rights to the producer for use in related promotional material, and perhaps in an exhibition about the show (again with a right to sub-license use of the image rights by sponsors and licensees of the show).

Celebrities may also develop and exploit their brand through products bearing their name and image. This may be done directly themselves (normally through a corporate vehicle, see 'Setting up image rights companies' section) or via third parties. For example, Kylie Jenner (named as the world's youngest billionaire in 2019) used her name and image to build the Kylie Cosmetics brand, and boxer George Foreman is possibly now better known for the range of grills which bear his name than his boxing career. Michael Jordan is synonymous with Air Jordan, the trainers and athletic-wear brand developed by the basketball superstar with Nike (identified by the famous silhouette logo of Jordan jumping with a ball), and numerous celebrities, from Britney Spears to David Beckham, have lent their name to perfumes. See 'Trade mark' section.

Ensuring that a celebrity can maximise their income from the exploitation of their image rights can lead to a range of issues and challenges and mean that agreements need to be carefully negotiated.

For more information about sponsorship, see: [Sponsorship—overview](#).

For more information about influencers, see Practice Note: [Influencer agreements—key issues](#), Precedent: [Influencer agreement](#) and [Influencer risk assessment—checklist](#).

Exclusivity

A business wishing to associate with or exploit a celebrity's name and image will normally want to prevent its competitors from doing the same. As such, exclusivity is a key provision to be negotiated in agreements which grant image rights. Exclusivity may be framed on a number of bases: term, product category and territory being the main ones.

Term

The term during which image rights can be exploited should be precisely defined in the contract. Generally no complications with this arise but two related issues need careful consideration. The first is what post-termination use of, or references to, the celebrity can be made by the party acquiring the image rights. They might want the right to be able to refer to the celebrity in a historic context after the term and to clarify that there's no obligation to take down social media posts and other archive material post-termination. If merchandising rights have been acquired, a run-off period is often also agreed post-termination to allow the licensee to sell off remaining stock.

The second issue is termination rights. A clause providing the right to terminate for disrepute (often called a 'morality' clause) is normally included and is often heavily negotiated. Both parties will want to be able to exit the arrangement if the other does something which damages their brand through association. A celebrity committing a criminal offence or an athlete receiving a doping ban are specifics often addressed, but less objective causes for concern can be harder to define.

Product category

When establishing the scope of exclusivity, the product category definition can be key, particularly in today's converged world—for example, if the category is defined as 'televisions and other audio-visual equipment' it would be unclear whether the exclusivity extends to PCs, laptops, tablets and mobile phone handsets, all of which allow audiovisual viewing.

The celebrity may also agree not to grant rights to competitors of the brand in question, including in respect of products or services outside of the defined product category. For example, an athlete may agree to endorse a global brand of TVs, in a relatively narrow product category for televisions only. If that brand also produces other household goods, it may want to restrict the athlete from doing deals with its biggest household goods competitors—for any goods, not just televisions. In that case, the relevant agreement will normally define 'Competitors' by reference to a schedule of specific companies and/or brands and prevent the celebrity from endorsing Competitors.

Territory

If granting rights on a territorial basis, and the celebrity has set up multiple image rights companies in different jurisdiction (see: [Taxation of image rights](#) below) it will be important to ensure that the relevant entity is granting the rights.

A business acquiring image rights for a specific territory will also want to ensure that a competitor acquiring similar rights for different territories is not able to encroach on its rights, and as such may seek to include contractual obligations on the celebrity to require absolute territorial restrictions via geo-blocking of online content and/or language restrictions. On the other hand, the celebrity will want to resist overly-onerous restrictions that might prove to be unattractive obstacles for doing other deals.

Overlapping rights

In each case, before granting a new licence of image rights, it will be important to ensure that no overlapping rights have already been granted and/or that relevant carve-outs are agreed.

One issue to watch out for is poorly or widely-defined product categories which could prevent the new deal. Another, which is common in sport, is navigating the different capacities in which a sportsperson may grant their image rights.

For example, a footballer will grant their club the right to use their image rights in a 'club context' (which will normally be a defined term) but will reserve the player's right to enter into personal endorsement deals, provided the player is not represented in a club context. It is quite possible therefore that one brand will have the right to feature the player in a club context, and a competing brand in the same product category will have the right to use the player's image rights in a personal/individual capacity. Another competing brand may also have the rights to use the player's image in a 'national team context'. As such it is essential that each of these agreements acknowledge and allow for these competing rights by carefully defining the scope of any exclusivity granted.

Regulatory issues

A number of regulatory issues can limit a celebrity's ability to exploit their image rights and should be considered when granting rights.

Advertising regulation

A number of products and services are highly regulated from an advertising point of view. For example, under the UK advertising codes, marketing for gambling, alcohol, and e-cigarettes all require people featured in the advertising to be, and appear to be, over 25 years old.

Such rules can be a barrier to the exploitation of image rights. For example, in 2019, William Hill was sanctioned by the Advertising Standards Authority for featuring 23-year-old Harry Winks and 22-year-old Davinson Sanchez in a tweet which showed the starting 11 for a Tottenham Hotspur football match. Although the brand had a sponsorship agreement with the club and it no doubt had contractual rights to use the players' images in a team context like this, this did not save the use of young players in the advert from regulatory scrutiny.

Social media and 'native' advertising

The social media reach of some celebrities is astounding and as a result they are able to monetise their accounts by charging, sometimes on a per-post basis, for posting content which promotes a brand. Endorsement contracts which grant image rights will also normally grant rights for an agreed number of posts by the celebrity promoting the brand during the term. The advertising regulators are however wise to this, and are particularly concerned where it is unclear that such content is advertising.

References:

ASA Ruling on Tottenham Hotspur Football & Athletic Co Limited

Rule 2 of the CAP Code requires that 'Marketing communications must be obviously identifiable as such'. Best practice is therefore to use a clear, upfront disclosure such as '#Ad' in celebrity posts which are promoting a brand. This may reduce some of the authenticity which brands are looking for, but nevertheless, compliance is likely to be in the interests of both the celebrity and the brand.

References:
Advertising codes
CAP Code, rule 2

Sport rules

Where a brand is contracting with a sportsperson, in addition to the potential issue of complex overlapping contractual rights mentioned above, it should be alert to any sporting rules which restrict the athlete's ability to market their product. Some such rules are category specific. For example, Rule E8(3) and (4) of the FA Betting Rules prohibit footballers under the jurisdiction of the Football Association from entering into any type of endorsement agreement with gambling companies.

References:
Rule E8(3) and (4) of the FA Betting Rules

Other rules are much wider. Bye-law 3 to Rule 40 of the Olympic Charter has come under much criticism in recent years due to the restrictions it places on Olympians allowing their image to be used in advertising while they are competing at the Games. The International Olympic Committee (IOC) relaxed the rule slightly in 2019, so it now reads:

References:
Olympic Charters

'Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board.'

The IOC Executive Board 'principles' include certain restrictions, such as that advertising must be generic (ie not Olympic themed) and must have been in the market for at least 90 days before the 'Games Period' (ie so that it isn't targeted specifically during the Olympics). The principles can also be amended (either relaxed or tightened) by an athlete's local National Olympic Committee, so careful consideration of these rules is required when contracting with an Olympian.

Retaining control

It might be assumed that a celebrity will always retain control of their image rights, but that is not the case. There have been several high-profile cases where individuals have lost control of 'their' image rights.

Despite football manager Jose Mourinho having left Chelsea Football Club in 2016 for Manchester United, the former club continues to be the registered proprietor of a series of UK and the EUTMs 'JOSE MOURINHO' and 'MOURINHO'. (See, for example: [here](#) and [here](#).)

Likewise, Roger Federer, has become very closely associated with 'his' 'RF' brand. However, the logo was developed by his long-term sponsor Nike. Nike registered numerous trade marks for the 'RF' logo, and despite Federer moving on to another sponsor (Uniqlo), those marks remain with Nike and Federer is currently unable to exploit or benefit from this 'signature' brand. (See, for example: [here](#).)

These cases should serve as a warning for celebrities, but also as a reminder to brands entering into endorsement agreements to double check that the celebrity they're contracting with has the rights they are purporting to grant. As well as seeking appropriate warranties, a trade mark check would be a prudent step. For more information, see Practice Note: [Managing a trade mark portfolio](#) and Precedent: [Trade mark search sheet](#).

Taxation of image rights

Image rights structures

An image rights structure typically refers to a situation whereby an individual (such as a player/athlete) assigns their image rights to a dedicated image rights company, and employers/third parties thereafter make payments to that company for use of the player's image rights. The structure is potentially beneficial from a tax perspective as it allows the player to separate payments made in respect of their playing duties (which are taxed as normal salary) from payments made to the company in respect of the use of their image (which can be taxed at lower corporation tax rates or possibly not taxed at all if an offshore structure is used, as discussed further below).

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

Although much of the attention in the media has focused on the sports industry (in particular football), the principles are applicable to any sector in which an individual's image rights may have commercial value. For ease of reference, however, this section of the Practice Note will focus on image rights taxation from a sports-specific perspective.

Setting up image rights companies

The creation and exploitation of image rights structures is a complex field, and continues to be a delicate topic for both players and clubs. 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 and commercial planning.

By way of overview, the basic structure is that a player assigns their image rights to a dedicated image rights company. The shares in the image rights company are commonly owned by the player themselves (or their spouse/other relative) and the company is thereafter administered by the player's representative (or a management company for a fee). Once this structure is in place, the image rights company is in a position to licence the player's image rights to clubs, sponsors, international teams, or as part of endorsement or other rights deals.

This structure allows both the player and the club to separate the payment of player wages (ie for on-field playing duties) from payments to a player's image rights company (ie for use of the player's image and other commercial services provided). The corporate vehicle to which the image rights payments are made benefits from limited liability, which means it is considered a separate legal entity distinct from its members; protecting the player from any personal liability in respect of the company's debts (up to the value of their shareholding). However, it is worth noting that if the corporate vehicle is being used in relation to the image rights of footballers, payments to a player's image rights company (unlike player earnings) enjoy no preferential status as 'football debts' if the relevant club becomes insolvent.

The player will invariably be treated as an 'employee' in respect of their playing duties, meaning standard salary payments will be taxed under usual income tax rules. (For current rates, see Practice Note: [Key UK tax rates, thresholds and allowances](#).) However, any licence fee which is genuinely for the exploitation of the player's image rights ought to fall outside of the player's every day employment duties. This means that any fees paid under such an arrangement are not treated as 'salary' and can instead be taxed as a corporate

profit at corporate tax rates in the UK (for current rates, see Practice Note: [Key UK tax rates, thresholds and allowances](#)) or possibly at a lower rate if an offshore structure is used, as discussed below. While this tax rate may look very appealing, bear in mind that extracting value from the company can itself incur further tax, so as part of any image rights structure you should consider your strategy for the business and extracting or using the profits.

Also, there are no National Insurance (NI) contributions for both the player or the club on genuine image rights-related payments, which both the player and the club may factor into negotiations.

The key case which legitimised image rights taxation structures in the UK was that of *Sports Club plc v Inspector of Taxes*. The case saw HMRC challenge the image rights arrangements entered into by Arsenal football club and two of its players, Dennis Bergkamp and David Platt. HMRC argued that overinflated image rights arrangements had been created to enable the club to pay players a higher salary by supplementing this with tax savings. However, HMRC's arguments were ultimately unsuccessful and the Special Commissioners found in favour of the taxpayers, Platt and Bergkamp. It was held that the contracts were genuine commercial arrangements and were not merely a 'smokescreen' to disguise salary payments as image rights payments. This is fundamental to any robust image rights structure; the values involved must be genuine and supportable.

The case also confirmed that some athletes will command much larger proportions of their salary as image rights, depending on their profile and provided always that it is commercially justifiable.

It is important to remember that the *Sports Club* case was a decision of the then 'Special Commissioners' which does not bind other courts and in any case turned heavily on its specific facts. This was made clear much more recently by the First-Tier Tribunal (Tax) in *Hull City AFC (Tigers) Ltd v HMRC*. The court in the *Hull* case did not reject the reasoning in *Sports Club* but found it of limited use, given the very different facts of the latter case, which is discussed in more detail below and where in particular, a much less elite footballer was involved. It is also fair to ask if the decision in *Sports Club* would go the same way if it were being heard now: certainly the decision in relation to the second player concerned looks finely balanced.

From a practical perspective, setting up these structures is not straightforward. 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 their image as opposed to payment for 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 themselves in a way that significantly damages their public image. As discussed below in relation to the *Hull* case, at a minimum there will need to be a proper valuation of image rights to justify any payments made for them, as well as a comprehensive business plan for turning those rights to account, which is in fact implemented.

For more information about the capital gains tax issues that arise when an individual assigns rights to an image rights company, see HMRC's commentary [here](#).

UK or offshore

In theory, an image rights company can be established anywhere in the world. However, tax authorities will look beyond the location in which a company is incorporated in order to consider how any tax should be paid. For example, an offshore company which is managed

References:

***Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443**

References:

***Hull City AFC (Tigers) Ltd v HMRC* [2019] SFTD 754**

and run from the UK may be deemed resident for tax purposes in the UK. However, this should be avoidable if steps are taken to appoint properly-qualified offshore directors and to ensure that all key strategic decisions of the company are taken outside the UK and are properly and contemporaneously minuted. The UK also has a wide variety of tax rules aimed at combatting offshore tax avoidance, the detail of which is beyond the scope of this note.

UK-domiciled athletes

If the athlete is a UK resident and also domiciled in the UK then establishing a UK image rights company is likely to be the only sensible option. The anti-avoidance rules at [section 720](#) of the Income Tax Act 2007 ([ITA 2007](#)) in relation to the transfer of assets abroad would result in any 'offshore' company being effectively ignored for UK tax purposes, with the individual continuing to be taxed personally at income tax rates (for current rates, see Practice Note: [Key UK tax rates, thresholds and allowances](#)) on the money received by such entities.

Non-domiciled athletes

Non-domiciled athletes are those living in the UK but who are considered under UK law to be 'domiciled' (ie with their permanent home) in another country. It is important to note that certain residents (especially long-stay residents) of the UK will be regarded as UK-domiciled for tax purposes, even if they would not be so regarded for non-tax purposes. Non-domiciled athletes can benefit significantly from being able to pay their image earnings into offshore image rights companies, which are capable of being completely outside the scope of UK tax (unless and until profit is extracted from such companies and brought back into the UK). Any planning involving non-UK resident companies (and the choice of jurisdiction) will need to factor in any applicable withholding taxes that might apply to parties paying the non-UK company and whether the benefit of any double tax treaty can be claimed.

Very often a non-domiciled athlete's image rights will be more popular outside the UK, particularly in their home country. Where the athlete's commercial value is higher in their home country, in particular where sponsorships deals are exclusive to that country, this will likely justify attributing a significant proportion of the player's image rights to their offshore image rights company.

In this scenario, the player may wish to establish two image rights companies; a UK resident company to manage UK rights, and a non-UK resident company to manage non-UK rights. This can be achieved by assigning non-UK image rights to the offshore company (or by way of granting an exclusive licence to the offshore company for exploitation of these rights). Any apportionments between salary, onshore and offshore image right fees must be commercially justifiable.

VAT

It will be important to consider the VAT treatment of any services provided under image rights agreements. In particular, if the rights are owned by an offshore image rights company, the user of the rights may need to self-assess under the VAT 'reverse charge'.

Increased scrutiny

HMRC has examined a number of image rights arrangements in order to determine whether the payments made to image rights companies are legitimate, or whether they should properly be treated as an employee payment and subject to Pay As You

Earn (PAYE)/NI (or perhaps taxed as the individual's personal income even if it's not employment income). Provided arrangements are properly structured, documented and exploited, and don't exaggerate or misrepresent the value of the image rights, such structures should be respected by the courts and HMRC, but this is not a simple exercise and close scrutiny can be expected, as illustrated by the *Hull* case discussed below.

According to the judge in the *Hull* case, HMRC and the top football clubs in the Premiership reached a 'without prejudice' agreement in 2010 regarding tax liabilities for prior years. Since then, image rights payments have generally been made in cases where they are commercially justifiable. In particular, Premiership clubs have taken the view that payments of up to 20% of earnings a year for worldwide image rights can be justified in relation to elite, recognisable players, although HMRC has not endorsed this rule of thumb.

It is apparently recognised that, at least in relation to football, players outside the elite may have image rights with a genuine commercial value outside the UK, eg up-and-coming players from parts of the world where audiences for football have hitherto been limited.

Three developments have cast doubt over the future of image rights company taxation.

The first development is the case of *RFC 2012 Plc v Advocate General for Scotland*, which involved Rangers paying players both in the form of wages and via payments into a trust. The trust would then loan such sums back to the players (directly or indirectly) at their instruction, in an effort to avoid income tax liability.

Ultimately, the court decided that the payments into the trust were still taxable as UK income. It was held that where payments are made to a third party were, in substance, 'employment income', taxable on the individual even though diverted to a third party (the trustee), despite the legal form adopted.

Although the exploitation of image rights was not directly relevant to the case, the court made clear that it would take a purposive approach in analysing the existence of employment income. The *Rangers* case therefore makes it easier for HMRC to argue that an apportionment of salary/fee needs to be re-examined on a commercial basis. The form of such arrangements will not protect taxpayers from challenge; the substance of them is crucial.

HMRC has subsequently issued guidance on the taxation of image rights, although it is sparse to say the least—see [here](#).

The second development is the *Hull* case, where the taxpayer failed to discharge the burden of showing that so-called image rights payments to an offshore company were not in substance further payments of earnings. HMRC did not argue that the arrangements were a 'sham' for tax purposes. Nor did they rely on the line of reasoning which prevailed in *RFC 2012 Plc*, although that case was cited. Instead, they relied on a number of cases (eg *HMRC v PA Holdings Ltd*) which permitted them to ignore the labels attached to particular arrangements and to focus on whether, in substance, payments were simply being made for the playing services of the footballer employee. The club in question was in the Premiership at the relevant time, although it was not a 'top club' with a high international profile. The alleged image rights related to a successful, but not top flight, Brazilian footballer. There was very little supporting documentation and no serious attempt had been made to value the image rights or to justify how the image rights payments had been computed. Inexplicably, the rights did not cover the UK (where the club's profile was by far the greatest) and appeared to have very little value. Furthermore, the club lacked a plan, the skills and the experience to exploit the image rights and had not done so. Hence the court concluded that the image rights payments were simply additional payments of

References:
RFC 2012 Plc (in liquidation)
(formerly *The Rangers*
Football Club Plc* v *Advocate
***General for Scotland* [2017]**
UKSC 45

earnings from the employment, falling within [section 62](#) of the Income Tax (Earnings and Pensions) Act 2003 ([ITEPA 2003](#)). Given this conclusion, there was no need for court to consider whether the payments could alternatively be taxed under the 'benefits' code in [ITEPA 2003](#). This was in fact considered by the court in the *Sports Club* case which ruled that the special rule deeming certain benefits to originate from employment did not apply.

References:
HMRC v PA Holdings Ltd
[\[2012\] STC 582](#)

The third development is the enactment, with effect from 6 April 2019, of new anti-avoidance rules to combat what the legislation refers to as 'profit fragmentation'. The legislation targets profits which are split between resident and non-resident recipients, and the value received by the non-resident recipient is broadly intended to be or capable of enjoyment by a UK resident individual (or someone connected with such an individual).

Whether HMRC intends to apply these new rules to image rights structures is not clear, but it could conceivably affect situations where players have negotiated split earnings between wages and payments to offshore trusts or other offshore corporate vehicles. Unlike the anti-avoidance rules in [ITA 2007, s 720](#), there is no element of exemption for taxpayers who are not treated as UK-domiciled for tax purposes.

The tax arrangements of those in the entertainment and sport sectors remain a significant target for HMRC scrutiny, which makes getting proper advice more important than ever. It may also be prudent for the employer to retain funds from payments under such structures which are sufficient to cover any PAYE/primary Class 1 (employee) NI obligations which are subsequently found to exist in respect of these payments. Those retained funds can then be released if and when it becomes clear that HMRC will not challenge the arrangements as providing supplementary employment income. In the *Sports Club* case, the employing club had such a retention policy.

Produced in partnership with Alex Kelham and JJ Shaw of Lewis Silkin



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