Privacy, Property and Personality

Civil Law Perspectives on Commercial Appropriation

Huw Beverley-Smith, Ansgar Ohly and Agnès Lucas-Schloetter

CAMBRIDGE STUDIES IN INTELLECTUAL PROPERTY RIGHTS

CAMBRIDGE www.cambridge.org/9780521820806

This page intentionally left blank

Privacy, Property and Personality

The protection of privacy and personality is one of the most fascinating issues confronting any legal system. This book provides a detailed comparative analysis of the laws relating to commercial exploitation of personality in France, Germany, the United Kingdom and the United States. It examines the difficulties in reconciling privacy and personality with intellectual property rights in an individual's identity and in balancing such rights with the competing interests of freedom of expression and freedom of competition. The discrete patterns of development in the major common law and civil law jurisdictions are outlined, together with an analysis of the basic models of protection.

The analysis will be useful for lawyers in legal systems which have yet to develop a sophisticated level of protection for interests in personality. Equally, lawyers in systems that provide a higher level of protection will benefit from the comparative insights into determining the nature and scope of intellectual property rights in personality, particularly questions relating to assignment, licensing, and post-mortem protection.

HUW BEVERLEY-SMITH is a Solicitor in the Brands, Technology, Media and Telecommunications Department at Field Fisher Waterhouse in London. He is also the author of *The Commercial Appropriation of Personality* (Cambridge 2002).

ANSGAR OHLY is Professor of Civil Law and Intellectual Property Law in the Faculty of Law and Economics at the University of Bayreuth, Germany. Until 2002 he was the head of the Commonwealth Department of the Max-Planck Institute for Intellectual Property, Competition and Tax Law, Munich.

AGNÈS LUCAS-SCHLOETTER is Lecturer in French law at the Ludwig-Maximilian University of Munich, Germany. Until 2003 she was a researcher at the Max-Planck Institute for Intellectual Property, Competition and Tax Law, Munich.

Cambridge Studies in Intellectual Property Rights

As its economic potential has rapidly expanded, intellectual property has become a subject of front-rank legal importance. *Cambridge Studies in Intellectual Property Rights* is a series of monograph studies of major current issues in intellectual property. Each volume contains a mix of international, European, comparative and national law, making this a highly significant series for practitioners, judges and academic researchers in many countries.

A list of books in the series can be found at the end of this volume.

Privacy, Property and Personality

Civil Law Perspectives on Commercial Appropriation

Huw Beverley-Smith
Ansgar Ohly
Agnès Lucas-Schloetter

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521820806

First published in print format 2005

ISBN-13 978-0-511-13477-7 eBook (EBL)
ISBN-10 0-511-13477-0 eBook (EBL)

ISBN-13 978-0-521-82080-6 hardback
ISBN-10 0-521-82080-4 hardback

Contents

Preface

The protection of privacy and personality is one of the most fascinating issues confronting any legal system. It has attracted the attention of a number of distinguished academics, practitioners and judges in the major legal systems and there is an increasingly rich comparative jurisprudence. The relationship between privacy and commercial exploitation of an individual's attributes in advertising and merchandising is long-standing and provided the background for the developing law of privacy in several jurisdictions. Nevertheless, it has received relatively limited attention when compared to other aspects of privacy and is often regarded as being the more proper concern of intellectual property law. This book provides a detailed analysis of the different ways in which the major common law and civil law jurisdictions have responded to demands for protection of attributes of an individual's personality and the difficulties in reconciling privacy, personality and intellectual property.

Inevitably a balance has to be struck between breadth and depth of coverage and we do not attempt to give a full account of all European legal systems. Rather, we have chosen four jurisdictions, England and Wales, the United States, Germany and France, which represent the most important approaches to the problem of commercial exploitation. Some jurisdictions, most notably England and Wales, are only beginning to address the issue of protecting attributes of personality from unauthorised commercial exploitation. Systems that are at a more advanced stage of evolution and offer a higher basic level of protection such as France and Germany have rather more intricate problems to confront in determining the nature and scope of the various personality rights. While a surprising number of common themes and patterns of development emerge the differences in structure and emphasis between the individual chapters reflect both the discrete stages of evolution in each jurisdiction and the fundamental differences between the legal systems surveyed. An awareness of these differences and the challenges faced by neighbouring jurisdictions can only help in identifying the most

appropriate conceptual models of protection and the nature and scope of such intangible rights.

Our foremost debt of gratitude is to Professor W. R. Cornish for his unfailing support and enthusiasm for the project and for reading and commenting on the draft chapters. We would also like to thank Finola O'Sullivan and the staff at Cambridge University Press for their help, support and patience as this collaborative comparative work, combining the efforts of three lawyers in separate jurisdictions took rather longer than expected to bring to fruition. Any errors, omissions or idiosyncrasies are entirely the responsibility of the authors.

Table of cases

Decisions of the European Court of Human Rights

Decision of the European Court of Justice

French Cases

German Cases

United Kingdom Cases

United States Cases

Other Cases

Jamaica

New Zealand

Table of Statutes

Table of United Kingdom legislation

Table of United States legislation

Table of EU Directives

Table of International Instruments

Abbreviations

2nd Cir	Second Circuit
A	*Atlantic Cases*
A 2d	*Atlantic Cases* (Second Series)
AC	*Appeal Cases*
AcP	*Archiv für die civilistische Praxis*
ACWS	*All Canada Weekly Summaries*
ACWS (3d)	*All Canada Weekly Summaries* (Third Series)
AD 2d	*Appellate Division Reports*, New York Supreme Court, Second Series
AfP	*Archiv für Presserecht*
ALJ	*Australian Law Journal*
All ER	*All England Law Reports*
ALR	*Australian Law Reports*
Anh.	*Anhang (annex)*
Ann. prop. ind.	*Annales de la propriété industrielle, artistique et littéraire*
ATPR	*Australian Trade Practices Reports*
Beav	*Beavan's Rolls Court Reports* (48–55 *ER*) 1838–66
BGB	*Bürgerliches Gesetzbuch* (*Civil Code*)
BGH	*Bundesgerichtshof* (*Federal Supreme Court*)
BGHZ	*Entscheidungen des Bundesgerichtshofs in Zivilsachen* (*Decisions of the Bundesgerichtshof in Civil Cases*)

BPatG	*Bundespatentgericht* (*Federal Patents Court*)
BPatGE	*Entscheidungen des Bundespatentgerichts* (*Decisions of the Federal Patents Court*)
Bro PC	*J Brown's Parliamentary Cases* (1–3 *ER*) 1702–1800
Brooklyn L Rev	*Brooklyn Law Review*
Bull Copyright Soc'y	*Bulletin of the Copyright Society*
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (*Decisions of the Bundesverfassungsgericht*)
C. civ.	*Code civil*
CA	Cour d'Appel
Cal Rptr 2d	*California Reports*, Second Series
CalifLRev	*California Law Review*
Can Bar Rev	*Canadian Bar Review*
Cardozo Arts & Ent LJ	*Cardozo Arts and Entertainment Law Journal*
Case West Res L Rev	*Case Western Reserve Law Review*
Cass. civ.	Cour de cassation, chambre civile
Cass. com.	Cour de cassation, chambre commerciale
Cass. crim.	Cour de cassation, chambre criminelle
CCE	*Communication – Commerce Electronique*
CCLT	*Canadian Cases on the Law of Torts*
CCLT (2d)	*Canadian Cases on the Law of Torts* (Second Series)
Ch	*Law Reports, Chancery Division*
ch. corr.	chambre correctionelle
chr.	*Chronique*
CIPR	*Canadian Intellectual Property Review*

CLJ	*Cambridge Law Journal*
CLP	*Current Legal Problems*
CLR	*Commonwealth Law Reports*
CMLR	*Common Market Law Reports*
coll.	*collection*
Colum L Rev	*Columbia Law Review*
Comm & L	*Communications Law*
comm.	*commentaire*
CPR (2d)	*Canadian Patent Reporter (Second Series)*
CPR (3d)	*Canadian Patent Reporter* (Third Series)
Ct App	Court of Appeal
D.	*Dalloz*
DA	Droit d'auteur (Revue de l'OMPI)
DeG & Sm	*De Gex & Smales' Chancery Reports* (63–4 *ER*) 1846–52
DePaul-LCA J Art & Ent L	*De Paul-LCA Journal of Art and Entertainment Law*
DH	*Dalloz hebdomadaire*
DLR	*Dominion Law Reports*
DLR (3d)	*Dominion Law Reports* (Third Series)
doct.	*Doctrine*
DP	*Dalloz Périodique*
DR	(see p. 17, 11. 14, 17)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	*Reports of Cases before the Court of Justice and the Court of First Instance, Court of Justice of the European Communities*
ED Mich	Eastern District, Michigan
EHRLR	*European Human Rights Law Review*
EHRR	*European Human Rights Reports*
EIPR	*European Intellectual Property Review*

EMLR	*Entertainment and Media Law Reports*
Emory LJ	*Emory Law Journal*
Eng Rep	*English Reports*
Ent LR	*Entertainment Law Review*
ETMR	*European Trade Mark Reports*
EWCA Civ	*England and Wales Court of Appeal – Civil Division*
EWHC	England and Wales High Court
F 2d	*Federal Reporter*, Second Series
F 3d	*Federal Reporter*, Third Series
F Supp	*Federal Supplement*
F Supp 2d	*Federal Supplement*, Second Series
Fasc.	*fascicule*
Fed Rep	*Federal Reporter*
fn	Footnote
Fordham Intell Prop Media & Ent LJ	*Fordham Intellectual Property, Media and Entertainment Law Journal*
FSR	*Fleet Street Reports*
Ga L Rev	*Georgia Law Review*
Gaz. Pal.	*Gazette du Palais*
GG	*Grundgesetz* (*Basic Law* = *German Constitution*)
GRUR	*Gewerblicher Rechtsschutz und Urheberrecht*
GRUR Int.	*Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*
Harv CR-CL Law Rev	*Harvard Civil Rights – Civil Liberties Law Review*
HarvLRev	*Harvard Law Review*
Hastings Comm & Ent LJ	*Hastings Communications and Entertainment Law Journal*
HL Cas	*House of Lords Cases*
Hous. L. Rev.	*Houston Law Review*
ICLQ	*International and Comparative Law Quarterly*
inf. rap.	*Informations rapides*
IPJ	*Intellectual Property Journal (Canada)*
IPR	*Intellectual Property Reports*

Ir Jur (N.S.)	*Irish Jurist* (New Series)
J. Intell Prop L	*Journal of Intellectual Property Law*
JCP	*JurisClasseur Périodique (Semaine Juridique)*
JCP ed. E	*JurisClasseur Périodique édition Entreprise*
JLS	*Journal of Legal Studies*
jur.	*Jurisprudence*
JZ	*Juristenzeitung*
KUG	*Gesetz betreffend das Urheberrecht an Werken der bildenden Kunst und der Photographie (Act on Copyright in Works of Art and Photography)*
Law & Contemp Probs	*Law and Contemporary Problems*
LG	Landgericht (District Court)
LGDJ	*Librairie Générale de Droit et de Jurisprudence*
LJ Ch	*Law Journal, Chancery*
LQR	*Law Quarterly Review*
LR 2PC	*Law Reports, Privy Council*
LR Eq	*Law Reports, Equity Cases*
LS	*Legal Studies*
LT	*Law Times Reports*
M & W	*Meeson and Welsby's Reports, Exchequer*
Mac & G	*Macnaghten & Gordon's Chancery Reports* 1848–51
MarkenG	*Markengesetz (Trade Marks Act)*
Mc Gill LJ	*McGill Law Journal*
Mc Gill L. Rev.	*McGill Law Review*
MLR	*Modern Law Review*
MMR	*Multimedia und Recht*
NJ Super	*New Jersey Superior Court Reports*
NCPC	*Nouveau Code de procédure civile*
ND Tex	Northern District, Texas
NE	*Northeastern Reporter*
NE 2d	*Northeastern Reporter*, Second Series
NJ Super	New Jersey Superior Court

NJW	*Neue Juristische Wochenschrift*
NJW-RR	*NJW-Rechtsprechungs-Report*
NSWLR	*New South Wales Law Reports*
NW	*North Western Reporter*
NW 2d	*North Western Reporter* (Second Series)
NY	*New York Court of Appeals Reports*
NY Sess. Laws	*New York Session Laws*
NYS	*New York Supplement*
NYS 2d	*New York Supplement*, Second Series
NYAD	*New York Appellate Division*
NYUL Rev	*New York University Law Review*
NZLR	*New Zealand Law Reports*
NZULR	*New Zealand Universities Law Review*
OJ L	*Official Journal of the European Community (L Series)*
OLG	Oberlandesgericht (Court of Appeal)
OR	*Ontario Reports*
OR (3d)	*Ontario Reports* (Third Series)
P	*Pacific Reporter*
P 2d	*Pacific Reporter* (Second Series)
PL	*Public Law*
PUAM	Presses Universitaires d'Aix-Marseille
PUF	Presses Universitaires de France
QB	*Law Reports, Queen's Bench Division*
QBD	Queen's Bench Division
réf.	Référé
RG	Reichsgericht (Supreme Court until 1945)
RGZ	*Entscheidungen des Reichsgerichts in Zivilsachen* (*Decisions of the Reichsgericht in Civil Cases*)
RIDA	*Revue Internationale du Droit d'Auteur*

RPC	*Reports of Patent Cases*
RSBC	*Revised Statutes of British Columbia*
RSM	*Revised Statutes of Manitoba*
RTD civ.	*Revue Trimestrielle de Droit civil*
S.	Sirey
SA	*South African Law Reports*
SD Tex	United States District Court for the Southern District of Texas
SDNY	United States District Court for the Southern District of New York
SE	*Southeastern Reporter*
SE 2d	*Southeastern Reporter*, Second Series
somm.	*Sommaire*
StGB	*Strafgesetzbuch* (*Criminal Code*)
Sup Ct	Supreme Court
SW	*South Western Reporter*
SW 2d	*South Western Reporter* (Second Series)
Sydney L Rev	*Sydney Law Review*
TGI	Tribunal de grande instance
TLR	*Times Law Reports*
TMR	*Trade Mark Reporter*
Trib. civ.	Tribunal civil
Trib. com.	Tribunal de commerce
Tul. L. Rev.	*Tulane Law Review*
U Chi L Rev	*University of Chicago Law Review*
U Tas L Rev	*University of Tasmania Law Review*
UBC L Rev	*University of British Columbia Law Review*
UKHL	United Kingdom House of Lords
UrhG	*Urheberrechtsgesetz* (*Copyright Act*)
US	*United States Supreme Court Reports*
US L Rev	*United States Law Review*

USC	*United States Code*
USCA	*United States Code Annotated*
USPQ	*United States Patent Quarterly*
UWG	*Gesetz gegen den unlauteren Wettbewerb* (*Act against Unfair Competition*)
VersR	*Versicherungsrecht*
Virg L Rev	*Virginia Law Review*
WD Ky	Western District, Kentucky
WIPO	World Intellectual Property Organisation
WLR	*Weekly Law Reports*
WRP	*Wettbewerb in Recht und Praxis*
Yale LJ	*Yale Law Journal*
ZPO	*Zivilprozeßordnung* (*Code of Civil Procedure*)
ZUM	*Zeitschrift für Urheber- und Medienrecht*

1 Introduction

The commercial value of aspects of personality

Fame has an attractive force that lends itself well to commercial exploitation. Attributes of an individual's personality, such as a person's name, voice or likeness, are often used in advertising or merchandising in order to increase the attractiveness and saleability of goods and services. The practice is not new and dates from at least the nineteenth century.[1] Since the advent of the industrial revolution and the increased proliferation of consumer products, advertisers and merchandisers sought new ways to draw the consuming public's attention and to differentiate their products and services from those of their rivals. In the late nineteenth and early twentieth centuries, the names and images of well-known persons such as the French actress Sarah Bernhardt,[2] German Count Zeppelin[3] and the American inventor Thomas A. Edison[4] were used to advertise, respectively, perfumes, cigars and medicinal products. Moreover, people with no obvious public profile began to find indicia of their identity used in advertising, resulting in varying degrees of distress, annoyance or indignation.

This reflects the fact that manufacturers of goods and suppliers of services can find the use of the images of a vast range of people beneficial to them in some way. Apart from the more common modern examples such as pop-stars and sportsmen, people of high professional standing, holders of public office, and politicians are often desirable people with whom to associate products or services. Although such individuals would not normally be actively trading in their image by granting licences or entering into endorsement deals, they may still have what might be referred to as 'recognition value'. Their names or images are familiar to

[1] See, e.g., J. P. Wood, *The Story of Advertising* (New York, 1958), 123; T. Richards, *The Commodity Culture of Victorian England* (London, 1990), 22 and 84.
[2] Trib. com. Seine 8.6.1886 and CA Paris 18.4.1888, *Sarah Bernhardt*, *Ann. prop. ind.* 1894, 351.
[3] RGZ 74, 308 – *Graf Zeppelin*. [4] *Edison* v. *Edison Polyform Mfg Co.* 67 *A*. 392 (1907).

the public, but their potential for endorsing or being associated with products remains latent and unrealised, until advertisers, with or without seeking prior permission, find a suitable use for them.

There are various ways in which individuals' images can be used in advertising and merchandising.[5] First, and most obvious are 'tools of the trade' endorsements of products that are closely related to a celebrity's field of activity. Sportsmen, for example, often endorse products that might be within their field of expertise such as sports equipment and clothing and an endorsement of this kind will often be an effective way of boosting sales of such goods. Second, a celebrity's image is often used in connection with goods or services that are totally unrelated to his usual activity (sometimes referred to as 'non-tools endorsements'). In Germany, for example, the football star Franz Beckenbauer endorses telecommunications services whereas the former tennis champion Boris Becker appeared in commercials for an Internet service provider. Third, companies frequently wish to associate their products or services with the image of a famous person in a way that falls short of endorsement of any particular product. The celebrity's image is merely used for the purpose of 'grabbing the attention' of the consuming public and the link between the subject and the product is often extremely tenuous.

Commercial and non-commercial interests

Celebrities habitually grant their permission for the use of their image in advertising and merchandising in exchange for a licence fee. In this situation, the unauthorised commercial exploitation of aspects of personality does not harm the person's reputation as long as the style of the advertisement or the nature of the product cannot be objected to. Rather, the use violates economic interests that can, at first glance, be compared to the interest the owner of an intellectual property right has in his patent, copyright or trade mark. On the other hand, a person who is not involved in advertising or merchandising activities, or a private individual, may object to any kind of commercial exploitation of his personality on the ground that such exploitation is inconsistent with the person's values, attitudes or personal standing. Here the concern lies with the protection of primarily non-economic interests in emotional tranquillity, privacy or freedom from mental distress. While economic interests can generally be represented purely in money terms, non-economic interests often cannot be completely compensated by a specific money payment and a plaintiff

[5] See I. J. Rein et al., *High Visibility* (London, 1987), 59 and see generally, H. Pringle, *Celebrity Sells* (London, 2004).

might remain unsatisfied after an award of damages. Moreover, such interests cannot be objectively valued, but rather, are inherently subjectively valued interests. There is no market where such interests may be valued, since they are not normally exchanged. For example the loss of a notional licence fee for the use of a person's image cannot be used as a rough measure: the perception of damage is often purely subjective. Even persons who have given their permission to some commercial usages of aspects of their personality may object to others because the advertisement itself, or the advertised goods or services, may reflect negatively on the person's reputation. Such an ability to control the commercial exploitation may be seen both as an economic right in maintaining commercial exclusivity and as an aspect of an individual's dignity or autonomy.

Personality, privacy and intellectual property

Commercial exploitation of aspects of personality does not fit easily into the established categories of tort law or property law. First, all legal systems analysed in the ensuing chapters protect a person's reputation against defamation and, in certain circumstances, the unauthorised use of a person's name or portrait can cause damage to his reputation and standing in public.[6] This will not usually be the case and while there may be borderline cases such as the unauthorised use of a famous singer's name in an advertisement for false teeth,[7] advertisements tend to show celebrities in a favourable light. Second, in some legal systems the right of privacy is protected either by means of a specific tort or under general principles of tort law. The cases examined below, however, often involve no intrusion into a person's privacy in the strict sense. Many of the claimants are public figures who deliberately seek media attention and who do not object to the publication of their portrait or the mentioning of their name in the media. Whereas in typical privacy cases a person vindicates a 'right to be let alone', claimants in cases of commercial exploitation defend the commercial value attached to their publicity against free-riders. Third it may thus seem as if intellectual property law offers a solution to the problem discussed here. However, although fame is a commodity it is not, in itself, the object of a generally accepted intellectual property right. While copyright subsists in original works, the attractive force of a media star's image may or may not be the result

[6] See, e.g., RGZ 74, 308, 311 – *Graf Zeppelin* and see 94 below; *Tolley* v. *Fry* [1931] AC and see 83 below; TGI Paris 3.12.1975; Claude Piéplu, *D.* 1977, jur., 211.
[7] See the German *Caterina Valente* case, *BGHZ* 30, 75 and see 82–5 below.

of original ideas or hard work. While the gist of trade mark law and the tort of passing off is the protection of distinctive signs against misrepresentation, the unauthorised commercial exploitation of personality is a misappropriation, which does not necessarily result in any confusion.

Courts in various jurisdictions have struggled to find a legal basis for, and an adequate level of protection against, the commercial exploitation of aspects of personality. Many legal problems surrounding the commercial exploitation of personality remain unresolved and the differences between the major European jurisdictions are still quite stark. Although increasingly fervent efforts have been made to harmonise most aspects of intellectual property law in Europe, the laws relating to commercial exploitation of personality, admittedly on intellectual property law's periphery, remain somewhat disparate. In a globalised world and, more particularly, in the internal European market, these differences are likely to cause difficulties. Traders who design their marketing campaign for the European market rather than for one particular country have to be aware that the use of a celebrity's picture in an advertisement may be permitted in the United Kingdom while it is likely to be enjoined by French or German Courts. Under English law, memorabilia of deceased celebrities such as Elvis Presley can be distributed without the heirs' consent,[8] whereas the daughter of the famous German actor Marlene Dietrich successfully sued a merchandiser for damages who sold 'Marlene' memorabilia after her death.[9] Such legal differences cause obstacles to intra-Community trade. In the light of the fundamental rights guaranteed by the European Convention on Human Rights it seems arguable that at least some common ground should exist as to the protection against unauthorised commercial exploitation of personality.

Competing doctrinal bases of protection

The problem has generally been approached from two main perspectives: (i) the unfair competition or intellectual property perspectives and (ii) the privacy or human dignity perspectives. Lawyers concerned with intellectual property naturally tend to see appropriation of personality (or personality merchandising, or endorsement) as a matter which falls within their field, albeit somewhat on the periphery. It is inevitable that once commercial value attaches to a thing or intangible, human nature and commercial factors will demand that greater protection be secured against exploitation by others. Thus, demands for protection of the

[8] *ELVIS PRESLEY Trade Marks* [1999] RPC 543. [9] BGHZ 143, 214.

valuable attributes of a person's name, voice or likeness form part of the broad range of claims that lie at the margins of intellectual property law. Whereas US law protects a 'right of publicity' that has obvious similarities with intellectual property rights, other jurisdictions will rather tend to protect the economic interests outlined above by means of tort law, in particular by specific economic torts or by a broad action for unfair competition.

The second main perspective focuses on the injury to personal dignity, be it labelled 'privacy', 'dignity', or 'personality'. The extent and precise form of protection for individual dignity differs markedly between the major civil law and common law systems. Initially, most legal systems used to give priority to claims for physical injury and in earlier times these injuries were the law's primary concern. As societies and modern living conditions change, plaintiffs inevitably claim redress for other kinds of harm. Interests in reputation or personal honour, personal privacy, and interests in freedom from mental distress become increasingly important. Usually, violations of individual personality are of a non-pecuniary nature, not only because they cannot be assessed in money terms with any mathematical accuracy, but also because they are usually of inherently non-economic value. We have tried to use a neutral set of terminology to cover the economic and non-economic interests in personality. This is not always easy, given the varying usages and contextual subtleties. For example, although the term 'dignitary interests' is often used in common law systems as a generic term for a number of non-economic interests such as privacy, reputation and freedom from mental distress,[10] in the French legal system dignity is a substantive legal value accorded formal substantive protection.[11]

Commercial interests often sit uneasily with the notion of affronted dignity and well-known plaintiffs have encountered problems in jurisdictions where their celebrity status has been taken at face value and where their claims for invasion of privacy have been deemed to be inconsistent with their celebrity status.[12] However, as will be seen below, most European jurisdictions recognise, partly under the influence of the European Convention on Human Rights, that an individual's celebrity status does not deprive that person of a right to privacy. An individual's status as a well-known public figure will only be one factor in determining

[10] See P. Cane, 'The Basis of Tortious Liability' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (Oxford, 1991), 372.
[11] Cass. civ. 20.2.2001, D. 2001, 1199; Cass. civ. 12.7.2001, *D.* 2002, 1380; Cass. civ. 13.11.2003, Légipresse 2004, No. 208, I, 5. See further below at 180.
[12] See 64 below.

the scope of a right of privacy and the balance with the competing right of freedom of expression.[13]

Unfair competition

Article 10 *bis* of the Paris Convention for the Protection of Industrial Property obliges signatories to provide effective protection against unfair competition that is contrary to honest practices in industrial or commercial matters. Three particular aspects are expressly included: (i) creating confusion with or discrediting the establishment, the goods, or the commercial activities of a competitor; (ii) making false allegations that discredit the establishment, goods, or the industrial or commercial activities of a competitor; and (iii) giving indications liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of goods.[14] The major common law and civil law jurisdictions give effect to these obligations in different ways,[15] either by means of specific legislation,[16] or by means of general codified[17] or common law actions, which may be supplemented, in turn, by piecemeal statutory provisions.

In common law jurisdictions, the phrase 'unfair competition' is generally used in three distinct ways: first, as a synonym for the common law tort of passing off; second, as a generic term to cover the broad range of legal and equitable causes of action available to protect a trader against unlawful trading activities of a competitor; and third, as a label for a general cause of action for the misappropriation of valuable intangibles, a cause of action that has so far been rejected in Commonwealth jurisdictions.[18] Bringing unauthorised commercial exploitation of personality within the law of unfair competition has met with varying degrees of success. In England, plaintiffs have, until recently, been unsuccessful in attempting to persuade the courts that unauthorised commercial exploitation of personality can

[13] See 224 below.

[14] Paris Convention For the Protection of Industrial Property, Art 10 *bis* (3). Cf. WIPO, *Model Provisions on Protection Against Unfair Competition* (Geneva, 1996) containing an expansive approach to Art 10 *bis* and see W. R. Cornish, 'Genevan Bootstraps' [1997] *EIPR* 336.

[15] See, e.g., F. K. Beier, 'The Law of Unfair Competition in the European Community – Its Development and Present Status' [1985] *EIPR* 284; World Intellectual Property Organisation, *Protection Against Unfair Competition* (Geneva, 1994); A. Kamperman Sanders, *Unfair Competition Law* (Oxford, 1997), 24–77.

[16] See, e.g., in Germany, *Gesetz gegen den unlauteren Wettbewerb*, 7 June 1909; Kamperman Sanders, *Unfair Competition*, 56.

[17] See, e.g., in France, Art. 1382 *Code civil*.

[18] *Moorgate Tobacco Co. Ltd* v. *Philip Morris Ltd* (1984) 56 ALR 414, 439–40, *per* Deane J and see 13 below.

come within the tort of passing off,[19] where liability is based on a misrepresentation leading to public confusion that damages a claimant's business or trading goodwill.[20] In Australia, however, the courts have been willing to take a far more expansive approach to the tort, and several actions for unauthorised commercial exploitation of personality have succeeded on this basis,[21] although such a pragmatic approach involves a questionable stretching of the tort's key elements.

Other jurisdictions have been willing to protect intangible recognition value unrelated to any conventional business or trading activity.[22] For example, some Canadian provinces have recognised that the misappropriation of a person's name or likeness for advertising purposes constitutes an independent tort, separate and distinct from the tort of passing off, which bases liability on misrepresentation,[23] while not amounting to a general cause of action for the misappropriation of valuable intangibles.[24] In the United States the right of publicity allows a person, usually (though not necessarily) a celebrity, to control the commercial exploitation of his name, voice, likeness or other indicia of personality. Liability is based not on *misrepresentation* leading to consumer confusion or deception,[25] but on the *misappropriation* of the commercial value of a person's identity.[26] The protection which most states provide is the most extensive in any common law jurisdiction, though there are considerable differences between individual states in the degree of protection afforded.[27] Although the right of publicity is often regarded as an aspect of unfair competition law[28] it has its roots elsewhere, in the law of privacy and, surprisingly perhaps, neither the law of passing off nor the misappropriation doctrine played much part in its development.

Civil law systems, on the other hand, tend to regard 'unfair competition' as a general term that covers distinct types of unlawful competitive

[19] See, e.g., *McCulloch* v. *Lewis A. May (Produce Distributors) Ltd* (1947) 65 RPC 58; *Lyngstad* v. *Anabas Products Ltd* [1977] FSR 62, and see further, ch. 3.

[20] See *Reckitt & Colman Ltd* v. *Borden Inc.* [1990] 1 WLR 491, 499 and see 19 below.

[21] See *Henderson* v. *Radio Corp. Pty Ltd* [1969] RPC 218 and the subsequent line of authorities, discussed in detail in ch. 2.

[22] See 40 and 69 below.

[23] *Krouse* v. *Chrysler Canada Ltd* (1973) 40 DLR (3d) 15; *Athans* v. *Canadian Adventure Camps Ltd* (1977) 80 DLR 583 and see 36–40 below.

[24] See further below at 13.

[25] Liability for misrepresentation is based on section 43(a) of the *Lanham Trademark Act*, 15 *USC* § 1125 (a), although this has played a relatively limited role, given the existence of the right of publicity. See 64–75 below.

[26] *Rogers* v. *Grimaldi* 875 F2d 994 (2nd Cir 1989), 1003–4; *Carson* v. *Here's Johnny Portable Toilets Inc.* 698 *F* 2d 831 (1983), 834–5.

[27] See generally, J. T. McCarthy, *The Rights of Publicity and Privacy* (New York, 1997).

[28] Witness its recent inclusion in the *Restatement, Third, Unfair Competition* (1995) § 46 et seq.

behaviour such as misleading advertising, comparative advertising that is not in accordance with the criteria set forth in European Community law,[29] aggressive and molesting advertising, the causation of confusion between products or traders, the unlawful disclosure of trade secrets and so forth. One type of unfair competition, against which protection is granted in most civil law systems, is the unlawful exploitation of a competitor's trade values. Misappropriation, however, is only regarded as unfair under specific circumstances. German law, for example, insists that the imitation of products not protected by intellectual property rights can only amount to unfair competition where additional factors such as a misrepresentation as to the origin of the products, the exploitation of another trader's reputation or a prior breach of confidence are present.[30] While the unfair competition law doctrine of misappropriation might seem to be an appropriate basis for the protection against unauthorised commercial exploitation of a person's image, German courts have not chosen this approach. Instead, they have extended personality rights such as the right to one's image, the right to one's name or the general personality right to protect economic interests. The reason for this development, which may seem surprising to a common lawyer, will be explored in more detail in chapter 4. The situation is similar in France. As will be shown in chapter 5, French courts refer to personality rights rather than to the 'parasitism doctrine' (which is quite similar to the unfair competition law doctrine of misappropriation in French law)[31] to afford protection against unauthorised commercial use of attributes of personality.

Privacy and publicity

English law knows no concept similar to the Roman law *injuria*, which in English would mean insult or outrage, though neither word suggests the true nature of the Roman idea which 'embraced any contumelious disregard of another's rights or personality'.[32] In the absence of a general remedy such as the *actio injuriarum*,[33] common law jurisdictions have traditionally given limited recognition to non-economic or dignitary

[29] See EC Directive 97/55/EC of 6 October 1997 amending directive 84/450/EEC on misleading advertising so as to include comparative advertising, *OJL* 270 of 23. 10. 1997, 18.
[30] § 4 No. 9 of the *Gesetz gegen den unlauteren Wettbewerb* (Act against Unfair Competition).
[31] See 162 below.
[32] B. N. Nicholas, *An Introduction to Roman Law*, (Oxford, 1962), 216.
[33] See further J. S. Beckerman, 'Adding Insult to *Iniuria*: Affronts to Honor and the Origins of Trespass' in M. S. Arnold *et al* (eds), *On the Laws and Customs of England*, (Chapel Hill, 1981), 178–9.

interests. Recovery for invasion of interests such as privacy and freedom from mental distress has, particularly in English law, traditionally been achieved parasitically, relying on the expansive judicial interpretation of existing torts such as defamation and trespass where other substantive interests such as reputation, property, or interests in the physical person have been affected.[34]

Some common law jurisdictions, most notably the United States, have been more willing to overcome the historical legacy in developing new causes of action to protect such non-economic interests in personality.[35] In the early years of the twentieth century in the United States the right of privacy established itself as the primary vehicle for protecting interests in personality from unauthorised commercial exploitation. As originally conceived, the right of privacy gave legal expression to the rather nebulous principle of 'inviolate personality' and secured a person's right 'to be let alone'.[36] This provided legal protection for dignitary interests which had previously fallen outside other legal and equitable causes of action such as defamation, trespass, and breach of confidence. The emphasis lay on separating privacy from causes of action protecting interests of an essentially proprietary nature.[37] However, from a relatively early period in its development it became clear that the right of privacy could be used to secure what were essentially economic rather than dignitary interests in preventing unauthorised commercial exploitation of a person's valuable attributes in name and likeness.[38] The right of privacy eventually developed into a separate right of publicity,[39] which many now regard as better placed among the unfair competition torts,[40] protecting intellectual property. Its proprietary characteristics can be seen in the fact that it is transferable, licensable and, in many states, descendible. While the early US cases dealing with appropriation of personality were criticised for failing to draw an adequate distinction between, on the one hand the damage to personal dignity and, on the other hand, the financial interests of celebrities,[41] it is possible for the distinction to become rather too sharp. It is often difficult to draw a clear distinction between, on the one hand, the purely economic interests of celebrities protected by a

[34] See 77–8 below. [35] See ch. 3 below.
[36] S. Warren and L. Brandeis, 'The Right to Privacy' (1890) 4 *HarvLRev* 193, 205; *Pavesich* v. *New England Life Insurance Co.* 50 *SE* 68 (1905).
[37] See 48–52 below.
[38] See, e.g., *Edison* v. *Edison Polyform Mfg Co.* 67 *A.* 392 (1907); *Flake* v. *Greensboro News Co.* 195 *SE* 55 (1938).
[39] *Haelan Laboratories Inc* v. *Topps Chewing Gum Inc* 202 *F* 2d 866 (2nd Cir 1953).
[40] See note 28 above.
[41] See, e.g., F. W. Harper and F. James, *The Law of Torts* (Boston, 1956), 689–90.

right of publicity and, on the other hand, the purely dignitary interests of others, protected by a right of privacy.[42]

Personality rights

Some jurisdictions, notably Germany, however have transcended the distinction between non-economic personality rights and property rights. Just as copyright, according to German doctrine, is a hybrid between a personality and a property right, German courts have also held that personality rights have the dual purpose of protecting both economic and non-economic interests.

A fundamental notion of German tort law is the concept of 'subjective rights', which has its roots in the legal philosophy of Immanuel Kant and the legal theory of Savigny, one of the most distinguished legal academics of the nineteenth century:[43] subjective rights delimit certain spheres in which each individual can act according to his or her free will. § 823 I of the *Bürgerliches Gesetzbuch* (*Civil Code* of 1900) provides that anybody who intentionally or negligently violates the subjective rights of another person is liable for damages. Savigny and the majority of the drafters of the *Civil Code* regarded property as the archetype of a subjective right, but they rejected the idea of a 'right in oneself'. The *Civil Code* only protected the right to one's name, but did not provide for explicit protection of privacy or personality. A 'right to one's image' was introduced by statute in 1907. With the enactment of the constitution of 1949 (*Grundgesetz*), which protects human dignity (Article 1) and the right to the free development of personality (Article 2 (1)), the general attitude shifted towards the acceptance of a broadly framed 'general personality right'.[44] The Bundesgerichtshof (Federal Supreme Court) took the lead and held that Articles 1 and 2 (1) of the *Basic Law* also required effective private law remedies against violations of the personality. Since then, both the specific personality rights to one's name and to one's image and the general personality right have been given shape by an extensive body of case law. Since the 1950s German courts have granted protection against the unauthorised exploitation of a person's portrait, name or public image on this basis. Copyright, which, according to German doctrine, is a hybrid right protecting both economic and ideal interests, has often been relied on as a model for the protection of personality aspects. In a recent judgment,[45] the Federal Supreme Court has again stressed the dual nature of personality rights, which protect both economic and

[42] See 64 below. [43] See 96 below. [44] See 100 below.
[45] BGHZ 143, 214 – *Marlene Dietrich*, on this judgment see below at 104.

non-economic interests and has held that the economic aspects of personality rights are descendible.

French law provides a similarly principled protection of individual dignity. Article 9 of the French *Code civil* states that '[e]veryone has the right to respect for his privacy'.[46] However, the general clause of French tort law has played a more important role. Article 1382 of the *Civil code* provides that anyone who causes damage to another person by his fault has to compensate this damage. From the middle of the nineteenth century onwards the courts have held that the misappropriation of another person's image or name amounts to a tort within the meaning of Article 1382. Given this broad statutory basis, the courts have had little reason to distinguish between economic and non-economic interests. Also, the notion of a subjective personality right, which is central in the German legal doctrine, is less important in French law, because Article 1382 does not require a violation of a right, but rather unlawful conduct. Unlike Germany, the French courts adopt a dualistic approach to those rights, which is similar to the French approach to copyright: rather than extending the existing personality rights to protect economic interests, the courts (or some of them) have acknowledged a new exclusive right, which is construed as a property right (monopole d'exploitation/droit patrimonial).

Synopsis

With a view to contributing to the discussion, the ensuing chapters provide an account of the substantive legal protection in cases of unauthorised commercial exploitation of personality in the major common law and civil law jurisdictions. The two basic economic and non-economic perspectives pervade the discussions of the individual jurisdictions. The question whether protection for personality should be rooted in personal dignity or intangible property rights has obvious practical implications for the nature and scope of the right. While we explore common questions such as the historical development, the present legal basis, the remedies available in cases of unauthorised personality advertising or merchandising or the descendability and licenceability of the respective rights, our account will reflect the considerable doctrinal differences between the various systems.

Chapter 2 examines the role of the law of unfair competition in protecting interests in personality in the major common law systems. When

[46] See generally, E. Picard, 'The Right to Privacy in French Law' in B. S. Markesinis (ed.), *Protecting Privacy* (Oxford, 1999), 49.

viewed globally, the unfair competition approach has played a somewhat residual role and chapter 3 examines the development of the rights of privacy and publicity in the United States and the emerging English law of privacy. Chapter 4 examines, in detail, the range of personality rights in German law. In chapter 5 we examine the distinct approach to the protection of personality in France, which is often regarded as the legal system which provides the most extensive and sophisticated protection for interests in personality. In the final chapter we draw the threads together to discover whether, despite all differences, there is some common ground. In an age of increasing cross-border advertising, in particular within the internal market created by the EC Treaty, a European way forward seems desirable. Since constitutional law has been a catalyst for the development of privacy protection and personality rights at least in some jurisdictions, Article 8 of the European Convention on Human Rights might provide a common basis for a further convergence of private law protection. This study will, however, also show that while there may be a degree of convergence at an abstract level, due to the fundamental difference between the various approaches a European way forward is likely to be littered with obstacles.

2 Property, personality and unfair competition in England and Wales, Australia and Canada

Introduction

Within the common law systems, the phrase 'unfair competition' is often used in three distinct ways: in the broadest sense, as a generic term to cover a wide range of legal and equitable causes of action dealing with unfair trading; as a synonym for the tort of passing off; and, finally, as a label for a general cause of action based on the misappropriation of valuable intangibles.[1] The latter form of unfair competition emerged in the United States in the early part of the twentieth century,[2] although it has been sparingly applied[3] and has subsequently been confined, largely by the constitutional doctrine that federal statutory intellectual property rights such as copyright and patents are supreme and, in any conflict, pre-empt the application of state laws.[4] Such a cause of action has been rejected by the English and Australian courts which refuse to protect 'all the intangible elements of value ... which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour'.[5] Intellectual property rights are dealt 'as special heads of

[1] See 6 above.
[2] *International News Service* v. *Associated Press* 248 *US* 215 (1918).
[3] *Restatement, Third, Unfair Competition* (1995) § 38, Comment *c*.
[4] See, e.g., *Sears, Roebuck & Co.* v. *Stiffel Co.* 376 US 225 (1964); *Compco Corp.* v. *Day-Brite Lighting Inc.* 376 US 234 (1964); *Bonito Boats Inc.* v. *Thunder Craft Boats Inc.* 489 *US* 141 (1989) and see, generally, *Restatement, Third, Unfair Competition* (1995) § 38; D. G. Baird 'Common Law Intellectual Property and the Legacy of *International News Service* v. *Associated Press*' (1983) *U Chi L Rev* 411.
[5] *Victoria Park Racing and Recreation Grounds Co. Ltd* v. *Taylor* (1937) 58 *CLR* 479; *Moorgate Tobacco Co. Ltd* v. *Philip Morris Ltd* (No. 2) (1984) 56 *CLR* 414, 445; *Hodgkinson & Corby Ltd* v. *Wards Mobility Ltd* [1994] 1 *WLR* 1564, 1569; *Mail Newspapers* v. *Insert Media* (No. 2) [1988] 2 *All ER* 420, 424; *Harrods Ltd* v. *Schwartz-Sackin & Co. Ltd* [1986] *FSR* 490, 494; *Chocosuisse Union des Fabricants Suisses de Chocolat* v. *Cadbury Ltd* [1998] *RPC* 117, 127. Cf. *Willard King Pty Ltd.* v. *United Telecasters Ltd* [1981] 2 *NSWLR* 547, 552; *Hexagon Pty Ltd.* v. *Australian Broadcasting Commission* (1975) 7 *ALR* 233, 251.

protected interests and not under a wide generalization'.[6] The crucial factor will be whether an intangible falls within one of the discrete recognised categories, rather than the fact that the intangible creation has some form of value.

Economic interests in personality have been protected by the Anglo-Australian courts through the flexible interpretation of existing causes of action for unfair competition, notably the tort of passing off with liability based on misrepresentation.[7] This reflects the typically casuistic approach of many common law jurisdictions rather than any inherent affinity between misrepresentation and commercial appropriation of personality. As the ensuing chapters show, the broader picture reveals that the law of unfair competition has played an essentially residual role when looking at the developments globally. The Canadian courts have gone somewhat further in developing a new cause of action based on misappropriation. To understand the different approaches in the major common law systems, a clear distinction needs to be drawn between four separate notions: first, the traditional English tort of passing off which does not, on an orthodox analysis, encompass damage to interests in personality as such; second, the extended form of passing off, developed in Australia and tentatively followed by the English courts, which does embrace damage to interests in personality; third, a general tort of misappropriation of intangibles and; fourth, a *sui generis* tort of appropriation of personality. The orthodox and extended approaches to the tort of passing off in England and Australia are examined in the first section. While the English courts are moving closer to the Australian model, it is useful to contrast this with the orthodox approach. The contrast highlights that it is at least questionable whether a cause of action based on misrepresentation is the best vehicle for protecting interests in personality. Successive sections explore the development of a *sui generis* tort of appropriation of personality in Canada, a discrete and limited addition to the catalogue of common law torts, which does not extend to a general doctrine of misappropriation. Most jurisdictions in the United States recognise a right of publicity, which allows a person to control the commercial exploitation of his name, voice or likeness, and this right is often

[6] *Victoria Park Racing and Recreation Grounds Co. Ltd* v. *Taylor* (1937) 58 *CLR* 479, 509.

[7] Registered trade marks can play an important role, although this is limited by the need to take proactive steps to register indicia of identity such as a particular portrait or signature, the relatively limited scope of what may be registered and the often narrow scope of an infringement of such a right. Purely for reasons of space, discussion is omitted here. See H. Beverley-Smith, *The Commercial Appropriation of Personality*, (Cambridge, 2002), 36–47.

treated as an aspect of unfair competition law.[8] However, neither the misappropriation doctrine nor the more traditional tort of passing off played an important part in its development. Its origins lie in the entirely separate right of privacy and it cannot properly be understood without an understanding of the development of its progenitor.[9]

Liability based on misrepresentation: the tort of passing off in English and Australian law

In its original, or classic, form the tort of passing off prevented a defendant from passing off his own goods as the claimant's goods,[10] although the basic formulation was gradually extended to cover misrepresentations that the claimant's goods were of a different class or of a different quality from what they actually were.[11] It expanded to cover a false suggestion by the defendant that his business was connected with the business of the claimant, thus damaging the claimant's goodwill, even though there was no direct competition in the same line of business.[12] Three key elements must be established for a valid cause of action: '(i) a reputation (or goodwill) acquired by the plaintiff in his goods, name, mark etc. (ii) a misrepresentation by the defendant leading to confusion (or deception) causing (iii) damage to the plaintiff'.[13] In analysing the particular facts of a passing off action it is usually advantageous to examine the three elements individually, even though they are often interactive and difficult to separate.[14]

Goodwill and reputation

Passing off protects the property in the business or goodwill likely to be injured by the defendant's misrepresentation.[15] The protected interest is a right of property in the claimant's business goodwill rather than in a

[8] Witness its inclusion in the *Restatement, Third, Unfair Competition*, §§ 46–9, and see 68–75 below. Cf. WIPO *Model Provsions on Protection Against Unfair Competition* (Geneva, 1996) Art 2(2)(vi).

[9] See ch. 3.

[10] See, e.g., *Reddaway* v. *Banham* (1896) 13 *RPC* 429.

[11] *A. G. Spalding & Bros* v. *A. W. Gamage Ltd* (1915) 32 *RPC* 273, 283–4.

[12] *The Clock Ltd* v. *The Clock House Hotel Ltd* (1936) 53 *RPC* 269, 275; *Erven Warnink BV* v. *Townend & Sons (Hull) Ltd* [1979] *AC* 731, 741–2 *per* Lord Diplock.

[13] *Consorzio del Prosciutto di Parma* v. *Marks & Spencer plc* [1991] *RPC* 351, 368, following the remarks of Lord Oliver in *Reckitt & Colman Ltd* v. *Borden Inc.* [1990] 1 *WLR* 491, 499.

[14] *County Sound plc* v. *Ocean Sound Ltd* [1991] *FSR* 367, 372.

[15] *A. G. Spalding & Bros* v. *A. W. Gamage Ltd* (1915) 84 *LJ Ch* 449, 450, *per* Parker LJ cited with approval in *Reckitt & Colman Ltd* v. *Borden Inc.* [1990] 1 *WLR* 491, 510 *per* Lord Jauncey. See also *British Telecommunications PLC and Others* v. *One in a Million Ltd and Others* [1999] *FSR* 1, 10 *per* Aldous LJ.

particular mark or get-up in itself.[16] Moreover, goodwill is inextricably linked to some form of business and has no independent existence. Thus, it cannot be assigned or dealt with independently of the underlying business.[17] Matters are complicated by the concurrent and seemingly alternative use of the term 'reputation',[18] a much wider notion, which is easier to satisfy. The better view is that passing off protects goodwill rather than a broader notion of reputation[19] and, as noted above, this goodwill is inevitably and perhaps inextricably linked to a particular business. There are dangers in confusing goodwill, which cannot exist in a vacuum, with mere reputation, which does not by itself constitute a property that the law protects.[20] A distinction also needs to be drawn between goodwill and reputation in the different sense of personal reputation, rather than commercial or trading reputation, although achieving such a distinction is difficult, particularly when dealing with professional reputation, which is both an economic asset and an aspect of an individual's dignity.[21] The protection afforded by the common law to these interests differs markedly. Cases of libel, and some cases of slander, are actionable *per se*, without the need to show special damage.[22] On the other hand, while goodwill is universally regarded as a property right, passing off is not actionable in the absence of damage, or, in a *quia timet* action, the likelihood of damage. In cases involving statements which are damaging to personal or professional reputation the law will presume that some damage flows from the bare fact of infringement of a person's interests in reputation, whereas no such presumption is made in the case of misrepresentations; the claimant must show that damage to

[16] *Star Industrial Co.* v. *Yap Kwee Kor* [1976] *FSR* 256, 269 *per* Lord Diplock and see *Inter Lotto (UK) Ltd* v. *Camelot Group PLC* [2004] *RPC* 171, 178.

[17] *IRC* v. *Muller & Co.'s Margarine Ltd* [1901] *AC* 217, 224.

[18] See, e.g., *Consorzio del Prosciutto di Parma* v. *Marks & Spencer plc* [1991] *RPC* 351, 368, *per* Nourse LJ. See also, J. Drysdale and M. Silverleaf, *Passing Off Law and Practice* (2nd edn) (London, 1994), ch. 3.

[19] *Anheuser Busch Inc.* v. *Budejovicky Budvar NP* [1984] *FSR* 413. Australian courts have gone further in recognising reputation, without actual trading goodwill in a particular jurisdiction, as sufficient: see, e.g., *Conagra Inc.* v. *McCain Foods (Aust.) Pty Ltd* (1992) 23 *IPR* 193 (Federal Court of Australia) (reputation without actual trading goodwill in a particular jurisdiction is sufficient). By virtue of section 56 of the *Trade Marks Act 1994*, in the absence of a business or goodwill in the United Kingdom a degree of protection may be provided where the mark is 'well-known', and an identical or similar mark is used in relation to identical or similar goods or services, where such use is likely to cause confusion. See generally C. Morcom, A. Roughton, and J. Graham, *The Modern Law of Trade Marks* (London, 1999), 225–7.

[20] *Anheuser Busch Inc.* v. *Budejovicky Budvar NP* [1984] *FSR* 413, 470.

[21] Cf. the distinction between economic and non-economic interests, 2–3 above, and see further 52–3 below.

[22] See 81–2 below.

goodwill results, or is likely to result. In the early English cases, involving the unauthorised use of professional surgeons' names, the notion of goodwill was inextricably linked with personal and professional reputation. While the courts rejected the notion that a person might have had a property right in his name *per se*,[23] they came close to accepting the proposition that a person might have a cause of action if damage to his property, business, or profession could be established.[24]

Two basic conceptions of goodwill in personality may be identified.[25] First, where there is an established business, the courts have been willing to grant a remedy and the notion of 'trade' has been widely interpreted to include persons engaged in a professional, artistic or literary occupation.[26] For example, performers and writers have successfully established goodwill in their names for the purposes of bringing an action in passing off.[27] Thus, an unauthorised use of a professional person's name could be actionable provided that goodwill could be established in respect of some business, trade, or profession which might be damaged by the defendant's misrepresentation.[28] The Australian courts took the lead in this respect. Although the remedy in passing off is necessarily only available where the parties are engaged in business, that expression was construed 'in its widest sense to include professions and callings'.[29] This reflected developments in advertising where certain persons could earn substantial amounts by endorsing or being associated with a wide range of different products as a result of their sporting, artistic or other activities.[30] Claimants who have been able to demonstrate goodwill for the purposes

[23] *Dockrell* v. *Dougall* (1899) 15 *TLR* 333, 334.

[24] *Clark* v. *Freeman* (1848) 11 Beav 112,119; *Dockrell* v. *Dougall* (1899) 15 *TLR* 333, 334. See also *Sim* v. *H. J. Heinz & Co. Ltd* [1959] 1 *WLR* 313.

[25] Leaving aside cases where a business trades under the name of its owner or founder, where the relevant goodwill relates to the particular business carried on by the eponymous owner or his successors, rather than the personality of the owner or founder. See, e.g., *Joseph Rodgers & Sons Ltd* v. *W. N. Rodgers & Co.* (1924) 41 *RPC* 277 (cutlery manufacturers); *Poiret* v. *Jules Poiret Ltd* (1920) 37 *RPC* 177 (theatrical costumiers); *Parker & Son (Reading) Ltd* v. *Parker* [1965] *RPC* 323 (estate agency). See also *ELIZABETH EMANUEL Trade Mark* [2004] *RPC* 293.

[26] *Kean* v. *McGivan* [1982] *FSR* 119. See also *British Diabetic Association* v. *Diabetic Society Ltd* [1995] 4 *All ER* 812, 819.

[27] *Landa* v. *Greenberg* (1908) 24 *TLR* 441. See also *Hines* v. *Winnick*, (1947) 64 *RPC* 113; *Modern Fiction* v. *Fawcett* (1949) 66 *RPC* 230; *Forbes* v. *Kemsley Newspapers Ltd* (1951) 68 *RPC* 183.

[28] See, e.g., *Clark* v. *Associated Newspapers Ltd* [1998] 1 *All ER* 959 (false attribution of authorship of claimant author under the tort of passing off and section 84 *Copyright Designs and Patents Act 1988*). As to the nature of the damage, see 27–33 below.

[29] *Henderson* v. *Radio Corporation Pty Ltd* [1969] *RPC* 218, 234 and see further text accompanying note 53 below.

[30] *Ibid.*, 243.

of passing off actions have included an actor,[31] a professional horse rider,[32] a pop group,[33] and a television presenter.[34] The English courts have moved closer to this approach, acknowledging that the goodwill enjoyed by a professional racing driver extended to the endorsement opportunities associated with his racing activities.[35]

A second, narrower, conception ascribes the relevant goodwill to a claimant's subsidiary business in exploiting a person's image for commercial purposes (either personally, or through a licensing programme), rather than as goodwill in respect of a profession or business. For example, the focus on the absence of any existing trading interests by a pop group, rather than on their recognition value generated by their activities in their business or profession as musicians[36] made it difficult to establish the necessary goodwill. This can be particularly problematic in interim proceedings, which form the bulk of the reported English authorities in this area. The balance of convenience[37] will often favour a defendant with a significant trading goodwill, which may be damaged by the grant of an injunction. Moreover, if the claimant's interest is in a subsidiary licensing business, a purely economic interest, the fact that damages would be an adequate remedy at trial is a further factor against the claimant.[38] The changes introduced by the Civil Procedure Rules make it more likely that a case will proceed to full trial and that interim relief will be limited to cases of genuine urgency, which weakens the value of pre-CPR decisions.[39]

Although seemingly too narrow, the notion of the relevant business and goodwill limited to existing trading interests in respect of a person's image has its attractions in focusing on the possible lack of damage. While

[31] *Pacific Dunlop Ltd* v. *Hogan* (1989) 87 *ALR* 14.
[32] *Paracidal Pty Ltd* v. *Herctum Pty Ltd* (1983) 4 *IPR* 201.
[33] *Hutchence* v. *South Sea Bubble Co.* (1986) 64 *ALR* 330.
[34] *10th Cantanae Pty Ltd* v. *Shoshana Pty Ltd* (1987) 79 *ALR* 279 (claim failed on facts). Cf. *Honey* v. *Australian Airlines Ltd* (1989) *ATPR* ¶ 40–961, affirmed (1990) 18 IPR 185 (Federal Court of Australia, Full Court) (claimant's status as amateur sportsman effectively precluded any business goodwill in respect of his image and there could be no misrepresentation that the claimant endorsed the defendants' business or their activities).
[35] *Irvine* v. *Talksport Ltd* [2003] *EWCA Civ.* 423, paras 34–6 [2002] 2 *All ER* 414, 427–31.
[36] *Lyngstad* v. *Anabas Products* [1977] *FSR* 62, 64–5; *Kaye* v. *Robertson* [1991] *FSR* 62, 69 (actor not 'in the position of a *trader in relation to his interest in his story about* [an] *accident and* [subsequent] *recovery*' (italics supplied), despite the Court's recognition that the claimant had 'a potentially valuable right to sell the story of his accident and recovery when ... fit enough to tell it'. Cf. *Clark* v. *Freeman* (1848) 11 Beav 112, 119 (if claimant surgeon 'had been in the habit of manufacturing and selling pills, it would be very like the other cases in which the Court has interfered for the protection of property').
[37] *American Cyanamid Co.* v. *Ethicon Ltd* [1975] *AC* 396.
[38] See, e.g., *Halliwell* v. *Panini* (Unreported, High Court, Chancery Division, 6 June 1997).
[39] See Wadlow, *The Law of Passing Off* (3rd edn) (London, 2004), 795–6.

appropriation of personality might damage economic interests that are entirely separate from an individual's personal reputation it is often difficult to identify any direct diversion of trade from the claimant to the defendant that is present in the classic case of passing off goods. The damage takes the form of an injurious association with the business of the defendant, or the loss of a licence fee, which might have been extracted had the defendants not exploited the claimant's personality without his consent.[40] This raises two points. First, and most immediately relevant, if a professional person finds that his image has been exploited without his consent, does that injure him in his profession? This depends on how broadly the notion of a business or profession may be construed. It could cover the activities of a sportsman or entertainer whose business might include commercial exploitation of personality through licensing agreements. It is questionable whether a statesman, politician, or religious leader would come within the notion of a person engaged in professional or business activities. Private individuals would almost certainly be excluded, since they lack goodwill in respect of their image, and rarely have goodwill in respect of their trade or profession that might be damaged by unauthorised appropriation of personality. Nevertheless, in principle all should have an equally valid right to object to unauthorised commercial exploitation. This illustrates the inherent artificiality in basing legal protection on the notion of goodwill rather than the substantive interest – latent recognition value. The second point raises the question whether an allegedly injurious association or the loss of a notional licence fee can furnish the appropriate element of damage. This is considered in detail below.

Misrepresentation

The nature of the misrepresentation in the tort of passing off may take many different forms which are neither possible nor desirable to define.[41] In its original form the defendant would misrepresent that his goods were the goods of the claimant, or were of the same kind or quality as the claimant's.[42] By the beginning of the twentieth century, the tort had been extended to cover cases 'where although the plaintiff and defendant were not competing traders in the same line of business, a false suggestion by

[40] Or, as in the rather unusual case of *Kaye* v. *Robertson* (see note 36 above), the opportunity to sell his story exclusively to the highest bidder.

[41] *Bulmer (HP) Ltd & Showerings Ltd* v. *Bollinger SA* [1978] *RPC* 79, 99; *Spalding* v. *Gamage* (1915) 32 *RPC* 273, 284.

[42] *Reddaway* v. *Banham* [1896] *AC* 199; *Spalding* v. *Gamage* (1915) 32 *RPC* 273.

the defendant that their businesses were connected with one another would damage the reputation, and thus the goodwill, of the plaintiff's business'.[43] Thus, according to the classic principle, 'no man is entitled to carry on his business in such a way, or by such a name, as to lead to the belief that he is carrying on the business of another man, or to lead to the belief that the business which he is carrying on has any connexion with the business carried on by another man'.[44] The principle covers cases of misrepresentation leading to confusion that the defendant's business is the claimant's business itself, or is a branch of the claimant's business or is connected with the claimant's business.[45]

Cases of appropriation of personality are generally concerned with misrepresentations relating to a connection between the defendant and the claimant, possibly in the form of a licensing or endorsement agreement, leading to confusion on the part of the public, resulting in damage or a real possibility of damage to the claimant. The early English cases relating to licensing connections were hampered by the need to show a 'common field of activity' in which the claimant and defendant were engaged.[46] While a misrepresentation that might lead the public to confuse the profession, business or goods of the claimant with the business or goods of the defendant could be potentially actionable,[47] the common field of activity test introduced a rather blunt instrument for assessing confusion. For example, a popular radio broadcaster failed to establish that he was in the same field of activity as a breakfast cereal manufacturer who had used his stage name without his consent.[48] Until the test was abandoned, at least as an absolute requirement,[49] it hampered attempts to expand the categories of actionable misrepresentation to cover licensing connections.[50] In other cases, where the absence of a common field of activity was not regarded as conclusive, claimants were unable to establish a real possibility of confusion in the minds of the public as to a connection between the claimants and the defendants, particularly where

[43] *Erven Warnink BV* v. *Townend & Sons (Hull) Ltd* [1979] *AC* 731, 741–2 *per* Lord Diplock.
[44] *The Clock Ltd* v. *The Clock House Hotel Ltd* (1936) 53 *RPC* 269, 275, *per* Romer LJ.
[45] *Ewing* v. *Buttercup Margarine Ltd* [1917] 2 Ch 1, 11 *per* Cozens-Hardy M. R. See also *Harrods Ltd* v. *R. Harrod Ltd* (1924) 41 *RPC* 74; *British Legion* v. *British Legion Club (Street) Ltd* (1931) 48 *RPC* 555.
[46] *McCulloch* v. *Lewis A. May (Produce Distributors) Ltd* (1948) 65 *RPC* 58.
[47] *Ibid*., 64. [48] *Ibid*., 67.
[49] See *Lyngstad* v. *Anabas Products Ltd* [1977] *FSR* 62, 67; *Lego System Aktieselskab* v. *Lego M. Lemelstrich Ltd* [1983] *FSR* 155, 186; *Mirage Studios* v. *Counter-Feat Clothing Co. Ltd* [1991] *FSR* 145, 157; *Irvine* v. *Talksport* [2002] 2 *All ER* 414, 420–3, affirmed [2003] *EWCA Civ*. 423.
[50] See *Wombles Ltd* v. *Wombles Skips Ltd* [1975] *FSR* 488; *Tavener Rutledge Ltd* v. *Trexapalm Ltd* [1977] *RPC* 275.

the claimants had a very limited business in exploiting their image,[51] or were unable to show that the issue of whether goods were licensed products was a material factor in the purchaser's decision.[52]

The Australian courts have taken a more expansive approach to connection misrepresentations since the decision in *Henderson* v. *Radio Corporation Pty Ltd*.[53] It was held that the conduct of the defendant in producing a record bearing an image of the claimant ballroom dancers (albeit with no express endorsement) amounted to a misrepresentation that the business of the claimants (interpreted in its widest sense as including professions and callings) was connected with the business of the defendant.[54] It was sufficient for the claimants to prove that the defendant was either falsely representing his goods as those of the claimant or that his business was the same as, or connected with, the business of the claimant.[55] In this respect there was nothing revolutionary about such an extension of the tort of passing off. More broadly, it was held that the 'wrongful appropriation of another's professional or business reputation' was held to be an injury in itself: the claimants' professional recommendation was theirs, to withhold or bestow at will and the defendant had wrongfully deprived them of their right to do so to receive payment.[56] This approach is somewhat question-begging: the claimants could only have insisted on a fee if they had a valid cause of action, which was precisely the issue under discussion. The existence of such a cause of action in passing off would depend on the ability to show damage, a requirement considered in detail below. It was also unclear from the decision in *Henderson* whether a remedy in passing off would be limited to misrepresentations that might damage the claimants in their business or profession, or whether it would extend a remedy in cases where there was no injury to the claimants in such a capacity. The narrow interpretation would effectively limit the claimants' remedy to cases where 'tools of the trade' endorsements were concerned; the relevant misrepresentation would relate to the fact that the claimants' business as dance instructors was connected with the business of the defendant and would be damaged by the defendant's misrepresentation. The broader interpretation tends towards viewing the claimant's capacity to endorse products unconnected with their business or profession either as a business in itself (i.e., a licensing or trading business) or as a property right in itself. The

[51] *Lyngstad* v. *Anabas Products Ltd* [1977] *FSR* 62.
[52] *Halliwell* v. *Panini* Unreported, High Court, Chancery Division, 6 June 1997.
[53] [1969] *RPC* 218. [54] *Ibid.*, 234.
[55] *Ibid.*, 231, citing the dictum of Romer LJ in *Clock (The) Ltd* v. *The Clock House Hotel Ltd* (see note 44 above and accompanying text).
[56] *Ibid.*

former might be said to be the proper concern of the tort of passing off, where the protected interest would be the goodwill in the business or profession of the claimant. The latter lies outside the tort of passing off, and amounts to a property right in the attributes of an individual's personality, such as a right of publicity.[57]

The Australian approach to licensing connections was followed somewhat over-enthusiastically in an artificial character merchandising case, *Mirage Studios* v. *Counter-Feat Clothing Co. Ltd*, where a misrepresentation was established despite the absence of affirmative evidence that the public would rely on the misrepresentation that the defendant's merchandise was licensed by the claimant copyright owners and was the cause of the public buying the goods in question.[58] The Court was prepared to infer that if the customer was aware that the product was not genuine, he would not buy it, but would seek the real object.[59] Later decisions have limited the breadth of this proposition and it cannot be said that character merchandising is generally 'established and accepted in the public mind as properly the exclusive preserve of the character himself'.[60] There must not only be a misrepresentation but, on the facts of each case, the misrepresentation must be a material one. The name or representation of the character must have trade mark significance in respect of the goods of which the complaint is made and '[i]t is not sufficient that the public should believe that there is some sort of connection between the defendant and the licensor: the public must select the defendant's goods in reliance upon the assumed connection'.[61] Although, in some cases, a claimant might establish that the public would wish to buy genuine goods, this is not universally true and consumers might well be indifferent as to whether a product was licensed or came from a particular source.[62] An unauthorised product can have the same attraction and glamour as an authorised product for many consumers.[63] Public knowledge of practices such as merchandising or endorsement, belief in the existence of quality control or approval, and reliance on that belief are three separate matters.[64]

[57] See below 64–75. [58] [1991] *FSR* 145, 159. [59] *Ibid.*
[60] *ELVIS PRESLEY Trade Marks* [1999] *RPC* 567, 597. [61] Wadlow, *Passing Off*, 313.
[62] See *BBC Worldwide Ltd* v. *Pally Screen Printing Ltd* [1998] *FSR* 665, 674. Cf. *Arsenal Football Club plc* v. *Reed* (2003) 3 All ER 865 (*CA*) (the fact that a registered trade mark was perceived as a badge of loyalty or affiliation by consumers rather than as an indication of trade origin of merchandise was immaterial and the trade mark proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the mark by selling unofficial products illegally bearing the mark).
[63] H. Carty, 'Character Merchandising and The Limits of Passing Off' (1993) 13 *LS* 289, 298.
[64] Wadlow, *Passing Off*, 509.

Despite the more cautious approach to connection misrepresentations in artificial character merchandising cases, more recently the English courts have accepted that a misrepresentation relating to an endorsement connection can be sufficient. In *Irvine* v. *Talksport*, a well-known Formula 1 driver brought an action in respect of the use of his photograph in an advertisement for the defendant's radio station. The photograph of the claimant had been altered by substituting a mobile phone for a portable radio bearing the name of the defendant's radio station. The court acknowledged that it is a common practice for famous people to exploit their names and images by way of endorsement, which often extends beyond their field of expertise, and that this represents a substantial part of their total income. The law of passing off should reflect the realities of the market place, where manufacturers and retailers pay for well-known personalities to endorse their goods.[65] The claimant conceded that it was not sufficient to show that his image had been used by the defendant in its brochure and the court was careful to distinguish between merchandising rights and endorsement. There had to be an implicit representation of endorsement, recommendation or approval (or a reasonable belief among the members of the target audience that this was the case).[66] The English character merchandising cases were somewhat cursorily distinguished on the basis that the defendants' activities in those cases did not imply any endorsement: there could be no question of a performer such as Elvis Presley endorsing any product, since he had been dead for many years.[67] The focus on the requirement of an endorsement served to limit the scope of a claimant's rights and to draw a line between cases of appropriation of personality and a broader form of quasi-copyright in names and images, which has been consistently rejected in English law.[68]

Endorsement and misappropriation

While a number of Australian cases have allowed actions based on a misrepresentation relating to a commercial connection between the claimant and the defendant,[69] the notion of endorsement remains rather troublesome and provides a foretaste of the difficulties that the English

[65] [2002] 2 *All ER* 414, 425. [66] *Ibid*., 427 and 431. [67] *Ibid*., 426.

[68] *Ibid*., 426 and see *ELVIS PRESLEY Trade Marks* [1999] *RPC* 567, 580–82 and 597; Whitford Committee, *Report of the Committee to Consider the Law on Copyright and Designs* Cmnd 6732 (London, 1977), para. 909; White Paper, *Reform of Trade Marks Law* Cm 1203, 1990, paras 4.42–3.

[69] See, e.g., *Children's Television Workshop Inc.* v. *Woolworths (NSW) Ltd* [1981] *RPC* 187; *Hutchence* v. *South Seas Bubble Co. Pty Ltd* (1986) 64 *ALR* 330; *Paracidal Pty Ltd* v. *Herctum Pty Ltd* (1983) 4 *IPR* 201.

courts will have to confront. The basic approach adopted by the Australian courts involves asking 'whether a significant section of the public would be misled into believing, contrary to the fact, that a commercial arrangement ha[s] been concluded between the plaintiff and the defendant under which the plaintiff agreed to the advertising'.[70] Thus, a misrepresentation that the claimant has endorsed, or is otherwise associated with, the defendant's business or products in such a way that it would (be likely to) mislead members of the public is potentially actionable.[71] This will require clear evidence of some form of connection between the business of the claimant (construed broadly) and the business of the defendant. The mere mention of a name in an advertisement will not necessarily suggest the endorsement, approval or involvement of that person.[72] Thus, for example, in one Australian case it could not be established that a reasonably significant number of people would infer that a leading amateur athlete was giving his endorsement to the defendant airline despite the fact that the athlete was featured prominently in an advertisement; the advertisement was primarily intended to promote sport in schools, rather than the airline's business itself.[73] In advertising parlance, the advertisement did not involve a 'tools of the trade' type of endorsement, or even a 'non-tools' endorsement, but involved the use of what could at most be described as an 'attention grabbing device', involving the use of the name or image of a celebrity in connection with goods or services without implying any endorsement.[74]

A looser approach involves considering whether an advertisement conveys a false endorsement of the product in question. This avoids the artificial question of whether a consumer reasons that a claimant has authorised a particular advertisement, since an unauthorised use does not invoke a logical train of thought in the minds of the public. The importance lies in creating an association between the character and the product, rather than making a precise misrepresentation. A consumer might wish to identify with the character or personality and an unauthorised advertisement would be misleading since it lacks the valuable association between the product and the celebrity.[75] While such an

[70] See *Pacific Dunlop Ltd* v. *Hogan* (1989) 87 *ALR* 14, 42.
[71] *10th Cantanae Pty Ltd* v. *Shoshana Pty Ltd* (1987) 79 *ALR* 299, 302 (claim failed on facts).
[72] *10th Cantanae Pty Ltd* v. *Shoshana Pty Ltd* (1987) 79 *ALR* 299, 306 *per* Pincus J.
[73] *Honey* v. *Australian Airlines Ltd* (1989) *ATPR* ¶ 40–961, affirmed (1990) 18 IPR 185 (Federal Court of Australia, Full Court), although an equally important factor was the claimant's inability to establish any relevant goodwill: see note 34 above.
[74] See I. J. Rein et al., *High Visibility*, (London, 1987), 59.
[75] *Pacific Dunlop Ltd* v. *Hogan* (1989) 87 *ALR* 14, 44–5, *per* Burchett J.

approach is arguably less artificial than one that presumes that the consumer is aware of, or concerned with, the existence of a commercial relationship between the claimant and the defendant, it sanctions, in effect, the protection of a celebrity's power of endorsement or product association *per se*. Both approaches beg the question whether consumers actually care about the existence of a formal commercial arrangement, or even whether there is a (valuable) association: many will simply want merchandise bearing a celebrity's image. The inevitable impression conveyed is that while the Australian courts are paying lip service to the requirement of a misrepresentation relating to a connection between two businesses, in reality, in cases of appropriation of personality, they have been protecting a celebrity's power of endorsement *in vacuo*.[76] These conclusions are supported by the nature of the damage that the courts have been prepared to accept.[77]

Finally, it should be noted that the notion of endorsement is inherently restrictive. De facto economic interests in personality take the form of latent recognition values as well as existing licensing or trading interests. Many unauthorised uses take the form of attention grabbing devices, where there is simply an association between the subject and the product or service in question. Often there is no misrepresentation as to any form of commercial arrangement between the subject and the advertiser. Neither is there any suggestion of express or implied endorsement in the real sense of a declaration of approval. What is often involved is the simple *taking* of another's image: the substance of the complaint is misappropriation rather than misrepresentation.

One Australian case, involving artificial character merchandising rather than appropriation of personality, has taken a more direct approach. In *Hogan* v. *Koala Dundee Pty Ltd*,[78] it was acknowledged that there is an inherent degree of artificiality in basing liability on deception of the public about licensing arrangements, particularly where the notional consumer would be guessing as to a legal requirement that is, in itself, unclear and unsettled in law. Such issues are not at the forefront of the notional consumer's mind, and are necessarily vague and inaccurate: '[u]nlike a representation as to the origin or quality of goods, use of mere images in advertising, although presumably effective to generate sales, does not necessarily do so by creating, or relying on, any conclusions in

[76] See R. G. Howell, 'Personality Rights: A Canadian Perspective' (1990) 1 *IPJ* 212, 219; J. McMullan, 'Personality Rights in Australia' (1997) 8 *AIPJ* 86, 91. C. R. Shanahan, '"Image Filching" in Australia: The Legal Provenance and Aftermath of the "Crocodile Dundee" Decisions' (1991) *TMR* 351, 365.

[77] See 31 below.

[78] (1988) 83 *ALR* 187.

the minds of the buying public'.[79] Liability was based on the misappropriation of another's commercial reputation, or, more widely, the wrongful association of goods with an image properly belonging to another.[80] It was held that the inventor of a sufficiently famous fictional character having certain visual or other traits, could prevent others from using his character to sell their goods and could assign the right so to use the character in gross, regardless of whether he had carried on any business at all, other than the writing or making of the work in which the character appeared.[81]

Such a proposition is extremely wide, and totally at odds with the principle that a passing off action does not confer any rights in respect of a name (or image) in itself, but in the goodwill of a particular business. Subsequent Australian cases have not followed this novel approach and have maintained the need to show a misrepresentation and damage to goodwill,[82] although these have been liberally construed. In effect, it is tantamount to the judicial recognition of a *sui generis* character right, which has been explicitly rejected in English law.[83] The adoption of a requirement of endorsement by the English courts serves to draw a line between cases of appropriation of personality and any wide-ranging expansion of character merchandising rights.[84] A wide-ranging tort of character misappropriation could well have the effect of tipping the balance in favour of the creator (whose skill, effort and investment is supposed to be adequately encouraged and rewarded by the law of copyright), to the detriment of a competitor's freedom to market his goods in the most attractive way possible. While it may well be desirable to reject a wide cause of action for misappropriation in respect or artificial character merchandising,[85] cases of appropriation of personality involve different considerations. Both economic and non-economic interests need to be

[79] *Hogan* v. *Koala Dundee Pty Ltd* (1988) 83 *ALR* 187, 195 *per* Pincus J.
[80] *Ibid*., 187, 196. [81] *Ibid*.
[82] *Pacific Dunlop Ltd* v. *Hogan* (1989) 87 *ALR* 14. See also *Talmax Pty Ltd* v. *Telstra Corp. Ltd* (1996) *ATPR* ¶ 41–535 (Supreme Court of Queensland – Court of Appeal) (defendant's advertisement featuring a photograph of the claimant swimmer misrepresented that the claimant was 'sponsored' by the defendant and had consented to the 'use of his name, image and reputation' in its advertising and supported the defendant's telecommunications services) and see *Twentieth Century Fox Film Corp.* v. *South Australian Brewing Co. Ltd* (1996) 34 *IPJ* 225 (use of the term 'Duff Beer', deriving from 'The Simpsons' television cartoon series, amounted to a misrepresentation suggesting an association between the defendant's beer and the claimant's business in producing cartoons and its extensive associated merchandising business).
[83] See note 68 above.
[84] See *Irvine* v. *Talksport Limited* [2002], *All ER* 414, 417–18 and 427.
[85] See text accompanying note 83 above.

considered and a new form of liability based on misappropriation is arguably easier to justify.[86]

Damage

Passing off does not protect a property right in a name or other indicium: it protects property in the underlying goodwill of a business.[87] Although the basis of the tort is interference with a property right, the tortious nature of the cause of action is reflected in the fact it is incomplete unless the claimant can show damage, or the likelihood of damage to his goodwill.[88] A claimant must satisfy the third necessary element[89] and show that the defendant's misrepresentation causes actual damage to his business or goodwill or, in a *quia timet* action, the probability of damage. Two distinct approaches may be found, which reflect the manner in which the tort has expanded from its early origins.[90] In the classic action for passing off, where the defendant misrepresented that his goods or his business were the claimant's goods or business,[91] there would almost automatically have been a diversion of trade from the claimant to the defendant, which invited little discussion of the issue of damage.[92] With the widening of the categories of actionable misrepresentations, and the move away from the classic factual situation, the requirement of damage became increasingly important to distinguish between misrepresentations that were actionable in passing off and those that were not. However, an alternative approach seems to presume that the claimant has suffered damage if the other essential elements can be shown,[93] although it is difficult to reconcile this with the general rule which insists on the need to prove damage.[94]

While the overwhelming bulk of the authorities suggest that damage is an essential element, the strictness of the requirement to show damage might well vary from case to case. Where both parties are clearly appealing to the same group of customers, and there is a clear intention to

[86] See *Tot Toys Ltd* v. *Mitchell* [1993] 1 *NZLR* 325, 363 *per* Fisher J.
[87] *Star Industrial Co.* v. *Yap Kwee Kor*, note 16 above.
[88] Cane, *Tort and Economic Interests*, 78. [89] See text accompanying note 13 above.
[90] See generally Wadlow, *Passing Off*, ch. 4.
[91] *Spalding (AG) & Bros* v. *A. W. Gamage Ltd* (1915) 32 *RPC* 273; *The Clock Ltd* v. *The Clock House Hotel Ltd* (1936) 53 *RPC* 269.
[92] See Wadlow, *Passing Off*, 248.
[93] *Henderson* v. *Radio Corp. Pty Ltd* [1969] *RPC* 218, 236. See also *Walt Disney Productions Ltd* v. *Triple Five Corp.* (1992) 93 *DLR* (4th) 739, 747 (Alberta Court of Queen's Bench).
[94] See, e.g., *Taco Bell Pty Ltd* v. *Taco Co. of Australia Inc.* (1981) 42 *ALR* 177 (Full Court); *Vieright Pty Ltd* v. *Myer Stores Ltd* (1995) 31 *IPR* 361, 369 (Full Court); *TGI Friday's Australia Pty Ltd* v. *TGI Friday's Inc.* (1999) 45 *IPR* 43, 50 (Full Court); and see Wadlow, *Passing Off*, 244.

exploit the claimants' goodwill, it might be easier to establish actual or likely damage[95] than in cases where the parties' respective fields of activity are different, and where the court might require fuller proof of damage.[96] In cases of appropriation of personality the claimant and the defendant will not be competing in the same field of business, and a claimant will, on an orthodox analysis, find it difficult to establish damage. For example, a celebrity television presenter does not ordinarily manufacture and sell video recorders, a celebrity athlete does not usually run an airline business and celebrity dance instructors do not normally manufacture and sell records.[97] Thus there can be no diversion of trade in the sense of the classic passing off action where the claimant loses sales as his customers go to the defendant as a result of the defendant's misrepresentation. Nevertheless, even the classic notion of passing off is not so narrow and encompasses misrepresentations that a defendant's goods or services are connected with the claimant. Consequently a number of different possible heads of damage which fall to be considered. Some are well-established, while others are more uncertain.

Damage through an injurious association

Arguments for extending the tort of passing off to encompass appropriation of personality rely on the notion of a licensing or endorsement agreement to bring such conduct within the classic principle that a defendant should not represent that his business is the business of the claimant, or is connected with the business of the claimant.[98] If such a misrepresentation can be proven, then a well-established head of damage will be damage in the form of an injurious association between the claimant and the defendant. Thus, for example, the owners of a famous department store were granted an injunction to prevent the defendant money lending company from trading under a confusingly similar name, on the basis that they might be damaged by being associated with the defendants in the minds of the public.[99]

[95] *Associated Newspapers Plc* v. *Insert Media* [1991] 1 *WLR* 571, 579–80 *per* Browne-Wilkinson V-C.

[96] *Stringfellow* v. *McCain Foods (GB) Ltd* [1984] *RPC* 501. See also *Pinky's Pizza Ribs on the Run Pty Ltd* v. *Pinky's Seymour Pizza & Pasta Pty Ltd* (Supreme Court of Victoria Court of Appeal) (1997) *ATPR* ¶ 41–600, 44, 283, *per* Tadgell JA.

[97] See, e.g, *10th Cantanae Pty Ltd* v. *Shoshana Pty Ltd*, (1987) 79 *ALR* 299; *Honey* v. *Australian Airlines Ltd* (1989) ATPR ¶ 40–961, affirmed (1990) 18 *IPR* 185; *Henderson* v. *Radio Corp. Pty Ltd* [1969] RPC 218 respectively.

[98] See note 44 above.

[99] *Harrods Ltd* v. *R. Harrod Ltd* (1924) 41 *RPC* 74. See also *Annabel's (Berkeley Square) Ltd* v. *Schock* [1972] *RPC* 838 (association between night club business and escort agency).

In cases of appropriation of personality goodwill may exist either (i) in respect of a person's profession or artistic or literary occupation; or (ii) in respect of a person's actual business of exploiting his image, or in granting licences for exploitation.[100] It is not always clear whether unauthorised commercial exploitation of an individual's personality can damage that person in relation to his business or profession.[101] Although the common field of activity doctrine has now been discredited, at least as an absolute requirement,[102] the proximity of the businesses of the claimant and defendant is still relevant in assessing damage or the likelihood of damage. If goodwill subsists in a person's business or profession (including artistic and literary occupations), then it is often difficult to show damage to goodwill in that business or profession. Of course, it would largely be a matter of fact in each case, and some unauthorised exploitation, such as the unauthorised use of a surgeon's name, might be more likely to damage the claimant's goodwill than others, for example, the unauthorised use of a radio broadcaster's name.

Damage through exposure to liability or risk of litigation

A claimant might allege that he has been exposed to liability or the risk of litigation if a defendant makes a misrepresentation that his business is in some way associated with the claimant. This head of damage overlaps with the previous head, and there is also a considerable overlap between this head of damage and the rule in *Routh* v. *Webster* that a claimant (who need not necessarily be a trader) may restrain the unauthorised use of his name where such use might expose him to the risk of exposure to liability.[103] Much will depend on the facts of the individual case and it will probably be relatively rare for an unauthorised appropriation of personality to lead to the danger of exposing the claimant to liability.[104] It is not altogether impossible to think of circumstances where this might happen, for example a variation on the facts of *Clark* v. *Freeman* [105] and some of the other professional cases, where the name of a well-known surgeon is used on dubious medicines. Nevertheless, in the case of more benign

[100] See 17–18 above.
[101] See, e.g., *Dockrell* v. *Dougall* (1899) 15 *TLR* 333; *Sim v. Heinz* [1959] 1 *WLR* 313.
[102] See 20 above.
[103] (1849) 10 *Beav* 561 (50 *ER* 698) and see R. G. Howell, 'Is There an Historical Basis for the Appropriation of Personality Tort?' (1988) 4 *IPJ* 265.
[104] Cf. *Consumer Protection Act 1987*, s. 2(2)(b) which extends liability to any person who has held himself out as producer of the product by putting his name or trade mark on the product, when damage is caused by a defect in the product and see generally Wadlow, *Passing Off*, 261; J. Adams, *Character Merchandising* (2nd edn) (London, 1996), ch. 7.
[105] (1848) 11 *Beav* 112.

products or services, appropriation of personality will not ordinarily expose the claimant to liability.[106]

Damage through loss of control

This head of damage is more uncertain. In some cases the claimant might claim that the defendant's misrepresentation that their businesses are connected might be damaging in that it involves a loss of the claimant's control over his own reputation, even though there is no risk of an injurious association, or risk of exposure to liability. Indeed, the defendant's business might be completely innocuous, unlike a situation involving the previous two heads of damage. In a few limited cases the courts have accepted loss of control as a relevant head of damage,[107] although the presence of other heads of damage makes it at least doubtful whether loss of control is sufficient in itself.[108] If this were the case, then almost any connection or misrepresentation would amount to a loss of the claimant's ability to control his reputation to some extent, making the requirement of damage largely superfluous. The better view seems to be that loss of control of the manner in which the attributes of his personality are to be exploited is insufficient. Although injurious association or risk of liability can be more easily squared with the requirement that damage must result from the defendant's misrepresentation, loss of control arguably lies beyond the bounds of passing off and is tantamount to a claim for misappropriation.

Damage through loss of a licensing opportunity

Where the relevant goodwill relates to a person's business in the broad sense, embracing professional, artistic, or literary occupations, unauthorised commercial exploitation of personality might damage that person's goodwill in respect of his profession, such as medicine, acting, or broadcasting. The first three heads of damage examined above are primarily concerned with such a conception of goodwill. On the other hand, the relevant goodwill might lie in a person's subsidiary business of exploiting his image, through advertising or merchandising, or through granting licences to third parties. This is a much narrower conception of goodwill in personality and it helps to focus on the precise nature of the damage that

[106] See, e.g., *McCulloch* v. *May* (1948) 65 *RPC* 58, 67 *per* Wynn-Parry J.
[107] See, e.g., *British Legion* v. *British Legion Club (Street) Ltd* (1931) 48 *RPC* 555; *Hulton Press* v. *White Eagle Youth Holiday Camp* (1951) 68 *RPC* 126; *Lego System Aktieselskab* v. *Lego M. Lemelstrich Ltd* [1983] *FSR* 155, 195, and see *Harrods Ltd* v. *Harrodian School Ltd* [1996] *RPC* 697, 715 *per* Millet LJ.
[108] See Wadlow, *Passing Off*, 269; Carty, 'Heads of damage', 490.

the claimant might suffer. If a claimant can establish the first two elements of the tort, then he might argue that his business in licensing his image might be damaged through the loss of the opportunity to charge a fee from the defendant for the use of his image. Alternatively, where the claimant does not trade in his image for the moment, he might argue that the defendant has damaged his potential for licensing the use of his image in the future.

In Australia, the *Henderson* decision establishes that the relevant damage is to 'deprive the plaintiffs of the fee or remuneration they would have earned if they had been asked for their authority to do what was done'.[109] This aspect of the decision and the subsequent line of cases[110] is the most troubling, and the circularity of the reasoning has been criticised. A claimant has a right to exact a licence fee for the use of his image only if there is an enforceable right to prevent others from using such an image without his permission. Such a right to prevent others depends on establishing a cause of action in passing off. This can only be established by showing a loss and the only loss is the loss of the licence fee that otherwise would have been charged.[111] This approach has been followed by the English courts in *Irvine* v. *Talksport*, although the claimant was already active in granting endorsements and had goodwill in respect of a subsidiary licensing business in his name and image.[112] The reasonable endorsement fee represented the fee which, on the balance of probabilities, the defendant would have had to pay to obtain lawfully what it had in fact obtained unlawfully.[113]

Damage through dilution

The status of dilution as a head of damage in passing off is somewhat uncertain.[114] As the underlying bases for trade mark protection have shifted from indication of origin and product differentiation[115] to

[109] [1969] *RPC* 218, 243.

[110] See *Talmax Pty Ltd* v. *Telstra Corp. Ltd* (1996) *ATPR* ¶ 41–535, 42, 828 (Supreme Court of Queensland – Court of Appeal); *Twentieth Century Fox Film Corp.* v. *South Australian Brewing Co. Ltd* (1996) 34 *IPJ* 225 (this head of damage was rather more convincing since it involved an element of injurious association (although the Court did not characterise it as such) in that the claimants had refused to license their artificial characters for use on alcohol and tobacco products).

[111] See *Tot Toys Ltd* v. *Mitchell* [1993] 1 *NZLR* 325, 362 *per* Fisher J.

[112] [2002] 2 *All ER* 414, 427–31.

[113] [2003] *EWCA* Civ 423, para. 106.

[114] See Wadlow, *Passing Off*, 271–4. See also H. Carty, 'Dilution and passing off: cause for concern' (1996) 112 *LQR* 632.

[115] *SA CNL-Sucal NV* v. *HAG GF AG* [1990] 3 *CMLR* 571, 583; *Parfums Christian Dior SA* v. *Evora BV* [1998] *RPC* 166, 180.

embrace supposedly new economic functions,[116] there have been corresponding demands to recognise new heads of damage. The dilution doctrine, as developed in the United States, protects a trade mark against the 'gradual whittling away' of the identity of a mark in the public's mind, through its use by rival traders on non-competing goods.[117] Such damage does not depend on confusion as to the origin or quality of the goods, but protects the advertising power and commercial attraction of the mark. This notion has been introduced into the statutory trade marks scheme by sections 5(3) and 10(3) of the *Trade Marks Act 1994*,[118] giving effect to Articles 4(3) and 5(2) of the *Trade Marks Directive*,[119] although the Act does not affect the tort of passing off.[120]

The English courts have come close to recognising dilution as a head of damage at common law,[121] although its validity has subsequently been questioned.[122] The law does not protect the value of a brand or name as such, but only the value of the goodwill that it generates, and the law insists on proof of confusion to justify its intervention. The erosion of the distinctiveness of a brand name by its degeneration into common use does not depend on confusion at all and it is difficult to accept 'that the law insists upon the presence of both confusion and damage and yet recognises as sufficient a head of damage which does not depend on confusion'.[123]

[116] See *Arsenal Football Club plc* v. *Reed* [2003] *All ER* (EC) 1; *Parfums Christian Dior SA* v. *Evora BV* [1998] *RPC* 166, 180 and W. R. Cornish and D. Llewelyn, *Intellectual Property*, 5th edn (London 2003), 589–92.

[117] See F. Schechter 'The Rational Basis of Trademark Protection' (1927) 40 *HarvLRev* 813, 825. Section 43(c)(1) *Lanham Act* (15 *USCA* 1125(c)(1)) now provides a Federal anti-dilution law. See generally, J. T. McCarthy, *McCarthy on Trade Marks and Unfair Competition* (4th edn) (St Paul, Minn, 1999), § 24; T. Martino, *Trademark Dilution* (Oxford, 1996); M. Strasser, 'The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context' 10 *Fordham Intell Prop Media & Ent LJ* 375, 404–16 (2000).

[118] See *Oasis Stores Ltd's Trade Mark Application* [1998] *RPC* 631; *AUDI-MED Trade Mark* [1998] *RPC* 863; *CORGI Trade Mark* [1999] *RPC* 549; cf. *C. A. Sheimer (M) Sdn Bhd's Trade Mark Application* [2000] *RPC* 484, 506.

[119] Council Directive 89/104/EEC. See [*Davidoff* v. *Gofkid* [2003] *ETMR* 534 ECJ]; General *Motors Corp*. v. *Yplon SA* [1999] *ETMR* 122;

[120] *Trade Marks Act 1994* s. 2(2).

[121] *Taittinger S. A.* v. *Allbev Ltd* [1993] *FSR* 641 (danger of confusion between the claimants' champagne and the defendants' elderflower champagne, leading to an erosion of the singularity and distinctiveness of the description 'Champagne', causing damage of an insidious but serious kind, although the dicta on dilution were *obiter*, since there was evidence that damage would result from confusion, and consequent loss of sales or injurious association).

[122] *Harrods Ltd* v. *Harrodian School Ltd* [1996] *RPC* 697.

[123] [1996] RPC 697, 716 *per* Millet LJ.

Nevertheless, dilution was relied on as a head of damage in *Irvine* v. *Talksport*.[124] Goodwill would be protected beyond cases involving goods for goods substitution or misrepresentations relating to quality. Although the defendant's activities might not damage goodwill as such, they would damage the value of the claimant's goodwill since

> instead of benefiting from exclusive rights to his property, the [claimant] now finds that someone else is squatting on it. It is for the owner of goodwill to maintain, raise or lower the quality of his reputation or to decide who, if anyone, can use it alongside him. The ability to do that is compromised if another can use the reputation or goodwill without his permission and as he likes.[125]

In the absence of a direct loss of sales, damages were assessed on the basis of the licence fee which would otherwise have been paid.[126] The challenge based on circularity could be refuted by the fact that the loss of a licence fee formed the basis of calculation of damages rather than the damage itself. It remains, however, difficult to accept that dilution, in itself, may be a sufficient head of damage. Indeed, this head of damage goes to the root question as to whether unauthorised commercial exploitation of personality is conducted in a way that leads to confusion amongst the public concerning a connection between the business of the claimant and the business of the defendant. This is, of course, a matter of fact to be decided in each particular case and cannot be conclusively affirmed or denied either way. Although the essence of a celebrity's complaint might lie in the fact that use of his image by others is diminishing the commercial power of his attributes of personality, and reducing the value that lies for him in his own exploitation,[127] a cause of action in passing off is dependent on establishing confusion and damage. It seems questionable whether dilution of the marketing power of a celebrity's attributes of personality can be sufficient in itself. While it was noted in *Irvine* that the purpose of the tort of passing off is 'to vindicate the claimant's exclusive right to goodwill and protect it against damage' this cannot be sufficient in itself.[128] Some recognised head of damage would need to be shown, although, given the foregoing discussion, other heads of damage might, in turn, be equally difficult to establish.

[124] [2002] 2 *All ER* 414. [125] [2002] 2 *All ER* 414, 423.
[126] [2002] *EWHC* 539 (Ch) *per* Laddie J. The Court of Appeal substituted an award of £25,000 for the original award of £2,000 and implicitly accepted that loss of a licence fee was a relevant head of damage: [2003] *EWCA Civ* 423.
[127] See *Pacific Dunlop Ltd* v. *Hogan* (1989) 87 *ALR* 14, 25 *per* Sheppard J.
[128] [2002] 2 *All ER* 414, 423.

Summary

It is useful to compare the extended form of passing off developed in Australia, and now followed by the English courts, with the more orthodox model. Under the orthodox model, the following elements need to be shown:

(i) that the claimant has goodwill in relation to his business or profession (or a business in licensing attributes of his personality); (ii)(a) that the defendant misrepresents that his business is connected with the business or profession of the claimant, possibly through a licensing or endorsement agreement; (ii)(b) that the public relies on the misrepresentation, believing the representation to be an implicit guarantee of the nature or quality of the goods or services; (iii) the claimant suffers damage, or the likelihood of damage, to his goodwill in his business or profession through (a) loss of sales, (b) an injurious association, (c) exposure to liability or litigation (or (d) the loss of a licence fee).

Under the extended model, it must be shown that:

(i) the claimant has goodwill in relation to his business or profession; (ii) that the defendant misrepresents that the claimant has endorsed the goods or services of the defendant in the sense that the public will form the erroneous belief that the goods or services are authorised or licensed; (iii) that the claimant has suffered damage in the form of the lost licence fee that he could have charged had the defendant not exploited his name without his consent or dilution to the value of his image.

At its most flexible the application of the tort of passing off to the problem of appropriation of personality involves a misrepresentation which no one believes, causing damage either to goodwill in a vague notion of a business or profession, or the loss of a licence fee, the enforceability of which is itself based on the existence of a valid cause of action for passing off. If the effective fictions used to adapt the tort of passing off to protect character merchandising and attributes of personality were applied generally, the shape of the tort would be radically altered. As the categories of actionable misrepresentation have expanded the tort has been kept within reasonable bounds by the need to show confusion, resulting in damage or a real likelihood of damage. In view of the open-ended nature of the potentially actionable misrepresentations, the requirement of damage assumes a central importance as an 'acid test' for distinguishing between those misrepresentations which are actionable in passing off, and those which are not.[129] If the damage requirement were to be relaxed, or completely abandoned, then the tort of passing off could

[129] Wadlow, *Passing Off*, 243–4.

potentially become a very wide and powerful monopoly right, which might have to be attenuated by, for example, requiring an element of intention.[130] Damage remains an element of the extended tort of passing off, although cases involving appropriation of personality and character merchandising have been treated as a special category to which the normal rules do not apply, an approach which is somewhat question begging.

Anglo-Australian law does not often develop new torts,[131] in contrast with the United States, where the courts are more willing to develop new forms of common law liability to meet new social conditions and trading practices, most notably rights of privacy and publicity.[132] The expansion of the tort of passing off does go some distance towards covering cases of appropriation of personality which might otherwise be protected under such causes of action.[133] In the hands of the Australian courts the classical trinity of goodwill, misrepresentation and damage have proved to be fairly pliable notions. One may legitimately wonder whether the courts would be exercising a much wider discretion in developing a new tort of appropriation of personality from existing precedents and principles than they are currently exercising in manipulating the requirements of goodwill, misrepresentation and damage, and rather nebulous notions such as sponsorship, association and endorsement.

Liability based on misappropriation: the Canadian tort of appropriation of personality

It is somewhat misleading to refer to a single 'Canadian' approach and several parallel developments may be seen in the Canadian provinces: first, the statutory torts of invasion of privacy in Manitoba, British Columbia, Newfoundland and Saskatchewan;[134] second, developments in Quebec, based on the *Quebec Charter of Human Rights and Freedoms*[135]

[130] J. D. Heydon, *Economic Torts*, 2nd edn (London, 1978), 137–8.

[131] W. L. Morison, 'Unfair Competition and Passing Off – The Flexibility of a Formula' (1956) 2 *Sydney L Rev* 50, 60.

[132] See ch. 3 below. Cf. *Henderson* v. *Radio Corp. Pty Ltd* [1969] *RPC* 218, 237 *per* Manning J. noting that calls for the introduction of new a tort of invasion of privacy were entirely different from the issue of what causes of action actually existed at common law.

[133] See *10th Cantanae Pty Ltd* v. *Shoshana Pty Ltd*, (1987) 79 *ALR* 299, 300, *per* Wilcox J.

[134] *Privacy Act, RSM 1987* c. P125; *Privacy Act, RSBC 1996*, c. 373; *Privacy Act RSN 1990* c. P-22; *Privacy Act, RSS 1978*, c. P-24 respectively. See generally D. Vaver, 'What's Mine is Not Yours: Commercial Appropriation of Personality Under the *Privacy Acts* of British Columbia, Manitoba and Saskatchewan' (1981) 15 *UBCL Rev* 241; M. Chromecek and S. C. McCormack, *World Intellectual Property Guidebook Canada* (New York, 1991), ch. 7; L. Potvin, 'Protection Against the Use of One's Own Likeness'(1997) 11 *IPJ* 203, 212–17; M. Henry (ed.), *International Privacy, Publicity and Personality Laws* (London, 2001), ch. 7.

[135] *RSQ* c. C-12.

and the *Civil Code*;[136] third, the Ontario common law tort of appropriation of personality; fourth, the embryonic common law tort of invasion of privacy. The following discussion is limited to the common law tort of appropriation of personality, which has been largely, although not exclusively, the work of the Ontario courts.

In *Krouse* v. *Chrysler Canada Ltd*[137] the Ontario courts embarked on a new approach, going beyond the tort of passing off and engendering a new tort of appropriation of personality.[138] Since the tort is sometimes confused with the tort of passing off and is often, primarily for reasons of convenience, discussed as an aspect of the law of privacy,[139] it is worthwhile examining its genesis in detail. The claimant professional football player had previously exploited his image in advertising and merchandising on a fairly modest level, although it was not in doubt that he did 'possess a saleable advertising power'.[140] Unlike the English and Australian cases discussed above, the claim was not based on passing off. Indeed, it is difficult to determine from the report precisely on what basis the case was argued. Although presented under the rubric of 'invasion of privacy', the claim had several distinct elements: (i) invasion of privacy *per se*; (ii) breach of confidence; (iii) breach of contract (iv) appropriation of the claimant's identity for commercial purposes; and (v) unjust enrichment. The first claim was held to be novel in principle,[141] while the second and third claims (strangely included despite an express agreement between counsel excluding claims of breach of contract, confidence, copyright, or defamation[142]) were also dismissed.

[136] *SQ* 1991, c. 64. [137] (1971) 25 *DLR* (3d) 49.

[138] The fullest treatment in the Canadian literature can be found in J. Irvine, 'The Appropriation of Personality Tort' in Gibson (ed.), *Aspects of Privacy Law* (Toronto, 1980), 163, and R. G. Howell, 'The Common Law Appropriation of Personality Tort' (1986) 2 *IPJ* 149. See also E. M. Singer, 'The Development of the Common Law Tort of Appropriation of Personality in Canada' (1998) 15 *CIPR* 65.

[139] See, e.g., L. M. Linden, *Canadian Tort Law*, 4th edn (Toronto, 1988), 52–3; L. Klar, *Tort Law* (Toronto, 1991), 56; P. Burns, 'The Law of Privacy: The Canadian Experience' (1976) 54 *Can Bar Rev* 1, 13 and 21–13; and see also, G. H. L. Fridman, *Fridman on Torts* (London, 1990), 521–2. Cf. D. Gibson, 'Common Law Protection of Privacy' in Klar (ed.), *Studies in Canadian Tort Law* (Toronto, 1977), 345.

[140] (1972) 25 *DLR* (3d) 49, 60.

[141] *Ibid.*, 56. The Ontario courts have since recognised the existence of a common law tort of invasion of privacy: see *Roth* v. *Roth* (1992) 9 *CCLT* (2d) 141; *Mackay* v. *Buelow* (1995) 24 *CCLT* (2d) 184, 186–8; *Lipiec* v. *Borsa* (1997) 31 *CCLT* 294, 300. Cf. *Lord* v. *McGregor* (British Columbia Supreme Court, 10 May 2000) (no common law right of privacy in British Columbia, despite 'some academic interest and case authority to support the notion that the common law tort of privacy is an emerging field' (*ibid.*, para. 13). See also J. D. R. Craig, 'Invasion of Privacy and Charter Values: The Common Law Tort Awakens' (1997) 42 *McGill LJ* 355, 367–9.

[142] *Ibid.*, 54.

At first instance, the Court held that the claimant had a 'saleable product advertising ability', which was held to be a property right protected by law. This could be supported by two 'separate but closely related lines of cases': passing off, and the right of an individual to the elements of his identity.[143] Once it was established that the claimant was in the business of being used in advertisements, the court reasoned, either line of cases supported an award.[144] The early English authorities were cursorily distinguished. *Clark* v. *Freeman*[145] was distinguished on the basis that unlike Sir James Clark, who was not 'in the habit of manufacturing and selling pills', Krouse was '"in the habit of manufacturing and selling" his image for advertising purposes'.[146] Similarly, *Dockrell* v. *Dougall*[147] was distinguished on the basis that Krouse was not claiming a property right in his name *per se*, but was claiming '"injury to him in his property", his valuable commercial property right of being used in an advertisement'.[148] What seemed to dictate the issue were the facts that the claimant had a (modestly) valuable economic asset in his name and image, and that the defendants had made unauthorised use of these attributes of the claimant's personality in their advertising. Although, in turn, an attempt was made at distinguishing the early professional cases that denied the notion of a property right in a name, while at the same time relying on the authorities in passing off, the ultimate decision was, strictly speaking, inconsistent with both strands of authority. There is scope for disagreement as to whether a valid distinction may be drawn between a property right in a name *per se*, and a 'valuable property right of being used in an advertisement'.[149] Equally, it is difficult to reconcile a property right in a claimant's commercial saleability with the notions of goodwill subsisting in a business or profession that is damaged by the defendant's misrepresentation, elements that are necessary for a valid cause of action in passing off. The Ontario High Court was effectively writing on a clean slate.

The Court of Appeal adopted an even looser approach, holding that the common law did contemplate a concept in the law of torts that may be broadly classified as an appropriation of one's personality'.[150] It is difficult to identify any clear pattern of inductive reasoning. The authorities in 'the several fields of tort' that were examined[151] consisted largely of defamation cases where claimants met with varying degrees of success, cases based on implied contract, some 'very isolated cases which can be

[143] *Ibid.*, 62. [144] (1971) 25 *DLR* (3d) 49, 68.
[145] (1848) 11 *Beav* 112, see 17 above. [146] (1971) 25 *DLR* (3d) 49, 68.
[147] (1899) 15 *TLR* 333, see 17 above. [148] (1971) 25 *DLR* (3d) 49, 68.
[149] (1971) 25 *DLR* (3d) 49, 68. [150] *Ibid.*, 28. [151] *Ibid.*, 22–5.

explained on other grounds'[152] and passing off cases. No attempt was made to analyse these disparate authorities in detail, and the synthesis of the new rule amounted to little more than a bare assertion that the authorities supported the existence of a cause of action for appropriation of personality. What seemed to have dictated the outcome in *Krouse* were the underlying reasons of substance,[153] rather than the formal authorities, particularly the apparent commercial reality that a professional athlete had earning power, not only in his role as an athlete, 'but also in his ability to attach his endorsement to commercial products or undertakings or to participate otherwise in commercial advertising'.[154] The claimant's real grievance lay in the interference with this de facto economic interest, and the Ontario Court of Appeal was unwilling to let the existing causes of action lead to a denial of the claimant's ability to protect such interests from unauthorised exploitation. There is room for genuine disagreement as to whether this is legitimate interstitial judicial lawmaking and such arguments are obviously not unique to this area. Experience from the United States shows an equally active approach being adopted by the courts in respect of the development of the rights of privacy and publicity, although there are a number of factors that explain the greater degree of judicial activism displayed in the American courts.[155]

Although the existence of a tort of appropriation of personality was affirmed on appeal in *Krouse*, the claim was dismissed on its facts in a manner which was potentially very limiting to the tort's future development. Several passages of the judgment refer to the requirement of an endorsement, although it is easy to exaggerate the significance of this factor. On the one hand, it is arguable that the element of endorsement could take the tort back from the notion of *appropriation* to the notion of a *misrepresentation*. This would make the tort of appropriation of personality little different from the tort of passing off. On the other hand, the element of endorsement could be viewed as 'a threshold issue establishing a sufficient degree of nexus before the defendant can be said to have *culpably usurped* the plaintiff's personality'.[156] This seems to be the better view. Indeed, there is no necessary correlation between misrepresentation and endorsement. An 'endorsement' is simply a declaration of one's

[152] *Ibid.*, 22.
[153] For a distinction between substantive and formal reasoning see P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (Oxford, 1987), ch. 1.
[154] (1973) 40 *DLR* (3d) 15, 19.
[155] See 207–10 below and see Beverley-Smith, *The Commercial Appropriation of Personality*, 189–98.
[156] Howell, 'The Common Law Appropriation of Personality Tort' 170 (italics in original).

approval of something or someone. While the notion of an endorsement by the claimant (or the claimant's licence, or approval) might be a factor which causes the public to make a connection between the business of the defendant and the business or profession of the claimant, the misrepresentation relates to the public's belief that there is a connection between the *businesses* of the claimant and defendant; a misrepresentation relating to an endorsement in itself is insufficient. Moreover, the damage that may be actionable in passing off is the damage (or in a *quia timet* action, the real likelihood of damage) to the goodwill of the claimant's business. A loss of an endorsement opportunity in itself is not a form of legal damage that is actionable in passing off.[157] Nevertheless, the lax approach adopted by the Australian courts and now followed in England effectively allows recovery for such damage, and the line of cases which follow this approach might be better understood as involving a right of publicity, although the Australian courts have refused openly to acknowledge the existence of such a right.[158]

The new approach initiated in *Krouse* was followed by the Ontario High Court in *Athans* v. *Canadian Adventure Camps Ltd.*[159] Independent of passing off, the claimant had 'a proprietary right in the exclusive marketing for gain of his personality, image and name'.[160] The 'commercial use of [the claimant's] representational image by the defendants without his consent constituted an invasion and *pro tanto* an impairment of his exclusive right to market his personality'.[161] This constituted an aspect of the tort of appropriation of personality, which entitled the claimant to damages in the 'amount he ought reasonably to have received in the market for permission to publish the drawings'.[162] Thus, *Athans* seemed to go further than *Krouse* in making pure misappropriation, regardless of any association or endorsement, actionable in tort.[163] Furthermore, the decision adopted a very relaxed approach as to the need for the claimant to be identified, since the defendants had used a stylised line drawing of the claimant water-skier. It was held to be sufficient that his 'representational image' had been appropriated. In this respect, the decision in *Athans* goes much further than the American right of publicity, in that the unauthorised use of the claimant's representational image was found to be actionable even though only a

[157] See 24–6 and 31 above.
[158] *Sony Music Australia Ltd & Michael Jackson* v. *Tansing* (1994) 27 *IPR* 649, 653–4 *per* Lockhart J. and 656, *per* French J. Cf. *10th Cantanae Pty Ltd* v. *Shoshana Pty Ltd* (1987) 79 *ALR* 299, 300 *per* Wilcox J.
[159] (1977) 80 *DLR* 583. [160] *Ibid.*, 592. [161] *Ibid.*, 595. [162] *Ibid.*, 596.
[163] Cf. text accompanying notes 69 to 76 above.

de minimis number of people would have been able to identify the claimant from the defendant's drawing.[164]

The Canadian tort of appropriation of personality remains a rather amorphous cause of action, which, as noted above,[165] has often been interpreted as an aspect of the law of privacy, although it is usually acknowledged that the *Krouse* line of cases involves something different, although related. In the absence of an authoritative appellate decision, it is difficult to determine the conceptual basis, scope and limits of the tort and any analysis involves a considerable degree of extrapolation from the existing authorities. Nevertheless, it is convenient to explore the nature of the tort, and its relationship with the tort of passing off, in terms of: (i) the protected interest, (ii) the nature of the damage, and (iii) the nature of the defendant's conduct.

The protected interest

While the tort of passing off protects a property right in the underlying goodwill of a business, the tort of appropriation of personality protects 'a proprietary right in the exclusive marketing for gain of [a claimant's] personality, image and name'.[166] Although the stated basis of the property right is a 'commercially saleable product advertising ability',[167] prior commercial exploitation of personality is not a necessary prerequisite for recovery. Despite the fact that claimants have included several professional sportsmen,[168] and a professional actor who had appeared extensively in television advertising,[169] other claimants such as an amateur body-builder,[170] participants in a conference on unemployment,[171] and a family whose name was 'synonymous with wealth and luxury',[172] have not been denied standing to sue on account of the fact that they had not previously exploited their names or images in advertising or commerce.

[164] See J. T. McCarthy, *The Rights of Publicity and Privacy*, 2nd edn (New York, 2001), § 6.149. To be an actionable infringement of the right of publicity, the unauthorised appropriation must sufficiently identify the claimant, otherwise it cannot be said that his identity has been misappropriated nor his interests violated: see *Motschenbacher* v. *R. J. Reynolds Tobacco Co*., 498 *F* 2d 821 (9th Cir 1974), 824, and see further 69–70 below.

[165] See note 139 above.

[166] *Athans* v. *Canadian Adventure Camps Ltd* (1977) 80 *DLR* (3d) 583, 592.

[167] *Krouse* v. *Chrysler Canada Ltd* (1972) 25 *DLR* (3d) 49, 58 *per* Haines J.

[168] *Krouse* v. *Chrysler Canada Ltd* (1973) 40 *DLR* (3d) 15; *Athans* v. *Canadian Adventure Camps Ltd* (1977) 80 *DLR* (3d) 583; *Racine* v. *CJRC Radio Capitale Ltee* (1977) 35 *CPR* (2d) 236. See also *Horton* v. *Tim Donut Ltd* (1998) 75 *CPR* (3d) 451 (estate of deceased hockey player).

[169] *Heath* v. *Weist-Barron School of Television Canada Ltd* (1981) 62 *CPR* (2d) 92.

[170] *Joseph* v. *Daniels* (1986) 11 *CPR* (3d) 544 (claim failed on facts).

[171] *Dowell et al.* v. *Mengen Institute* (1983) 72 *CPR* (2d) 238 (claim failed on facts).

[172] *Baron Philippe de Rothschild, S. A.* v. *La Casa de Habana Inc.* (1987) 19 *CPR* (3d) 114.

Thus, a cause of action for appropriation of personality is not limited to those with existing trading interests, and is potentially broad enough to cover those with latent recognition value in respect of their personality. However, although the tort clearly embraces *economic* interests in personality, it is unclear whether it is broad enough to encompass *non-economic* interests such as privacy, or freedom from mental distress.

While goodwill cannot have an existence independent of a particular business, and subsists only to the extent that the underlying business continues,[173] the proprietary right in the exclusive marketing of a personality protected by the tort of appropriation of personality is not so limited. Although the tort protects what is described as a 'proprietary' right, its scope and duration is uncertain. The Canadian courts have yet to address in detail the precise nature of the tort of appropriation of personality, and whether it survives the owner of the proprietary right in the exclusive marketing of personality, image and name for commercial gain. Some *obiter dicta* suggest that the tort of appropriation may be descendible, drawing on the distinction between the rights of privacy and publicity in the United States,[174] the former being a personal tort, intended to protect an individual's interests in dignity and peace of mind, while the latter 'protects the commercial value of a person's celebrity status'.[175] This effectively equates the tort of appropriation of personality with a right of publicity.[176] This approach has been adopted in Jamaica in *The Robert Marley Foundation* v. *Dino Michelle Ltd*,[177] where the successors in title of the late musician were successful in obtaining damages and an injunction for the unauthorised use of Bob Marley's image on T-shirts and other merchandise. The Court adopted the reasoning in two American right of publicity cases,[178] and held that the right to the exclusive exploitation of Marley's name and image survived his death, even though there was no evidence that Marley had licensed the use of his image during his lifetime.[179]

[173] See 15–16 above. [174] See 70–2 below. [175] (1997) 30 *OR* (3d) 520, 528.

[176] *Ibid.* ('[T]he right of publicity, being a form of intangible property under Ontario law akin to copyright, should descend to the celebrity's heirs. Reputation and fame can be a capital asset that one nurtures and may choose to exploit and it may have a value much greater than tangible property. There is no reason why such an asset should not be devisable to heirs ...').

[177] Unreported Suit No. C.L. R115/ 1992, judgment 12 May 1994.

[178] *Martin Luther King Jr Center for Social Change Inc.* v. *American Products Inc.* 694 *F* 2d 674 (1983); *The State of Tennessee, ex rel. The Elvis Presley International Memorial Foundation* v. *Crowell* 733 *SW* 2d 89 (1987). See further ch. 3.

[179] See also *Horton* v. *Tim Donut Ltd* (personality rights of deceased hockey player, in the form of trade mark licences and consents to use his likeness, treated as having been assigned during his lifetime). Quaere whether the latter constitutes any assignable subject matter. Cf. *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.* 202 *F* 2d 866, 868 and see 70–2 below.

Damage to the claimant

Damage is an essential element of passing off, although the forms are various and it is effectively a matter of fiction where such damage takes the form of a lost licence fee.[180] Under the Canadian tort, the damage takes the form of an appropriation of a claimant's property right in the exclusive marketing of his own image. It is not clear to what extent must the claimant show actual damage to his property right, or whether damage will be presumed, and appropriation of personality will be actionable *per se*. In *Krouse* v. *Chrysler Canada Ltd*, it was held that the claimant had to show both injury and damage, rejecting trespass, a tort actionable *per se*, as an appropriate conceptual basis for the wrong.[181] Subsequently, in *Athans* v. *Canadian Adventure Camps Ltd*, the claimant was held to have suffered damage to the exclusive right to market his personality,[182] while in *Heath* v. *Weist-Barron School of Television Canada Ltd*,[183] it was held that the claimant six-year-old actor's claim for general and special damages disclosed a valid cause of action. More recently, a claim by a trick rope performer was rejected on the basis that the claimant would have to show 'the commercial value of the asset he owns and which has been misappropriated' and there was no evidence that the claimant would have been able to negotiate a fee for the advertisement.[184] However, some dicta suggest that the tort of appropriation of personality might be actionable *per se*, drawing an analogy with libel, where an action may be sustained even though the claimant's economic interests do not suffer any actual damage.[185]

While the High Court and Court of Appeal of Ontario in *Krouse* purportedly based the new proprietary right on the de facto values of a professional athlete's image,[186] their findings were essentially based on certain rudimentary and unchallenged assumptions. The idea that 'the wrongful appropriation of that which in the business world has commercial value and is traded daily must *ipso facto* involve a property right which the Courts protect',[187] shows an alarmingly casual approach to an issue

[180] See 30–1 above. [181] (1973) 40 *DLR* (3d) 15, 27.
[182] (1977) 80 *DLR* (3d) 583, 596. [183] (1981) 62 *CPR* (2d) 92.
[184] *Holdke* v. *Calgary Convention Centre* [2000] ACWS (3d) 1281 (Alberta Provincial Court).
[185] See *Racine* v. *CJRC Radio Capitale Ltee* (1977) 35 *CPR* (2d) 236, 240 (a lower County Court decision, given orally, and one which should be treated cautiously). See also *Dowell et al.* v. *Mengen Institute* (1983) 72 *CPR* (2d) 238; *Baron Philippe de Rothschild, SA* v. *La Casa de Habana Inc.* (1987) 19 *CPR* (3d) 114, 115.
[186] *Krouse* v. *Chrysler Canada Ltd* (1972) 25 *DLR* (3d) 49, 59–62; (1973) 40 *DLR* (3d) 15, 19–20.
[187] *Krouse* v. *Chrysler Canada Ltd* (1972) 25 *DLR* (3d) 49, 61–2.

which is essentially question-begging. If it were generally accepted that commercial value compels legal protection as property, then the public domain would be much poorer indeed.[188] It needs to be considered whether claimants in cases such as *Krouse* (had he eventually been successful) and *Athans* had suffered any real loss. Were they in any worse a position than they had previously been, before their images had been used without their consent? There are several difficulties in this area, particularly in ascertaining a market value of the property right that has been appropriated, assuming that there is a relevant market in the first place: this inevitably introduces an element of arbitrariness in the assessment of damages.[189] Given the difficulties that claimants will face in establishing damage, there are problems with insisting that damage is an essential element of the tort. It might be more realistic, despite the courts' insistence to the contrary, to accept that the tort is indeed actionable *per se*.

Thus the position may be approached from three broad standpoints. First, the tort of appropriation might be actionable *per se*, and a claimant would not need to show that he had suffered any material damage as a result of the unauthorised commercial exploitation of his personality. The tort would then have the potential to cover interests in personal privacy, or injuries in freedom from mental distress, feelings or sensibilities, which is possibly why the notion of actionability *per se* was expressly rejected in *Krouse*.[190] Second, the approach that the Court of Appeal purported to set out in *Krouse* requires that the claimant be able to show material damage to his economic interests: mere injured feelings or loss of privacy will not give rise to a cause of action. This would make the tort of appropriation of personality a very narrow and limited addition to the economic torts. The third approach is essentially a compromise between the first two approaches, where the need to show damage is stated although the need to show affirmative evidence of actual material loss is interpreted loosely.[191] Viewed as a whole the authorities to date resemble such a compromise, which awaits an authoritative ruling, or a developing body of case law that takes the tort in one or other direction. Ultimately, the issue turns on the value that is placed on the underlying interests and the question whether either economic or non-economic interests in personality deserve to be protected. On the one hand, there is much to be said, not least in the interests of certainty, for the view that only injuries to

[188] See 215 below.
[189] *Athans* v. *Canadian Adventure Camps Ltd* (1977) 80 *DLR* (3d) 583, 596; *Krouse* v. *Chrysler Canada Ltd* (1972) 25 *DLR* (3d) 49, 68.
[190] See text accompanying note 149 above.
[191] *Krouse* v. *Chrysler Canada Ltd* (1972) 25 *DLR* (3d) 49, 69 (Ontario High Court); *Athans* v. *Canadian Adventure Camps Ltd* (1977) 80 *DLR* (3d) 583, 594 and 596.

material interests that are capable of real proof can be actionable where a person's name, voice or likeness is used without his consent; unless a claimant can show damage to such material interests, or show that his reputation has been injured in a defamatory way, no action will lie.[192] On the other hand, such an approach precludes recovery for harm to non-economic interests other than interests in reputation, such as interests in privacy and freedom from mental distress.

The defendant's conduct

While a valid cause of action in passing off is dependent on the claimant being able to show that the defendant has made a misrepresentation that his goods or business are connected to the business or profession of the claimant, under the Canadian tort it is sufficient to show a *misappropriation* by the defendant of the claimant's proprietary right in the exclusive marketing of his personality. Although the Ontario Court of Appeal in *Krouse* decided that misappropriation was sufficient without misrepresentation, the notion of endorsement was maintained. However, there is no necessary correlation between misrepresentation and endorsement, and the requirement of endorsement is better understood as a general threshold test to help establish liability.[193]

One case has sought to restrict the tort to endorsement type situations to strike a balance between the claimants' property rights and broader interest in freedom of expression and prevent the tort from being used to suppress biographical and newsworthy uses of an individual's image.[194] This approach has subsequently been interpreted as resting on a more explicit policy-based distinction between, on the one hand, works falling within the public interest where private interests gave way to broader social interests in freedom of expression and, on the other hand, activities predominantly of a commercial nature where such broader interest did not conflict.[195] Moreover, the Supreme Court of Canada, in an appeal from the Quebec Court of Appeal concerning the Quebec *Charter of Human Rights and Freedoms*, has rejected a distinction based on categories of information (socially useful information and commercial information), preferring a more open balancing of the rights at issue.[196] Taken as a whole, endorsement does not seem to be an essential prerequisite and

[192] Irvine, 'The appropriation of personality tort', advocates such a conservative approach.
[193] See text accompanying note 156 above.
[194] *Gould Estate* v. *Stoddart Publishing Co.* (1997) 30 *OR* (3d) 520, 525–7.
[195] *Horton* v. *Tim Donut Ltd* (1998) 75 *CPR* (3d) 451, 458.
[196] *Aubry* v. *Editions Vice-Versa Inc.* (1998) 78 *CPR* (3d) 289, 309.

actions have been successful where there is no explicit endorsement of any product.[197]

Finally, the defendant's unauthorised use of the claimant's image must be in such a way which identifies the claimant. This is unproblematic where an individual's name or likeness is used, although several Canadian cases have been on the borderline of identifiability. The use of a 'representational image' of the claimant water-skier in the form of a stylised line drawing of a distinctive pose and setting was held to be sufficient in *Athans* v. *Canadian Adventure Camps Ltd*, regardless of the fact that very few people would identify the representational image with the claimant.[198] However, a bodybuilder's claim was rejected on the basis that only his torso was depicted.[199] The defendant had avoided any reference to the claimant and had not used 'any proprietary interest associated by the public with the plaintiff's individuality'. To establish liability it would have to be shown that the defendant was 'taking advantage of the name, reputation, likeness, or some other components of the claimant's individuality or personality' that would be associated with the claimant.[200] Again, a stricter approach to the question of identifiability was taken in rejecting a claim by a trick rope performer for the unauthorised use of video footage of an impromptu performance at a local festival in an advertisement for the festival, on the basis that the claimant had not been identified by his stage name and was not dressed in the usual manner of his cowboy alter ego. There was no evidence that the claimant, or his alter ego, were so well-known that his persona would be recognisable in the advertisement, and thus nothing to establish that the commercial value of his image had been misappropriated.[201] In common with the other elements of the tort of appropriation of personality, it is difficult to identify any clear rule. This awaits an authoritative appellate judgment, although the case law on the right of publicity in the United States may provide some assistance in considering the competing arguments.[202]

[197] *Athans* v. *Canadian Adventure Camps Ltd* (1977) 80 *DLR* (3d) 583, 596; *Racine* v. *CJRC Radio Capitale Ltee* (1977) 35 *CPR* (2d) 236; *Baron Phillippe de Rothschild, SA* v. *La Casa de Habana Inc* (1987) 19 *CPR* (3d) 114; *Heath* v. *Weist-Barron School of Television Canada Ltd* (1981) 62 *CPR* (2d) 92.

[198] See text accompanying note 164 above.

[199] (1986) 11 *CPR* (3d) 544.

[200] *Ibid.*, 549.

[201] *Holdke* v. *Calgary Convention Centre Authority* [2000] *ACWS* (3d) 1281.

[202] See 64–75 below.

Conclusions

The law of unfair competition plays an important role in protecting economic interests in personality in England and Wales, Australia and Canada. In a typically pragmatic way a proprietary interest in goodwill has been protected by construing the essential elements of passing off liberally. The focus is on the damage to an individual's business or profession (liberally construed) or on the business of exploiting indicia of identity caused by a misrepresentation relating to some kind of commercial connection between the claimant and the defendant. Where a claimant cannot be said to have any economic or proprietary interest akin to goodwill in respect of his image a cause of action in passing off will not be available. Thus a private individual with no public profile or no proprietary interest in respect of a business or profession will have no remedy. The Canadian courts have taken a very different and arguably much less artificial approach to cases of appropriation of personality than their English and Australian counterparts. It avoids the problems in basing liability on misrepresentation and has the potential to extend beyond protecting a proprietary interest in goodwill. However, the tort is very much in its infancy, particularly when compared to the much more mature and developed right of publicity in the United States. Relatively limited reference has been made to the US jurisprudence. This is somewhat surprising (despite the constraints of precedent) given that the US courts have had to address the same issues in reconciling a cause of action for appropriation with the general notion of privacy, and in determining the 'proprietary' nature of the protected interest, particularly the issue of descendibility.[203] The detailed requirements and scope of the Canadian tort remain to be fully delineated, particularly the question of the precise nature of the damage which might be actionable. Indeed, the tensions inherent in limiting the tort to cases involving actual material damage are apparent, and the tort has the potential to develop into a truly *sui generis* cause of action embracing both economic interests and non-economic interests.

[203] See below 70–2.

3 Privacy and personality in the common law systems

Introduction

Four predominant approaches to problems of invasions of privacy may be identified.[1] First, the adjustment of existing causes of action to cover invasions of privacy. The traditional common law approach has involved stretching statutory provisions and well-established torts such as defamation, trespass and the action for breach of confidence to embrace interests in privacy. Second, the piecemeal addition of new causes of action, either by reference to the circumstances in which liability is imposed (e.g., harassment or appropriation of personality) or by explicitly labelling them as invasions of privacy. A number of common law jurisdictions have adopted this piecemeal approach. Property and reputation remain the primary protected interest, and protection for other interests is parasitic. Third, a general remedy declaring that, in principle, every invasion of privacy is actionable, subject to necessary qualifications limiting recovery: this might be non-exhaustive, leaving the terms and scope open-ended or exhaustive, defining the terms and circumstances for recovery comprehensively. Fourth, the declaration that every person has a right to privacy in a general and open-ended way, without specifying the circumstances in which privacy can be invaded. English law has traditionally been reluctant to develop beyond the first two approaches. In the United States, the casuistic approach was abandoned in favour of a general remedy for invasion of privacy, cast rather unusually in rights based terminology.[2] This is an approach which other common law systems have, thus far, refused to adopt.

[1] See R. Gavison, 'Privacy and Its Legal Protection' DPhil Thesis, University of Oxford (1975), 243 and Justice, *Privacy and the Law* (London, 1970), para. 127.

[2] D.W. Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case West Res L Rev* 769.

From property to inviolate personality

Property is obviously one of the primary interests that any legal system protects. The shift from the protection of property to the protection of personality in the United States owed much to the celebrated *Harvard Law Review* article by Warren and Brandeis.[3] As is well known, they argued that the protection afforded by common law copyright in particular circumstances[4] was merely the application of a more general right to privacy.[5] The common law allowed every individual the right to determine the extent and manner in which his thoughts might be communicated, a right which existed irrespective of the method of expression adopted, the nature or value of the thought or emotion, or the quality of the means of expression.[6] In each case, the argument ran, an individual was entitled to decide whether what was inherently his own should be given to the public. This right was not lost when the author himself communicated his production to the public and was entirely independent of the statutory copyright laws, since these were aimed at securing the profits of publication for their author. The common law right served a different purpose and allowed the author absolute control over the act of publication and, indeed, the more fundamental decision of whether there should be any publication at all.

Warren and Brandeis conceded that the basis for the right to prevent publication of manuscripts and works of art was a right of property. However, cases beyond those involving the reproduction of literary and artistic compositions called for an alternative, non-proprietary, basis, since the value of the subject matter did not lie in the profits

[3] S. Warren and L. Brandeis 'The Right to Privacy' (1890) 4 *HarvLRev* 193.

[4] In England, since the decision in *Donaldson* v. *Beckett* (1774) 4 *Bro PC* 129, copyright in published works derives entirely from statute. However, common law copyright continued to subsist in unpublished works for a period after the decision in *Donaldson*, until it was finally abolished by the *Copyright Act 1911*, s. 31. This gave the author rights of control over his work up to and until it was published, at which point, statutory copyright would govern. Similarly, in the United States, it was held in *Wheaton* v. *Peters*, 26–33 *US* 1055 (1834), that copyright was derived entirely from statute. However, copyright continued to exist in the common law of individual states in unpublished works, and it is with this common law right, which subsisted until publication, that Warren and Brandeis were concerned. Since the *Copyright Act 1976*, 17 *USC* § 301, the dual system of state common law copyright for unpublished works and statutory copyright for published works has been replaced by a single federal statutory copyright. Copyright now vests at the moment a work is created, that is the point at which the work is fixed in a tangible form for the first time, rather than the time of publication. Consequently, common law copyright is now of limited importance: see, e.g., P. Goldstein, *Copyright* (Boston, 1989), 504 et seq., and see generally, S. M. Stewart, *International Copyright and Neighbouring Rights* (2nd edn) (London, 1989).

[5] Warren and Brandeis, 'The Right to Privacy', 198. [6] *Ibid.*, 199.

of publication, but in the peace of mind or relief afforded by the ability to prevent any publication at all.[7] Although they acknowledged that the courts had based their decisions on the narrow grounds of protection of property, they argued that the cases were 'recognitions of a more liberal doctrine'.[8] For example, in the celebrated English case principally relied on, *Prince Albert* v. *Strange*,[9] the claimant sought to restrain the defendant from publishing a catalogue of impressions, taken by a workman, of etchings made by the claimant, which were of a private and domestic nature. The judgments both at first instance[10] and on appeal[11] were based on the conventional grounds of breach of common law copyright and breach of confidence. However, Warren and Brandeis laid great emphasis on a number of passages in the judgment of Knight-Bruce V-C at first instance[12] which stressed that the claimant was entitled to privacy in respect of his private etchings. Principally from these passages, and dicta in the judgment of Lord Cottenham LC on appeal,[13] Warren and Brandeis discerned a broader principle, concluding that:

> the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed . . . The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of inviolate personality.[14]

Thus, the law afforded a principle which could be invoked to protect the privacy of the individual from invasion by the over-intrusive press, by photographers, or by the use of modern devices for recording and reproducing scenes or sounds. Such protection should not be limited to conscious products of labour, based on a need to encourage effort, since the right to privacy was part of the more general right to the immunity of the person and the right to one's personality.[15] The emphasis lay on the non-economic nature of invasion of privacy; the basis of the law's intervention was the protection of personal dignity rather than the protection of property rights.

[7] *Ibid.*, 200. [8] *Ibid.*, 204. [9] (1849) 2 *DeG & Sm* 652.
[10] (1849) 2 *DeG & Sm* 652. [11] (1849) 1 *Mac & G* 25.
[12] (1849) 2 *DeG & Sm* 652, 670 and 696–7. [13] (1849) 1 *Mac & G* 42, 47.
[14] 'The Right to Privacy', 205. [15] *Ibid.*, 206–7.

Whatever the defects in inductive reasoning,[16] what ultimately mattered, for present purposes, was the fact that the Warren and Brandeis thesis was accepted by the courts. In the first major case, *Roberson* v. *Rochester Folding Box Co*. the majority rejected the view that privacy was a pre-existing principle, interpreting the early English cases relied on by Warren and Brandeis narrowly. The Court stressed the conventional grounds of breach of trust and equity's jurisdiction to intervene to protect the claimant's property.[17] In emphasising the formal basis of equity's jurisdiction, the majority effectively ignored the efforts made by Warren and Brandeis to separate privacy from property interests, and the pains they took to base their right to privacy on the principle of inviolate personality.[18] This reflected the formalist approach for which late nineteenth-century jurisprudence has been heavily criticised.[19]

The dissenting minority took a more dynamic and flexible view of the Court's powers, stressing the need to extend the principles of the common law to remedy a wrong made possible by changing social conditions and commercial practices and rejecting the majority's insistence on basing the issue of liability on the invasion of a property interest. The right of privacy was regarded as a complement to the right to the immunity of one's person since the common law had always regarded one's person and property as inviolate.[20] Consequently, according to the minority view, the claimant had the same property in the right to be protected against the use of her face for commercial purposes as she would have had if the defendants were publishing her literary compositions. If her face or her portraiture had value, then the value was exclusively hers until she granted the use to the public.[21] Property, privacy, and personality were beginning to converge.[22] The decision in *Roberson* received widespread and immediate criticism[23] and in the following year the New York legislature intervened and enacted a statute making the unconsented use of a person's name, portrait or picture for advertising, or for the purposes of trade, both a tort and a misdemeanour,[24]

[16] R. Dworkin, *Taking Rights Seriously*, (London, 1977), 119, arguing that the Warren and Brandeis thesis is sometimes taken to be a kind of brilliant fraud, though sound in its ambition. Cf. R. Wacks, *Personal Information* (Oxford, 1989), 31 who doubts whether such a view can be found in the privacy literature.

[17] 171 *NY* 538 (1902), 556. [18] See Warren and Brandeis, 'The Right to Privacy', 205.

[19] See Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law', 796.

[20] 171 *NY* 538 (1902), 564. [21] *Ibid.* [22] Cf. 96–102 below.

[23] See Note, 'An Actionable Right of Privacy? *Roberson* v. *Rochester Folding Box Co*.' (1902) 12 *Yale LJ* 35.

[24] *NY Sess. Laws* 1903 ch. 132 ss. 1–2.

which exists in the same form in the current New York Civil Rights Law.[25]

In stark contrast to the decision in *Roberson*, three years later, in *Pavesich* v. *New England Life Insurance Co.*,[26] the Supreme Court of Georgia recognised the existence of a right of privacy at common law. The claimant, an artist by profession, brought an action based on defamation and invasion of privacy against the defendants for publishing his picture, accompanied by a false testimonial, in their advertisements for life insurance. The judgment has a distinct natural rights flavour, regarding privacy as an absolute right belonging to a person in a state of nature, which every person would be entitled to enjoy within or without society. Privacy would take its place alongside other absolute rights such as the right of personal security and the right of personal liberty.[27] Consequently, one who wished to live a life of total or partial seclusion could choose the time, place, and manner in which he would submit himself to the public gaze, and a right to withdraw from the public gaze was 'embraced within the right of personal liberty'.[28] Such a right, deriving from natural law, was given effect through the provisions in the Constitutions of the United States and the State of Georgia declaring that no person should be deprived of liberty except by due process of law. It was acknowledged that the main stumbling block in the way of the recognition of a right of privacy was the fact that it would inevitably tend to curtail freedom of speech and the freedom of the press, though both were regarded as natural rights which should be enforced with due respect for each other.[29] The Court accepted that all the early English authorities relied on by Warren and Brandeis were based on conventional grounds such as interference with property, breach of trust, or breach of contract.[30] To this extent, the Court agreed with the decision of the majority in *Roberson*, but went on to criticise the conservatism of the New York Court of Appeals in denying a right which 'the instincts of nature' had proved to exist, and which was not disproved by judicial decision, legal history and legal writings.[31] The dissenting judgment of Gray J in *Roberson* was adopted in its entirety as an *ex post facto* justification of the conclusion which the majority of the

[25] *New York Civil Rights Law* §§ 50–1. It is the only type of invasion of privacy that New York recognises, and has been narrowly construed (see *Messenger* v. *Gruner & Jahr Printing and Pub.* 208 *F* 3d 122 (2nd Cir 2000), 125). The courts have refused to accept that other categories of invasion of privacy are actionable at common law, insisting that the balancing of the competing policy considerations underlying recovery for other kinds of invasions of privacy is a matter for the legislature: see, e.g., *Howell* v. *New York Post Co.* 612 *NE* 2d 699 (NY 1993), 703.

[26] 50 *SE* 68 (1905). [27] *Ibid.*, 70. [28] *Ibid.* [29] *Ibid.*, 73.

[30] *Ibid.*, 75. [31] *Ibid.*, 78.

Georgia Supreme Court had already reached through its natural rights reasoning.[32]

Inviolate personality and the accretion of proprietary attributes

Although the right of privacy was originally conceived as a right of inviolate personality, it quickly began to develop distinctly 'proprietary' attributes, which ultimately formed the fourth limb of Prosser's dominant reductionist analysis.[33] The process of designating a particular right as a 'property' right often involves no more than placing a descriptive label on that right. The term 'property' is used in a metaphorical sense, and the categorisation does not have any inherent significance.[34] However, looking behind the label or terminology used by the courts, and examining the substance of the interests, it is clear that even in the earliest right of privacy cases, the courts were protecting interests of an essentially economic or proprietary nature rather than dignitary interests in inviolate personality.

For example, the economic aspect was stressed in an early right of privacy case involving Thomas Edison, whose name had been used by a company in advertisements for a medicinal preparation, Polyform, which he had invented several years previously and had sold to the defendants.[35] The assignment did not, however, give the defendants permission to use Edison's name and picture in connection with the medicine. It was noted that: '[i]f a man's name be his own property ... it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make unauthorised use of it'.[36] Unlike the two early leading privacy cases, *Roberson* and *Pavesich* the claimant was well known, and, significantly, the right of privacy was seen as being capable of remedying injuries to interests of an economic nature in addition to injuries to inviolate personality. Similarly, when a radio announcer succeeded in a claim for invasion of privacy for the unauthorised use of her image in an advertisement for bread, the court stated that if a person's name or features could be a valuable asset for the purposes of advertising, then it followed that such features could not be

[32] *Ibid.*, 79.
[33] W. L. Prosser, 'Privacy' (1960) 48 *CalifLRev* 383, 401 and see 54–8 below.
[34] See Beverley-Smith, *The Commercial Appropriation of Personality*, ch. 10.
[35] *Edison* v. *Edison Polyform Mfg Co*. 67 *A* 392 (1907). [36] *Ibid.*, 394.

used for advertising purposes without the consent of the owner.[37] In other cases, the courts stressed that, although the right of privacy was intended primarily for the protection of an individual's personality against unlawful invasion, damages might include 'recovery for a so-called "property" interest inherent and inextricably interwoven in the individual's personality', although it was injury to the person not to property which established the cause of action.[38]

It is difficult to draw any neat division between the multifarious de facto interests that different people might enjoy in their image. What the early development of the law of privacy in the United States shows is that the new right could be used to protect the whole spectrum of economic and non-economic interests ranging from existing trading interests through to interests in feelings or sensibilities. However, it soon became clear that the right of privacy was being used to secure protection for an extraordinarily disparate range of interests, resulting in considerable conceptual confusion regarding the proper scope and doctrinal basis for the right of privacy, with various competing conceptions of the right of privacy emerging. These are outlined in the next section. The difficulties in reconciling a right to privacy with a right to prevent the unauthorised commercial exploitation of essentially *economic* attributes in personality proved to be considerable, and led to the development of a separate right of publicity which is traced in succeeding sections.

Conceptions of privacy

In the United States the right of privacy, cast in the broad terms of a right 'to be let alone', had obvious attractions for litigants seeking redress for increasingly disparate forms of damage to a number of different interests. In its early years it was merely a residual category of tort law, covering cases where the harm was emotionally based.[39] The concept of privacy has 'a protean capacity to be all things to all lawyers'[40] and its very vagueness lends itself well to manipulation. Thus, with varying levels of generality, the essence of the right of privacy has involved: the right to be 'let alone';[41] the protection of human dignity or inviolate personality;[42]

[37] *Flake* v. *Greensboro News Co.* 195 *SE* 55 (1938).
[38] *Gautier* v. *Pro-Football Inc.* 106 NYS 2d 553 (1951), 560 affirmed 107 *NE* 2d 485 (1952), 560 (claim for invasion of privacy under the New York Civil Rights Law).
[39] See G. E. White, *Tort Law in America* (Oxford, 1980), 174.
[40] T. Gerety, 'Redefining Privacy' (1977) 12 *Harv CR-CL Law Rev* 233, 234.
[41] Warren and Brandeis, 'The Right to Privacy', 205.
[42] E. J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *NYUL Rev* 962, 1001.

a person's control over access to information about himself;[43] a person's limited accessibility to others;[44] and autonomy or control over the intimacies of personal identity.[45] Such conceptions are influenced by the disparate range of activities that both laymen and lawyers commonly regard as involving damage to interests in personal privacy. These range from what many would regard as the core concerns of privacy, for example the unauthorised use of personal data, the activities of peeping toms, long lens surveillance, the taping of personal conversations etc., to activities that might be regarded as being at the periphery of any notion of privacy, such as harassment, insulting behaviour, or the depiction of a person in a false and unfavourable light. The discussion here is solely concerned with the common law tort of invasion of privacy rather than the constitutional right of privacy. The constitutional right developed later,[46] applying primarily as a control on government rather than as a control on the conduct of private individuals and affording protection against, for example, unreasonable search and seizure[47] or interference with personal decisions relating to marriage and family relationships such as the use of contraceptives[48] or decisions concerning abortion.[49] The constitutional right is very different in scope and much narrower than the common law tort,[50] reflecting different notions of the appropriate behaviour of government officials as compared to private individuals.[51]

The reductionist paradigm

In a hugely influential article, Prosser argued that the right of privacy was not one tort, but encompassed 'four distinct kinds of invasion of four different interests of the plaintiff ... tied together by the common name, but otherwise have almost nothing in common except that each

[43] C. Fried, 'Privacy' (1968) 77 *Yale LJ* 475, 493.
[44] R. Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale LJ* 421, 423.
[45] Gerety, 'Redefining Privacy', 236.
[46] See generally, R. F. Hixson, *Privacy in a Public Society* (New York, 1987), ch. 4.
[47] See, e.g., *Stanley* v. *Georgia* 394 *US* 557 (1969).
[48] See *Griswold* v. *Connecticut* 381 *US* 479 (1965).
[49] See, e.g., *Roe* v. *Wade* 410 *US* 113 (1973).
[50] See, e.g., *Morris* v. *Danna* 411 *F Supp* 1300 (1976), 1303, citing Prosser's quadripartite classification (see 54–8 below); *Rosenberg* v. *Martin* 478 *F* 2d 520 (1973) (constitutional right to privacy could not be equated with the statutory right under New York law). The constitutional rights is arguably more concerned with personal autonomy than with personal privacy: see, e.g., L. Henkin, 'Privacy and Autonomy' (1974) 74 *Colum L Rev* 1410, 1425.
[51] See P. L. Felcher and E. L. Rubin, 'Privacy, Publicity, and the Portrayal of Real People by the Media' (1979) 88 *Yale LJ* 1577, 1584. See generally, J. Rubenfeld 'The Right of Privacy' (1989) 102 *HarvLRev* 737.

represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone"'.[52] The following four torts, subject to their own discrete rules, were identified: '(i) intrusion upon the plaintiff's seclusion or solitude; (ii) public disclosure of embarrassing private facts about the plaintiff; (iii) publicity which places the plaintiff in a false light in the public eye; and (iv) appropriation, for the defendant's advantage, of the plaintiff's name or likeness'.[53] However, despite his assertion to the contrary, Prosser only identified three interests that were protected by his four torts scheme.[54] First, the intrusion tort protected a primarily mental interest that had been useful in filling out the gaps left by trespass, nuisance and the intentional infliction of mental distress.[55] Second, both the disclosure tort[56] and the false light tort[57] protected an interest in reputation, with the same overtones of mental distress that are present in defamation. Third, the appropriation tort protected 'not so much a mental as a proprietary [interest] in the exclusive use of the plaintiff's name and likeness as an aspect of his identity'.[58]

The categories are largely self-explanatory. The first tort, intrusion, deals with what is close to the popular notion of invasion of privacy, where a person's seclusion or solitude is invaded.[59] The tort was soon extended beyond purely physical intrusion to cover activities such as eavesdropping on a person's private conversation by means of wiretapping or through the use of microphones,[60] the main limitations being the requirements that the intrusion must be offensive to a reasonable man, and that the subject matter of the intrusion was something which the claimant would be entitled to regard as private.[61] While the intrusion tort protects what Prosser referred to as primarily a mental interest, the second tort, disclosure, protects an interest in reputation. This is apparent from the fact that the tort is concerned with a *public* disclosure of private facts which

[52] 'Privacy' (1960) 48 *CalifLRev* 383, 389.

[53] *Ibid*. Cf. G. Dickler, 'The Right of Privacy' (1936) 70 *US L Rev* 435, 435–6, setting out an earlier (and less influential) grouping under three labels: (i) intrusions on the personal life and affairs of others; (ii) disclosures of personal thoughts, habits, manners and affairs etc.; and (iii) appropriations, involving elements of unfair trade practices and appropriation of potential profits.

[54] A fact noted by Bloustein, 'Privacy as Human Dignity', 965, and H. Gross 'The Concept of Privacy' (1967) 42 *NYUL Rev* 34, 46.

[55] Prosser, 'Privacy', 392. [56] *Ibid*., 398. [57] *Ibid*., 400. [58] *Ibid*., 406.

[59] Cf. *Kaye* v. *Robertson* [1991] *FSR* 62 and see 88–92 below. Cf. *Barber* v. *Time Inc*. 159 *SW* 2d 291 (1948).

[60] See Prosser, 'Privacy', 390. In the United Kingdom, the Younger Committee took the view that no further legal protection beyond the established legal categories was necessary to prevent intrusions on home life by prying neighbours, landlords and others: see *Report of the Committee on Privacy* Cmnd 5012 (London, 1972), paras 119–20.

[61] See Prosser, 'Privacy', 391.

would be offensive and objectionable to a reasonable man of ordinary sensibilities.[62] Prosser's third tort, publicity placing a person in a false light, also protects an interest in reputation and is very closely related to the tort of defamation, although it goes beyond the bounds of the tort of defamation in protecting sensibilities or feelings rather than reputation *stricto sensu*.

The category of primary interest for present purposes is the fourth: appropriation.[63] Prosser recognised that appropriation was a different matter from the other three categories and argued that the interest protected was 'not so much a mental as a proprietary one, in the exclusive use of the claimant's name and likeness as an aspect of his identity'.[64] The ambit of the appropriation category was governed by two main rules. First, the law would only protect a person's name as a symbol of his identity and would not protect the name in itself from being adopted by others; the existence of several thousand John Smiths showed that there was no right to the exclusive use of a name.[65] Secondly, as a consequence of the first rule, liability would only arise when a defendant pirated the claimant's identity for his own advantage. Although some statutes required that the claimant could show that the defendant had derived some pecuniary advantage, Prosser noted that the common law was not so limited and a defendant could be liable where, for example, he had used the claimant's name in a petition, or a telegram, or as the name of the father on a birth certificate.[66] Although it might have been argued that the use of a person's name in a defendant's newspaper or magazine was an use for the defendant's advantage, the courts had given greater weight to free speech considerations and had held that incidental inclusion of a

[62] See, e.g., *Melvin* v. *Read* 297 *P* 91 (1931) (actionable invasion of privacy where the defendant made and exhibited a film enacting the claimant's life's story revealing her past as a prostitute and defendant in a murder trial, thereby ruining her new life by exposing her past to the world and her friends). English law affords piecemeal protection primarily through the tort of defamation and the action for breach of confidence: see 80–92 below.

[63] Prosser, 'Privacy', 401, made the rather strange assertion that there was little indication that Warren and Brandeis intended to direct their article at what was in his scheme, the fourth branch of the tort, the exploitation of attributes of the claimant's identity, although as noted above, Warren and Brandeis expressed particular concern at the 'unauthorised circulation of portraits of private persons.' ('The Right to Privacy', 195). It is difficult to imagine that the cases cited by Warren and Brandeis could come more clearly within Prosser's fourth category, and equally difficult to see how they could fall within any other of his categories.

[64] Prosser, 'Privacy', 406.

[65] Amongst the authorities Prosser cited in support of this proposition were two English cases, *Du Boulay* v. *Du Boulay* (1869) *LR* 2 *PC* 430 and *Cowley* v. *Cowley* [1901] *AC* 450.

[66] See Prosser, 'Privacy', 405, note 180, and the references cited.

person's name or likeness in a newspaper, book, or newspaper was not actionable.[67]

Prosser saw little point in discussing, as some courts had done, whether the right should be classified as a property right, since, even if it was not a property right, once it was protected by law it was a right of value, which the claimant could exploit by selling licences. Indeed, in his view, evidence of its proprietary nature could be seen from the fact that an exclusive licensee had a 'right of publicity' which entitled him to prevent the use of the name or likeness by a third person.[68] The phrase 'right of publicity' was only mentioned in passing and was merely used as a label for the right of a licensee in the privacy cases that were concerned with commercial appropriation, possibly because he did not want to disrupt his 'four torts' conceptual scheme by dividing the fourth tort into two, with an 'appropriation privacy' tort dealing with the mental distress aspect and a 'right of publicity' dealing with the economic aspect.[69] Other leading contemporary American tort scholars such as Harper and James were more aware of this distinction, and recognised that the two unrelated ideas of emotional distress (which most ordinary people would suffer) and purely financial loss (suffered by public figures) produced a legal schizophrenia, which was not conducive to clarity of thought. In their view, a public figure would suffer from an invasion of an interest in publicity rather than an interest in privacy, and the law should draw an appropriately sharp distinction between cases involving financial considerations and cases involving purely emotional disturbances such as grief, humiliation and loss of personal dignity.[70] Ultimately, it became impossible to reconcile the notion of a purely commercial exploitation of personality with a right of privacy, as was seen by the development of the right of publicity, traced in the text below.

Despite these shortcomings, Prosser's re-interpretation of the law of privacy proved to be hugely influential, and was adopted by the American Law Institute in the second Restatement.[71] The fact that it was so influential, and so readily accepted, was not particularly surprising, given the need for an organising framework for such a diverse body of

[67] Prosser, 'Privacy', 405. [68] Prosser, 'Privacy', 407.
[69] See J. T. McCarthy, *The Rights of Publicity and Privacy* 2nd edn (New York, 2001) § 1.23.
[70] *The Law of Torts* (Boston, 1956), 689–90.
[71] See *Restatement, Second, Torts* (1977) § 652. The order of the categories was changed slightly, the new order being: (1) intrusion upon solitude or seclusion (2) appropriation of name or likeness (3) disclosure of private facts and (4) publicity placing the plaintiff in a false light.

case law and Prosser's status as the leading contemporary tort scholar.[72] However, his views did not reign unchallenged.

A holistic conception

Four years later Bloustein proposed a general theory of individual privacy which attempted to reconcile the divergent strands of legal development and to re-establish privacy as a single, unified, legal concept,[73] arguing that a common thread of principle running through all the cases could be discerned: the principle which Warren and Brandeis had identified as 'inviolate personality'.[74] The interest served in the privacy cases was in some sense a spiritual interest rather than an interest in property or reputation and the nature of the injury in a case of invasion of privacy, like the torts of assault, battery, and false imprisonment, was an injury to a person's individuality and dignity. Accordingly, the legal remedy represented a social vindication of the human spirit rather than compensation for loss suffered.[75] Bloustein acknowledged that 'the words that we use to identify and describe basic human values are necessarily vague and ill defined',[76] yet, was rather more successful in outlining why the interest was important enough to merit legal protection, than in delineating the right.[77] In terms of definition, his conception of privacy was hopelessly vague.[78]

Such a broad argument limits appropriation cases as being concerned with the protection of purely dignitary interests. What was 'demeaning and humiliating' was the 'commercialization of an aspect of personality',[79] and in a passage redolent of Cobb J's dictum in *Pavesich* v. *New England Life Insurance Co.*,[80] Bloustein argued that: '[n]o man wants to be "used" by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others. In a community at all sensitive to the

[72] For an account of Prosser's contribution to tort law in America in general and the tort of invasion of privacy in particular, see White, *Tort Law in America*, ch. 5 esp. 173–6. Prosser's framework has also provided the basis for studies of the developing law of privacy in other jurisdictions. See, e.g., D. J. McQuoid-Mason, *The Law of Privacy in South Africa* (Cape Town, 1978), which also provides an account of the law of privacy in several common law and civil law jurisdictions.

[73] E. J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *NYUL Rev* 962.

[74] *Ibid.*, 1001. [75] *Ibid.*, 1002–3. Cf. 2–3 above. [76] *Ibid.*, 1001.

[77] Gross, 'The Concept of Privacy', 53.

[78] See G. Dworkin, 'The Common Law Protection of Privacy' (1967) 2 *U Tas L Rev* 418, 433.

[79] *Ibid.*, 987. [80] See note 26 above and accompanying text.

commercialization of human values, it is degrading to thus make a man part of commerce against his will'.[81] In Bloustein's view, in most cases the name or likeness which was used had no intrinsic commercial value, or at best a purely nominal value which would not justify the costs of a legal action.[82] This involved playing down cases where the claimants' images had a de facto commercial value, cases which, Bloustein suggested, had led Prosser and others such as Nimmer to the mistaken conclusion that the interest involved was a proprietary one.[83] This purely dignitary analysis was distinctly at odds with the existence of the right of publicity, protecting predominantly commercial interests in personality, which had been developing in the eleven years prior to his article.[84] According to Bloustein, the very existence of a right of publicity depended on the fact that a name and likeness could only command a commercial price in a society that recognised a right to privacy allowing a person to control the conditions under which his name or likeness were used: there was no right of publicity, but 'only a right, under some circumstances, to command a commercial price for abandoning privacy'.[85] Every man had the right to prevent the commercial exploitation of his personality 'not because of its commercial worth, but because it would be demeaning to human dignity to fail to enforce such a right'.[86] This overlooked the fact that, in reality, advertisers would not pay famous people such as sports and entertainment personalities for giving up their privacy, but would pay because such persons' images already had a 'recognition value'.[87]

While Bloustein sought to challenge Prosser's reductionist approach by arguing that Prosser's four torts could be encompassed within a single concept of privacy, underpinned by a single unifying principle, the resulting alternative holistic conception of privacy and its underlying principle was hopelessly vague. In short, Bloustein was trying to do too much and other challenges to Prosser's account have been more successful.

A core conception of privacy

Perhaps the strongest and most thoughtful attack on the reductionist approach can be seen in the argument, propounded by Gavison, which restores privacy as a unitary legal concept, reflecting our extra-legal notions of privacy rather than breaking it down into component

[81] Bloustein, 'Privacy as Human Dignity', 988. [82] *Ibid.*, 987. [83] *Ibid.*, 988.
[84] See 64–7 below. [85] Bloustein, 'Privacy as Human Dignity', 989. [86] *Ibid.*, 989.
[87] See A. D'Amato, 'Comment on Professor Posner's Lecture on Privacy' (1978) 12 *Ga L Rev* 497, 499. See also *Lugosi* v. *Universal Pictures Cal.* 603 *P* 2d 425 (1979), 438.

interests.[88] Although the appeal of the reductionist approach lies in underlining the fact that privacy is seldom protected in the absence of some other interest, the danger in this approach is that it might lead to the conclusion that privacy is not an important value and that its loss should not elicit legal protection.[89] If the concept is viewed as being largely parasitic and that protection may be secured by protecting separate primary interests such as property or reputation, its conceptual distinctiveness becomes uncertain.[90] Gavison argues that everyday speech reveals that the concept of privacy is coherent and useful in three different, but related contexts: (i) as a neutral concept, which allows us to identify when a loss of privacy has occurred; (ii) as a distinctive value, since claims for legal protection of privacy are compelling only if losses of privacy are undesirable for similar reasons; and (iii) as a legal concept that enables us to identify those occasions calling for legal protection. Accordingly, (i) losses of privacy (ii) invasions of privacy and (iii) actionable violations of privacy are related in that each is a subset of the previous category. While reductionist analyses of privacy deny the utility of privacy as a separate concept and sever these conceptual links, Gavison argues that the use of the word 'privacy' in all three contexts reinforces the belief that they are linked and suggests that privacy is a distinct and coherent concept in all of these contexts.[91] The proposed neutral concept of privacy, starts from the premise that an individual enjoys perfect privacy when he is completely inaccessible to others, (obviously impossible in any society), which has three components: (i) the amount of information known about an individual; (ii) the attention paid to an individual and (iii) the degree of physical access to an individual. These three elements of secrecy, anonymity and solitude are arguably distinct but interrelated, providing a richer definition than any centred around only one element, and better explain common intuitions as to when privacy is lost.[92]

However, any formulation of a core concept of privacy involves rejecting some claims that lie at the periphery. While the core encompasses typical invasions of privacy, such as the collection and dissemination of personal data, peeping toms, watching and photographing individuals, intruding into private places, eavesdropping, and wiretapping, it does not include such activities as insulting, harassing or persecuting behaviour, presenting individuals in a false light, unsolicited mail and unwanted phone calls; neither does it include commercial exploitation. Although such invasions of privacy might all be included in an all-embracing and

[88] R. Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale LJ* 421, 424.
[89] *Ibid.* [90] R. Wacks, *Personal Information* (Oxford, 1989), 18.
[91] Gavison, 'Privacy and the Limits of Law', 423. [92] *Ibid.*, 428–9.

rhetorically forceful notion such as the 'right to be let alone'[93] such an approach covers almost any conceivable claim that might be made and denies any distinctiveness and meaning which invasion of privacy might have.[94] Similarly, although the coherence of privacy might lie in its relationship with human dignity, this does not always hold true. There are ways to offend human dignity and personality that have nothing to do with privacy; having to beg or sell one's body in order to survive is an affront to dignity, but does not involve a loss of privacy. Gavison expressly rejects commercial exploitation of personality as an aspect of privacy, noting that privacy 'can be invaded in ways that have nothing to do with such exploitation',[95] citing governmental wiretapping as an obvious example of an invasion of privacy with no hint of commercial exploitation.[96] Similarly, 'there are many forms of exploitation that do not involve privacy under the broadest conception'; individuals may be commercially exploited if they are compensated for their services at rates below the market price, although this does not seem to involve loss of privacy.[97]

Such an approach falls some way short of the somewhat extreme position that commercial exploitation *never* involves invasion of privacy. This involves reasoning along the lines that: (i) commercial appropriation is concerned with the exploitation of the images of celebrities, (ii) a person's position as a celebrity is inconsistent with a claim for a right to privacy, therefore (iii) commercial appropriation has nothing to do with privacy. The first premise is impossible to defend. Commercial practice in advertising suggests that this is simply not the case, a fact confirmed by the non-celebrity status of the claimants in many of the American privacy cases. The second premise poses greater difficulties. Although there are certainly problems in reconciling a person's status as a celebrity with a claim for privacy, it is rather crude to argue that celebrity will automatically disentitle a person to a right of privacy.[98] A somewhat less extreme view holds that if, for example, a famous athlete finds that his name is used without his consent to promote sports equipment, then the essence of the complaint is the unauthorised commercial exploitation of a commercial asset; the concern is with the athlete's public reputation, rather than his private life.[99] Consider a case where an ordinary person finds his

[93] *Ibid.*, 437. [94] *Ibid.*, 437–8. [95] *Ibid.*, 440. [96] *Ibid.*, note 61. [97] *Ibid.*

[98] See 64 below.

[99] See D. Gibson, 'Common Law Protection of Privacy: What To Do Until the Legislators Arrive' in L. Klar (ed.), *Studies in Canadian Tort Law* (Toronto, 1977) 343, 345, arguing that commercial appropriation 'has no place in a study of privacy law'; cited by D. Vaver, 'What's Mine is Not Yours: Commercial Appropriation of Personality Under the *Privacy Acts* of British Columbia, Manitoba and Saskatchewan' (1981) *UBC L Rev* 241 arguing (*Ibid.*, 255) that '[i]t is sterile to argue that appropriation is not a facet of privacy'.

image being widely used without his consent in an advertisement. The claimant might become subject to unwanted attention, which would thus affect the claimant's anonymity which, in Gavison's scheme, is one of the three core irreducible elements of privacy, which form the conception of privacy as limited accessibility. Thus the notion of privacy is relevant, although perhaps not central, in some cases of appropriation of personality which result in damage to a person's dignitary interests. Admittedly, cases where the claimants are celebrities are more difficult to reconcile with the notion of a right to privacy, a point which emerges from our account of the development of the right of publicity.

Attempts to banish commercial appropriation from privacy altogether are unrealistic, and involve taking a very broad view as to what constitutes commercial appropriation, ultimately ascribing a commercial value to practically every image. For example, in *Pavesich*, the claimant's image had no intrinsic commercial value, and the advertisers could have used the image of thousands of other similar persons at little extra cost or inconvenience. Rather, the essence of the claimant's complaint was the damage to his dignitary interests, which might be protected at law either as part of a general right of privacy or by a tort of appropriation of personality which might provide redress for either or both economic or dignitary interests. Again this highlights the basic point that looking at the problem purely from a commercial appropriation perspective, or from an exclusively dignitary right of privacy perspective,[100] distorts the true picture. Both economic and dignitary interests have to be taken into account.

Privacy as principle

Alternatively, the choice need not be limited to a simple adoption or rejection of the concept of privacy.[101] If the notion of privacy is sufficiently coherent as a social or psychological concept, then the question arises whether it can be embodied within a legal system, having due regard to various competing interests. If an interest is defined as a claim, demand, need or concern, and a right is defined as a legally protected interest, then should privacy be accorded the status of an interest and then a right?[102] While rules are particularisations that describe the state of the law in a defined context, being prescriptive,

[100] As in Bloustein's scheme: see text accompanying note 85 above.
[101] See P. A. Freund, 'Privacy: One Concept or Many' in J. R. Pennock and J. W. Chapman (eds), *Nomos XIII Privacy* (New York, 1971), 182.
[102] *Ibid.*, 194.

with a relatively high degree of immediacy and precision, principles may be regarded as more plastic and more useful for predicting and shaping the course of legal development.[103] Thus, principles occupy the middle ground between abstract philosophical definitions and concrete legal applications. While never claiming to provide an abstract general definition, nor being so determinate in its effects as simple rules of precedent, the middle ground of principles can possibly encompass both.[104] Even if it would be seen as misleading to incorporate a right of privacy into a legal rule, it would be undesirable to exclude it as the term of a legal principle.[105] Indeed, Warren and Brandeis sought to avoid the charge of advocating judicial legislation by arguing that what they envisaged was the mere application of a pre-existing principle to changing social conditions, rather than the introduction of a new principle.[106]

Leaving aside the controversial role of rules and principles in general jurisprudence,[107] it is perfectly possible to refer to a master rule by which principles as well as rules of law may be identified. Accordingly a court must apply statutory provisions, rules of precedent and the *rationes decidendi* of cases, but in a case to which no statutory provision or *ratio decidendi* applies, in coming to its decision, the court must take into account principles derived from legislation, *rationes decidendi* of relevant cases and from relevant dicta.[108] While legislation and binding precedent are the only ultimate sources of law, principles, which embody the persuasive sources, should not be excluded if only for the reason that they play a considerable part in the solution of legal problems to which no rule is directly applicable,[109] although it is possible to find dicta in support of more or less any principle.[110] The English courts have accepted that privacy may be seen as a value that underlies the existence of a rule of law (and can provide a direction for the law to develop). Such a value may only be regarded as a principle in the broadest sense, rather than a legal principle which is capable of sufficient definition to allow specific rules to be deduced and applied.[111] The extent to which the values of the

[103] *Ibid.*, 197. [104] Gerety, 'Redefining Privacy', 239.
[105] Freund, 'Privacy: One Concept or Many', 198. See also, E. Barendt, 'Privacy as a Constitutional Right and Value' in P. Birks (ed.), *Privacy and Loyalty*, (Oxford, 1997), 12, (arguing that privacy should be seen primarily as a constitutional value rather than as a set of constitutional and statutory rights).
[106] Warren and Brandeis, 'The Right to Privacy', 213.
[107] See, e.g., Dworkin, *Taking Rights Seriously*, chs 2 and 3. Cf. H. L. A. Hart, *The Concept of Law* (2nd edn) (Oxford, 1994), 259–63.
[108] R. Cross and J. W. Harris, *Precedent in English Law* (4th edn) (Oxford, 1991), 215.
[109] *Ibid.*, 216.
[110] *Ibid.*, citing Kelly CB in *River Wear Commissioners* v. *Adamson* (1876) 1 *QBD*, 551.
[111] *Wainwright* v. *Home Office* [2003] UKHL 53, para. 31.

European Convention on Human rights have influenced the development of the traditional causes of action, in particular breach of confidence, is examined below.[112]

Reconciling privacy and commercial exploitation: the birth of the right of publicity in the United States

Even in the earliest right of privacy cases,[113] the difficulties in reconciling a person's status as a public figure with that person's claim for a right of privacy became apparent. This was one of the reasons why the New York Court of Appeals felt unable to recognise a right of privacy at common law in *Roberson* v. *Rochester Folding Box Co*.[114] The majority took the view that it was beyond the powers of the court to draw arbitrary distinctions, which were best left to the legislature. In many states, when celebrity claimants claimed that their privacy had been invaded by the unauthorised use of their images, the courts refused to accept that they had suffered any indignity that could form the basis of an award of damages for mental distress, particularly where the celebrities were willingly licensing others to use their images to advertise or endorse products. The privacy label was taken at face value and the courts were unwilling to accept that the unpermitted commercial use of the identity of a public figure had invaded a right to be left alone.[115] By virtue of their status as public figures, some claimants were deemed to have waived their right to privacy.[116]

In the first significant right of publicity case, the decision of the Second Circuit Court of Appeals in *Haelan Laboratories Inc*. v. *Topps Chewing Gum Inc*.,[117] the parties were rival manufacturers of chewing gum. The claimant company had entered into contracts with famous baseball stars for the exclusive right to use their photographs in connection with its chewing-gum products. With knowledge of the claimant's contracts with particular baseball players, the defendant deliberately induced the players

[112] See 85–93 below.
[113] See *Schuyler* v. *Curtis* 15 NYS 787 (Sup Ct 1891); *Corliss* v. *Walker* 57 *Fed Rep* 434 (1893); *Atkinson* v. *John. E. Doherty & Co*. 80 *NW* 285 (1899).
[114] 171 *NY* 538 (1902) 554–5. Cf. *Pavesich* v. *New England Life Insurance Co*. 50 *SE* 68 (1905) 72.
[115] See J. T. McCarthy, *The Rights of Privacy and Publicity* (2nd edn) (New York, 2001), § 1.6.
[116] See, e.g., *O'Brien* v. *Pabst Sales Co*. 124 *F* 2d 167 (5th Cir 1941). See also *Paramount Pictures Inc* v. *Leader Press Inc*. 24 *F Supp* 1004 (1938); *Gautier* v. *Pro-Football Inc*. 107 *NE* 2d 485 (1952). The English courts are now beginning to address this issue (see 88–92 and 225 below).
[117] 202 *F* 2d 866 (2nd Cir 1953).

to enter into contracts authorising the defendant to use their photographs in connection with the defendant's chewing-gum. The defendant argued that even if such facts were proved, they disclosed no actionable wrong since the contracts with the baseball players were no more than waivers of the players' right to sue in tort for invasion of privacy. The right of privacy, in this case deriving from the New York statute, was a personal and non-assignable right and the contracts did not give the claimant any property right or other legal interest that would give title to sue. The situation was complicated by the fact that the defendant had not contracted with all of the players through its agent; some contracts were obtained by a third party, who then assigned the rights to the defendant. An action for deliberately inducing breach of contract was not available on the facts, since the breach in question had been induced by the third party, and not by the defendant acting through its agent.

While impliedly accepting the defendant's arguments on the right of privacy point, the Court rejected the defendant's contention that the contracts created no more than a release of liability and that a claimant would have no other legal interest in the publication of his picture. Independently of the right of privacy, a person had 'a right in the publicity value of his photograph i.e., the right to grant the exclusive privilege of publishing his picture'.[118] Such a grant could be validly made 'in gross', without an accompanying transfer of a business. Frank J acknowledged the fact that many prominent people did not suffer any injury to feelings from having their name or likeness exploited without their consent, but rather, felt sorely deprived from not receiving any money for such exploitation. Thus the right of publicity was born, a right of property allowing a person to prevent the unauthorised commercial use of his identity and, furthermore, providing the corresponding right to grant exclusive rights of exploitation, which could potentially be enforced directly by a licensee. However, relatively little emphasis was placed on the shift from privacy to property. Judge Frank did not place much significance on the question whether such a right should be regarded as a property right, taking the view that 'here as often elsewhere, the tag "property" simply symbolizes the fact that the courts enforce a claim which has a pecuniary worth'.[119] In the short judgment, only two cases were cited in support of the new proposition, neither of which were considered in any detail, while two others were cursorily distinguished.[120] What dictated the outcome in the case were the reasons of substance underlying the dispute between the parties and the

[118] *Ibid.*, 868. [119] *Ibid.* [120] *Ibid.*, 868–8.

commercial reality that the images of famous people such as well-known baseball stars were, in effect, used as tradeable commodities.

The courts were reluctant to accept the existence of the new right immediately[121] with some preferring to base their decisions on more traditional bases of liability such as the appropriation category of the privacy torts,[122] or the *International News Service* v. *Associated Press*[123] misappropriation doctrine.[124] Gradually, the courts in most jurisdictions acknowledged both that the right of privacy and the right of publicity were separate claims[125] and that the right of publicity was a distinctly independent tort and not an application of the misappropriation doctrine.[126] In *Uhlaender* v. *Henricksen*,[127] it was recognised that the claimant baseball player's claim to prevent the unauthorised use of his name and statistics concerning his athletic achievements in the defendant's table baseball game was not a claim for invasion of privacy but a claim for the misappropriation of the commercial value of the claimant's name, stressing the pecuniary loss through interference with property rather than the injury to feelings.[128] On the other hand, in *Motschenbacher* v. *R. J. Reynolds Tobacco Co.*,[129] the Ninth Circuit Court of Appeals held that the claimant had a proprietary interest in his identity, but declined to specify whether the right should be characterised as a right of privacy or a right of publicity. Although some courts[130] preferred to treat the new right of publicity as an aspect of the misappropriation doctrine, generally, the law of unfair competition did not play a great part in the development of the right of publicity in the United States. The courts relied on the *International News Service*

[121] See, e.g., *Strickler* v. *National Broadcasting Co.* 167 *F Supp* 68 (SD Cal 1958), 70 where the court stated that it did not wish to 'blaze the trail' to establish a right of publicity as a cause of action in California and see generally McCarthy, *Rights of Publicity and Privacy*, § 1.9, and H. I. Berkman, 'The Right of Publicity – Protection For Public Figures and Celebrities' (1976) 42 *Brooklyn L Rev* 527, 534 et seq.

[122] See, Prosser, 'Privacy', 401. [123] 248 *US* 215 (1918).

[124] See, e.g., *Hogan* v. *A. S. Barnes & Co. Inc.* 114 *USPQ* 314, 317. The Court relied on a decision of the Pennsylvania Supreme Court in *Waring* v. *WDAS Broadcasting Station* 35 *USPQ* 272 (1937), which in turn, had relied on the decision in *International News Service*.

[125] Nevertheless, some claims for invasion of essentially economic interests continued to be based on invasion of privacy rather than right of publicity or misappropriation as in *Palmer* v. *Schonhorn Enterprises Inc.* 232 *A* 2d 458 (1967), involving the unauthorised commercial exploitation of the images of famous golfers Arnold Palmer, Gary Player and Jack Nicklaus: see generally Berkman 'The Right of Publicity', 537.

[126] See generally McCarthy, *Rights of Publicity and Privacy*, § 1.10; Berkman 'The Right of Publicity', 534–41.

[127] 316 *F Supp* 1277 (1970). [128] *Ibid.*, 1279–80. [129] 498 *F* 2d 821 (1974), 826.

[130] See, e.g., *Hogan* v. *A. S. Barnes & Co. Inc.* 114 *USPQ* 314.

misappropriation doctrine only until new rights such as the right of publicity had acquired their own separate identity.[131]

When the right of publicity was considered for the first time by the Supreme Court in *Zacchini* v. *Scripps-Howard Broadcasting Co.*,[132] a clear distinction was drawn between invasions of privacy and infringement of a right of publicity:[133] while the interest protected through a cause of action for a false light invasion of privacy was an interest in reputation, with overtones of mental distress, the rationale underlying the right of publicity lay in 'protecting the proprietary interest of the individual in his act in part to encourage such entertainment'.[134] The aims of the law were considered to be analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward for his endeavours, and had little to do with protecting feelings or reputation.[135] The Court approved the rationale which Kalven had identified for the appropriation branch of privacy:[136] preventing unjust enrichment by the theft of goodwill. No social value would be served by allowing the defendant to get for free something that had a market value and for which he would usually have to pay.[137] Furthermore, the free speech implications differed between false light privacy cases and right of publicity cases. While in false light privacy cases, the only way to protect a claimant's interests would be to attempt to minimise publication of the damaging matter, in right of publicity cases the only question, according to the Court, would be the question of who should be allowed to do the publishing. Ordinarily, a claimant such as the human cannonball in *Zacchini* would have no objection to the widespread dissemination of his act as long as he received the commercial benefit from such dissemination. Thus, according to the court, the free speech implications were less acute where a claimant merely wished to be compensated for an unauthorised exploitation without wishing to prevent any form of publication.[138]

It is somewhat ironic that the Supreme Court should stress an utilitarian basis for the right of publicity, based in part on the need to encourage labour and investment. Although Warren and Brandeis partly based their argument for a right of privacy on common law copyright, they

[131] See D. G. Baird, 'Common Law Intellectual Property and the Legacy of *International News Service* v. *Associated Press*' (1983) 50 *U Chi L Rev* 422, arguing that contrary to common fears, the misappropriation doctrine has not been used by the courts as 'a license to cut rough justice wherever they find competitive practices that they do not like'.

[132] 433 *US* 562 (1977). [133] *Ibid.*, 572. [134] *Ibid.*, 573. [135] *Ibid.*

[136] H. Kalven, 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 *Law & Contemp Probs* 326, 331.

[137] 433 US 564 (1977), 576. [138] *Ibid.*, 575 and see further 217–24 below.

emphasised that the right of privacy should be based on the principle of inviolate personality and did not wish that it should be limited to conscious products of labour based on a need to encourage effort.[139] With the decision in *Zacchini*, the wheel had turned full circle. The right of publicity had evolved some way from its early origins in the right of privacy, based on the principle of inviolate personality. From an early point in its history, the appropriation branch of privacy had developed distinctly proprietary attributes, before developing into a completely autonomous right of publicity, taking the form of a property right seemingly more akin to intellectual property rights such as copyright, patents and trade marks, than a right of personality.

The scope and limits of the right of publicity

Space does not permit an extended discussion of the scope of the right of publicity[140] and its infringement, although its contours may be sketched, bearing in mind that there are considerable differences between the statutory and common law provisions in different states.[141] It should also be noted that the right of publicity is not, as yet, quite as autonomous as some might suggest. Precedents from privacy cases continue to be used by the courts in determining the scope and limits of the right of publicity and the links between the two rights have yet to be fully severed, particularly in states where the right of publicity is in a relatively early stage of development.[142]

Misappropriation

Liability arises where the defendant 'appropriates the commercial value of a person's identity by using, without consent, the person's name, likeness or other indicia of identity for the purposes of trade'.[143]

[139] See text accompanying note 15 above.
[140] See generally McCarthy, *Rights of Publicity and Privacy*, chs 3 and 4.
[141] Suggestions have been made for a federal law: see, e.g., M. A. Hamilton et al. 'Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress' (1998) 16 *Cardozo Arts & Entertainment Law Journal*, 209; E. J. Goodman, 'A National Identity Crisis: The Need For a Federal Right of Publicity Statute' (1999) 9 *DePaul-LCA J Art & Ent L* 227; R. S. Robinson, 'Preemption, The Right of Publicity, and a New Federal Statute' (1998) 16 *Cardozo Arts & Ent LJ* 183.
[142] See, e.g., *Allison* v. *Vintage Sports Plaques* 136 *F* 3d 1443 (11th Cir 1998), 1147 'Alabama's commercial appropriation privacy right ... represent[s] the same interests and address[es] the same harms as does the right of publicity as customarily defined'.
[143] *Restatement, Third, Unfair Competition* (1995) § 46 and see text accompanying note 197 below.

Liability is based on misappropriation rather than misrepresentation, thus proof of deception or consumer confusion is not required.[144] The interest that is protected is the intangible value of the person's identity rather than trading or promotional goodwill. Despite some dicta to the contrary,[145] prior commercial exploitation by the claimant does not seem to be a necessary prerequisite.[146] Thus a claimant who does not exploit his image for the moment,[147] or a claimant who does not contemplate exploiting his image at all,[148] will not be precluded from claiming an infringement of his right of publicity. Furthermore the 'appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless'.[149]

The unauthorised appropriation must be sufficient to identify the claimant, otherwise it cannot be said in any real sense that the claimant's identity has been misappropriated, nor his interest violated.[150] In this respect, the right of publicity differs from the law of registered and un-registered trade marks in that there may be liability despite there being no likelihood of confusion as to source or connection by way of endorsement or sponsorship.[151] The Restatement states that in relation to names, 'the name as used by the defendant must be understood by the audience as referring to the plaintiff', while in relation to visual likenesses, 'the plaintiff must be reasonably identifiable from the photograph or other depiction'.[152] McCarthy proposes a variation of the test applied in defamation and privacy cases:[153] that the statement was published 'of and concerning'

[144] *Rogers* v. *Grimaldi* 875 *F* 2d 994 (2nd Cir 1989), 1003–4.
[145] See, e.g., *Lerman* v. *Chuckleberry Publishing Inc.* 521 *F Supp* 228, (SDNY 1981), 232.
[146] McCarthy, *Rights of Publicity and Privacy* § 4.7.
[147] See, e.g., *Palmer* v. *Schonhorn Enterprises Inc. A* 2d 458, 462 (NJ Super 1967).
[148] See, e.g., *Grant* v. *Esquire Inc.* 367 *F Supp* 876 (SDNY 1973): '[i]f the owner of Blackacre decides for reasons of his own not to use his land but to keep it in reserve, he is not precluded from prosecuting trespassers' *per* Knapp J, 878.
[149] *Motschenbacher* v. *R. J. Reynolds Tobacco Co.* 498 *F* 2d 821 (9th Cir 1974), 824, n.11 and see *Restatement, Third, Unfair Competition* § 46, comment *d.* Cf. *Landham* v. *Lewis Galoob Toys Inc.* 227 *F* 3d 619 (6th Cir 2000), 624 ('a plaintiff must demonstrate that there is value in associating an item of commerce with his identity'); *Cheatham* v. *Paisano Publications, Inc.* 891 *F Supp* 381 (WD Ky 1995), 385 (remedy available to those whose identity has commercial value, established by proof of (i) the distinctiveness of the identity and by (ii) the degree of recognition of the person among those receiving the publicity).
[150] *Motschenbacher* v. *R. J. Reynolds Tobacco Co.* 498 *F* 2d 821 (9th Cir 1974), 826–7; *Waits* v. *Frito-Lay Inc.* 978 *F* 2d 1093 (9th Cir 1992), 1102.
[151] *Elvis Presley Enterprises, Inc.* v. *Capece* 950 *F Supp* 783, (SD Tex., 1996) 801; *Henley* v. *Dillard Dept Stores* 46 *F Supp* 2d 587 (ND Tex., 1999), 590 and cf. 19–27 above.
[152] *Restatement, Third, Unfair Competition* § 46, comment *d.*
[153] See *Restatement, Second, Torts* (1977) § 564.

the claimant and that the claimant is identifiable by the defendant's use to more than a *de minimis* number of persons.[154]

A person's identity may be appropriated in various ways[155] and although a claimant is most commonly identified by personal name (including former name)[156], nickname,[157] or likeness, use of other indicia of identity such as a claimant's voice,[158] distinctive catch-phrase,[159] or distinctively marked car[160] may give rise to liability. Protection has also been extended to cover more amorphous indicia of identity that might severally combine to identify the claimant, such as the claimant's distinctive style of dress, hairstyle and pose.[161] Intent to infringe another's right of publicity is not a necessary element of liability at common law and a mistake relating to the claimant's consent will not be a defence.[162]

Assignability and descendibility

From the earliest cases, it became clear that the right of publicity differed from the right of privacy in that it was a right of property which was freely assignable, rather than a personal right.[163] Thus where the right of publicity is assigned, the assignee has a direct cause of action against a third party infringer, rather than a mere release of liability for invasion of the subject's privacy. However, an assignment or licence of the right of publicity only transfers the right to exploit the commercial value of the assignor's image, and does not transfer any rights of

[154] McCarthy, *Rights of Publicity and Privacy* § 3.7, cited with approval in *Henley* v. *Dillard Dept Stores* 46 *F Supp* 2d 587 (ND Tex., 1999), 595.

[155] *Carson* v. *Here's Johnny Portable Toilets Inc*. 698 *F* 2d 831 (6th Cir 1983), 835–6.

[156] *Abdul-Jabbar* v. *General Motors Corp*. 85 *F* 3d 407 (9th Cir 1996).

[157] *Hirsch* v. *S. C. Johnson & Sons Inc*. *NW* 2d 129 (1979), 137 (nickname 'Crazylegs' for well-known footballer used on shaving gel).

[158] *Waits* v. *Frito-Lay Inc*. 978 *F* 2d 1093 (9th Cir 1992).

[159] *Carson* v. *Here's Johnny Portable Toilets Inc*. 698 *F* 2d 831 (6th Cir 1983).

[160] *Motschenbacher* v. *R. J. Reynolds Tobacco Co*. 498 *F* 2d 821(9th Cir 1974), 824.

[161] *White* v. *Samsung Inc*. 971 *F* 2d 1395 (9th Cir 1992) rehearing denied 989 *F* 2d 1512 (9th Cir 1993). See also W. Borchard, 'The Common Law Right of Publicity is Going Wrong in the US' (1992) *Ent LR* 208; D. S. Welkowitz, 'Catching Smoke, Nailing Jell-O To a Wall: The Vanna White Case and the Limits of Celebrity Rights' (1995) 3 *J. Intell Prop L* 67.

[162] See *Douglass* v. *Hustler Magazine Inc*. 769 *F* 2d 1128, 1140 (7th Cir 1985) and *Restatement, Third, Unfair Competition* § 46 comment *e*. McCarthy, *Rights of Publicity and Privacy*, § 3.41 argues that the law of trade marks and unfair competition provide the most appropriate analogies where lack of intention to infringe is irrelevant for establishing liability. The position is similar in the English tort of passing off, where the mental element is irrelevant for establishing a misrepresentation: see C. Wadlow, *The Law of Passing Off* (3rd edn) (London, 2004), 313 et seq.

[163] *Haelan Laboratories Inc*. v. *Topps Chewing Gum Inc*. 202 *F* 2d 866 (2nd Cir 1953).

privacy.[164] An exclusive (though not a non-exclusive) licensee will have a right to sue third party infringers, to the extent that their rights are infringed.[165]

One of the issues that caused greatest trouble for the courts and commentators was defining the duration of the right of publicity and, in particular, determining whether it was descendible.[166] While the right of privacy is a personal right which dies with the claimant, the right of publicity, as noted above, is usually described as a property right. Consequently, some argued that it follows that such a property right should be descendible and that the heirs of deceased figures should be allowed to profit from the valuable right that had been enjoyed by their famous ancestors. However, describing the right of publicity as a 'property' right is often only an acknowledgement of 'the fact that the courts enforce a claim which has a pecuniary worth'.[167] It does not automatically follow that because a right is labelled a 'property' right, that right should have all the attributes of property.[168] There are considerable variations between the statutory and common law provisions in different states.[169] For example, at common law, the descendibility of the right of publicity has been recognised in Georgia,[170] New Jersey,[171] and (despite its initial denial[172]) in Tennessee.[173] Under statute, the right of publicity is descendible in California,[174] but in New York, whatever rights of publicity exist are found in the privacy framework of section 50 of the Civil Rights Law[175] and any rights terminate at

[164] *Bi-Rite Enterprises Inc* v. *Button Master* 555 *F Supp* 1188 (1983), 1199; *Restatement, Third, Unfair Competition* § 46 comment *g*.

[165] *Bi-Rite Enterprises Inc*. v. *Button Master* 555 *F Supp* 1188 (1983), 1200. See generally McCarthy, *Rights of Publicity and Privacy*, ch. 10.

[166] See T. P. Terrell and J. S. Smith, 'Publicity, Liberty and Intellectual Property: a Conceptual and Economic Analysis of the Inheritability Issue' (1985) 34 *Emory LJ* 1; Felcher and Rubin, 'The Descendibility of the Right of Publicity'; Goodenough, 'The Price of Fame' and see generally McCarthy, *Rights of Publicity and Privacy*, ch. 9.

[167] *Haelan Laboratories Inc*. v. *Topps Chewing Gum Inc*. 202 *F* 2d 866 (2nd Cir 1953), 868.

[168] See further Beverley-Smith, *Commercial Appropriation*, ch. 10.

[169] See McCarthy, *Rights of Publicity and Privacy*, ch. 6, esp. § 6.8 for an overview.

[170] *Martin Luther King Jr Center for Social Change Inc*. v. *American Heritage Products* 296 *SE* 2d 697 (1982) esp. 704–6 for a review of the early case law.

[171] *Estate of Prelsey* v. *Russen* 513 *F Supp* 1339 (1981).

[172] *Memphis Development Foundation* v. *Factors etc. Inc*. 616 *F* 2d 956 (1980).

[173] *State of Tennessee ex rel. The Elvis Presley Memorial Foundation* v. *Crowell* 733 SW 2d 89 (Ten App 1987). For the complicated history of the descendibility of the right of publicity in Tennessee, see McCarthy, *Rights of Publicity and Privacy*, § 9.5[B][10].

[174] California Civil Code § 3344 and § 3344.1 (The *Astaire Celebrity Image Protection Act*).

[175] *Costanza* v. *Seinfeld* 719 NYS 2d 29 (NYAD 1 Dept, 2001), 30; *Stephano* v. *News Group Publications*, 485 *NYS* 2d 220 (Ct App. 1984), 224.

death.[176] Although many jurisdictions have not yet considered the descendibility issue, most of the jurisdictions that have done so have recognised that the right is descendible[177] and has a limited post mortem duration of between ten[178] and one hundred years.[179]

Where the unauthorised commercial use of a person's identity is established, the defendant will be liable for the claimant's pecuniary loss, or alternatively, for the defendant's own pecuniary gain. As in other areas of unfair competition, the claimant may establish either or both measures of relief, but may only recover the greater of the two amounts.[180] Although proof of monetary loss is not a prerequisite to recovery of damages, and although the claimant may be compensated purely for the deprivation of his right to control the use of the commercially valuable asset in his name or likeness, in the absence of specific loss such damages are likely to be nominal.[181] Because of the difficulty in proving loss to the claimant, or gain to the defendant that results from the unauthorised appropriation, the courts sometimes apply a measure of damages by reference to a lost licence fee, based on the fair market value of the unauthorised use,[182] although such a calculation is rarely mathematically exact.[183] This applies not only to famous people, but also to private persons who may recover damages measured by the fee that the defendant would have been required to pay in order to secure similar services from other private persons or from professional models.[184] Such damages might not deprive the claimant of the full extent of his gain from the appropriation, though the courts sometimes give the claimant the benefit of the doubt in determining a fair market value, in order to prevent unjust enrichment and to ensure adequate deterrence.[185] In any case, full restitutionary relief in the form of an account of the defendant's profits is also available in appropriate circumstances.[186] Punitive damages may also be awarded, where appropriate.[187]

[176] *Pirone* v. *MacMillan Inc.* 894 *F* 2d 579 (2nd Cir 1990). See S. A. McEvoy, '*Pirone* v. *Macmillan Inc.*: Trying to Protect the Name and Likeness of a Deceased Celebrity Under Trade Mark Law and the Right of Publicity' (1997) 19 *Comm & L* 51.
[177] *Restatement, Third, Unfair Competition* §§ 46, comment *h*.
[178] Tennessee Code § 47–25–1104 (*Personal Rights Protection Act 1984*).
[179] See, e.g., Indiana Code § 32–13–1–8.
[180] *Restatement, Third, Unfair Competition* § 49 comment *d*.
[181] *Zim* v. *Western Publishing Co.* 573 *F* 2d 1318 (1978) (5th Cir CA), 1327 note 19.
[182] *Restatement, Third, Unfair Competition* § 49 comment *d* and see, e.g., *Cher* v. *Forum Intern Ltd* 692 *F* 2d 634 (CA Cal. 1982).
[183] *Zim* v. *Western Publishing Co.* 573 *F 2d 1318 (1978) (5th Cir CA), 1327 note 19.*
[184] *Restatement, Third, Unfair Competition* § 49 comment *d* and see, e.g., *Canessa* v. *J. I. Kislak Inc.* 97 *NJ Super* 327, 235 *A* 2d 62 (1967).
[185] *Restatement, Third, Unfair Competition* § 49 comment *d*.
[186] *Ibid.* and see, e.g., *Bi-Rite* v. *Button Masters* 578 *F Supp* 59 (SDNY 1983).
[187] See, e.g., *Waits* v. *Frito-Lay Inc.* 978 *F* 2d 1093 (9th Cir 1992).

The balance with freedom of expression

From the earliest cases of appropriation of personality, the courts recognised the tensions between controlling unauthorised appropriation (initially through a right of privacy)[188] and freedom of expression.[189] The First Amendment to the US Constitution provides that Congress shall not make any law abridging freedom of speech or of the press. However, different categories of speech have been held to merit differing degrees of protection.[190] The highest level of protection is given to news, particularly political news. Fictionalised stories (including films, radio and television broadcasts and live entertainment) are given the next highest priority, on the basis that they both inform and entertain, and the courts are wary of drawing a boundary between information and entertainment thus giving entertainment substantial First Amendment protection.[191] Commercial speech or advertising occupies a subordinate position in the scale of First Amendment values.[192] The First Amendment does not protect false and misleading commercial speech[193] and even speech that does not mislead is generally subject to somewhat lesser protection.[194] Thus an individual's right of publicity may often trump the right of advertisers to make use of celebrity figures.[195] The seller's interests in attracting attention to his wares does not outweigh the personal and economic interests protected by the right of publicity.[196]

Liability will generally only arise in most states where an individual's likeness or other indicium is used for the purposes of trade, such as in

[188] See 51 above.

[189] See generally McCarthy, *Rights of Publicity and Privacy*, chs 7 and 8. Cf. S. R. Barnett, 'The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy' (1996) 18 *Hastings Comm & Ent LJ* 593. See also, D. L. Zimmerman, 'Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!' (2000) 19 *De Paul-LCA J Art Ent L* 283; E. Volokh, 'Freedom of Speech and the Right of Publicity' (2003) 40 *Hous. L. Rev.* 903.

[190] P. L. Felcher and E. L. Rubin, 'Privacy, Publicity and the Portrayal of Real People by the Media' (1979) 88 *Yale LJ* 1577, 1597; McCarthy, *Rights of Publicity and Privacy*, 8.12.

[191] *Winters* v. *New York* 333 *US* 507, 510 (1948) ('what is one man's amusement, teaches another's doctrine'); *Zacchini* v. *Scripps-Howard Broadcasting Co.* 433 *US* 562, 578 (1977) ('entertainment itself can be important news').

[192] See *Ohralik* v. *Ohio State Bar Association* 436 *US* 447, 456 (1978), cited by Munro, 'The Value of Commercial Speech', 135–8.

[193] See *Central Hudson Gas & Elec. Corp.* v. *Public Service Commission of New York* 447 *US* 557 (1980), 563; *Florida Bar* v. *Went for It Inc.* 515 *US* 618 (1995).

[194] See generally *44 Liquormart, Inc.* v. *Rhode Island* 517 *US* 484 (1996).

[195] *Comedy III Productions Inc* v. *Gary Saderup Inc.* 106 *Cal Rptr* 2d 126 (Cal. 2001), 133.

[196] *Restatement, Third, Unfair Competition* § 47, comment *a*.

advertising or merchandising,[197] and will not extend to circumstances where the use of a person's identity is primarily for the purpose of communicating information or expressing ideas.[198] This usually excludes use in news reporting, which would cover, for example, photographs of a celebrity's public appearances or public performances.[199] Use of an individual's identity in news is constitutionally immune, as long as the identity bears a reasonable relationship to the 'news'. The notion of news has not been confined to political expression or comment on public affairs[200] and covers all 'matters of public concern'.[201] This tends to be interpreted broadly and in a somewhat circular manner as covering all information on public issues which might be expected to be found in a newspaper or magazine.[202] The US courts are generally reluctant to interfere with the judgment of the press as to what is and is not newsworthy.[203] Although celebrity reportage arguably amounts to little more than gossip which serves no informational purpose and is essentially exploitative in nature,[204] it is given wide latitude. If the use of an individual's identity bears no reasonable relationship to the content of the news, liability may arise for infringement of the right of publicity as an advertisement in disguise, for example where a celebrity's photograph is used on the cover of a magazine even though it does not relate to any news story. However, liability is often avoided given that it is easy to present a tenuous link between a celebrity and a news story.[205]

The courts have held that merchandise such as posters, games or other celebrity memorabilia do not convey speech of any constitutional

[197] See, e.g., *California Civil Code* § 3344 (use of indicia of identity 'on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services') and, e.g., *White* v. *Electronics America, Inc.* 971 *F* 2d 1395, 1401 (9th Cir 1992); New York Civil Rights Law § 51 ('any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade') and, e.g., *Messenger* v. *Gruner & Jahr Printing and Pub.* 208 *F* 3d 122 (2nd Cir 2000).

[198] See generally, *Restatement, Third, Unfair Competition* § 47.

[199] See, e.g., *Titan Sports Inc.* v. *Comics World Corp.* 870 *F* 2d 85 (2nd Cir 1989); *Paulsen* v. *Personality Posters Inc.* 299 *NYS* 2d 501 (1968) (television comedian, who conducted mock campaign for presidency could not prevent marketing of a poster embodying his photograph since it constituted news or information of public interest).

[200] *Time, Inc.* v. *Hill* 385 *US* 374, 388 (1967).

[201] *Dun & Bradstreet Inc.* v. *Greenmoss Builders Inc.* 472 US 749.

[202] See McCarthy, *Rights of Publicity and Privacy*, 8.51.

[203] *Ibid.*, citing D. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell L Rev* 291, 353.

[204] Felcher and Rubin, *Privacy, Publicity and the Portrayal of Real People*, 1602. Cf. Zimmerman, 'Requiem for a Heavyweight', 333; R. Posner, 'The Right of Privacy' (1978) 12 *Ga L Rev* 393, 396.

[205] *McCarthy, Rights of Publicity and Privacy*, 8.59 citing *Booth* v. *Curtis Publishing Co.* 15 *AD* 2d 343.

significance, given that such merchandise conveys no real message.[206] Although a public figure or someone who is presently newsworthy 'may be the proper subject of news or informative presentation' this does not extend to unrelated commercialisation of his identity or surrender of a right to privacy; although his privacy is necessarily limited by the newsworthiness of his activities, he retains the 'independent right to have [his] personality, even if newsworthy, free from commercial exploitation at the hands of another'.[207] Similarly, use of an individual's identity in works of fiction, or in biographies, will usually be allowed, regardless of whether the defendant gains a commercial advantage, since the notion of name, voice or likeness does not extend to a person's life story[208] and any remedy would be limited to those available for defamation or false light invasion of privacy. Expressive works (including non-verbal visual representations) do not lose their constitutional protections when they are for purposes of entertaining rather than informing, although depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected.[209] The right of publicity does not allow a right to control the celebrity's image by censoring disagreeable portrayals; once the celebrity thrusts himself or herself into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope.[210]

Privacy in English law

Four basic objections have traditionally hindered the development of a general right of privacy in English law and the systems that are closely modelled on it. First, the problem of definition, which featured

[206] P. L. Felcher and E. L. Rubin, 'Privacy, Publicity and the Portrayal of Real People by the Media' (1979) 88 *Yale LJ* 1577, 1606; S. J. Hoffman, 'Limitations on the Right of Publicity' (1980) Bull Copyright Soc'y 111, 124; McCarthy, *Rights of Privacy and Publicity*, 7.3.

[207] See *Titan Sports Inc.* v. *Comics World Corp.* 870 *F* 2d 85 (2nd Cir 1989), 88 and the authorities cited.

[208] See, e.g., *Ruffin-Steinback* v. *dePasse* 82 *F Supp* 2d 723 (E. D. Mich. 2000); *Matthews* v. *Wozencraft*, 15 *F* 3d 432 (5th Cir 1994); *Rogers* v. *Grimaldi*, 875 *F* 2d 994 (2nd Cir 1989).

[209] *Comedy III Productions Inc.* v. *Gary Saderup Inc.* 106 *Cal Rptr* 2d 126 (Cal., 2001) (drawings of images of deceased members of comedy act, reproduced on T-shirts sold for commercial gain, contained no significant transformative or creative contribution so as to be entitled to First Amendment protection). Cf. *Hoffman* v. *Capital Cities/ABC Inc.* 255 *F* 3d 1180 (9th Cir 2001).

[210] *Comedy III Productions Inc.* v. *Gary Saderup Inc.* 106 *Cal Rptr* 2d 126 (Cal. 2001), 139.

prominently in committee reports,[211] although the enactment of a new right is a different procedure and process from the elucidation of a concept. There is a fundamental difference between defining x and defining a right to x, whatever x might be and the difficulty of choosing among competing alternative definitions should not be seen as a conclusive objection.[212] Privacy is arguably no less capable of bearing definite legal meanings than other overworked legal concepts such as 'property' or 'reputation, which have been stretched to accommodate interests in personality.[213] This reflects the second, and deeper, underlying problem of conceptual uncertainty and whether privacy is a sufficiently distinctive and coherent value to form the basis of a correspondingly coherent substantive legal right. The attraction of the dominant reductionist approach in the United States lay in the fact that it overcame the inherent vagueness of privacy and reduced the notion to a number of separate rules that protected more readily identifiable interests.[214] The House of Lords has drawn on this experience in questioning the usefulness of any high-level generalisation which can be used to deduce a rule which can be applied to a concrete case.[215] Furthermore, there are difficulties in balancing a right of personal privacy with the wider public interest values in freedom of expression, which, in the abstract, might appear to be of equal weight. This has traditionally been

[211] Younger Committee, *Report on Privacy*, paras 57–73 and para. 665 (the Committee's terms of reference were whether legislation was needed to provide further protection to individual citizens and commercial and industrial interests against intrusion into privacy by private persons and organisations, or by companies). Cf. Calcutt Committee, *Privacy and Related Matters*, paras 12.13–12.18, where the Committee was satisfied that a statutory tort of infringement of privacy could be adequately defined and could specifically relate to the publication of personal information, including photographs, although this reflected a narrower conception of privacy, which in turn reflected the Calcutt Committee's narrower terms of reference than earlier reports (measures needed 'to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, taking account of existing remedies . . .') (*ibid.*, para. 1.1).

[212] N. MacCormick, 'Privacy: A Problem of Definition?' (1974) 1 *JLS* 75, 77.

[213] See D. Seipp, 'English Judicial Recognition of a Right to Privacy' (1983) 3 *OJLS* 325, 331; Calcutt Committee, *Privacy and Related Matters*, para. 12.12. See further 214–17 below.

[214] See 54–8 above. R. Wacks, 'The Poverty of Privacy' (1980) 96 *LQR* 73, 81–6 draws heavily on the American experience in urging that the concept of privacy should not be admitted to English law, arguing that privacy has been confused with other issues, both as a tort law right (for example, with confidentiality, defamation and a proprietary interest in name or likeness) and in the constitutional sphere (for example, with liberties such as freedom from unreasonable search, freedom of association, and freedom of expression) (*ibid.*, 78–81). Wacks argues, privacy is arguably an irredeemably nebulous concept and, whatever its merits as a general abstraction of an underlying value, it should not be used as a means to describe a legal right or cause of action (*ibid.*, 88) and see further Wacks, *Personal Information*.

[215] *Wainwright* v. *Home Office* [2003] *UKHL* 53, para. 18.

regarded as an extension of the judicial role 'too far into the determination of controversial questions of a social and political character',[216] although this problem is obviously not unique to any single legal system. Finally, and most fundamentally, it has been argued that a general right to privacy does not fit easily within English law, which is generally cast in terms of breaches of duties rather than positive declarations of rights,[217] the underlying guiding principle holding that what is not prohibited is permitted.[218]

The last two objections cannot be sustained following the incorporation of the European Convention on Human Rights in the *Human Rights Act 1998* (*HRA*) and the more explicit rights-based approach it entails, which inevitably involves a judicial balancing of competing rights.[219] The *HRA* does not have direct horizontal effect and where there is no cause of action, the *HRA* does not provide a private individual with a cause of action against another private individual for a breach of his Convention rights.[220] The *HRA* does, however, have indirect effect in claims between individuals in that existing law must be interpreted and applied in a way that achieves compatibility with the Convention values.[221] The rights which Articles 8 and 10 protect are absorbed in the established causes of action, giving them a new strength and breadth to accommodate the requirements of the Convention. This requires a generous approach to the situations in which privacy is protected, while maintaining the appropriate balance with freedom of expression.[222]

The English courts have explicitly rejected a general tort of invasion of privacy.[223] In the absence of such a tort, English law has protected

[216] Younger Committee, *Report on Privacy*, paras 652–3. Cf. *Report of the Committee on Privacy and Related Matters*, Cm 1102, 1990 (Calcutt Committee) paras 12.24–12.29.

[217] See Calcutt, *ibid.*, para. 12.15; Winfield, 'Privacy', 24.

[218] See, e.g., *Attorney-General* v. *Guardian Newspapers Ltd (No 2)* [1988] 3 *All ER* 545, 596 *per* Donaldson M. R.; *Douglas* v. *Hello! Ltd (No 1)* [2001] 2 *WLR* 992, 1009 *per* Brooke LJ. *Report of the Committee on Privacy* Cmnd. 5012, 1972; Younger Committee, *Report on Privacy*, para. 35 and see, generally, A. Lester and D. Oliver (eds), *Constitutional Law and Human Rights* (London, 1997), 102. Cf. N. MacCormick, 'A Note Upon Privacy' (1973) 89 *LQR* 23; N. S. Marsh, 'Hohfeld and Privacy' (1973) 89 *LQR* 183.

[219] See 90–2 below.

[220] See M. Hunt, 'The "Horizontal Effect" of the *Human Rights Act*' [1998] *PL* 423, 438; I. Leigh, 'Horizontal Rights, The *Human Rights Act* and Privacy: Lessons From the Commonwealth' (1999) 48 *ICLQ* 57, 84–5.

[221] *Campbell* v. *MGN Limited* [2004] UKHL 22, paras 17 and 132; *A* v. *B Plc* [2002] *EWCA Civ* 337, para. 4 and see A. L. Young, 'Remedial and Substantive Horizontality: The Common Law and *Douglas* v. *Hello! Ltd*' [2003] *PL* 232; J. Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 *CLJ* 444; G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act' (2003) 66 *MLR* 726, 729–32.

[222] *A* v. *B* [2002] 3 *WLR* 542, 548–9.

[223] *Wainwright* v. *Home Office* [2003] *UKHL* 53; 1137; *Campbell* v. *MGN Limited* [2004] *UKHL* 22.

interests in privacy in piecemeal fashion in several disparate areas.[224] For some time, it has been somewhat misleading to state that there is no law of privacy, the relevant question being the extent of the piecemeal protection and the capability of the law to develop.[225] Protection has largely been achieved through casuistic applications of existing causes of action, not always under explicit 'privacy' rubric. Legislative reform has not been forthcoming, despite the fact that the principle has not been in dispute.[226]

Piecemeal statutory provisions

Section 85 of the *Copyright Designs and Patents Act 1988* allows a limited right of privacy to a person who, for private and domestic purposes, commissions the taking of a photograph or the making of a film. The commissioner is entitled to prevent copies of the photograph being issued to the public, having the work exhibited or shown in public, or broadcast or included in a cable programme service, subject to some exceptions, such as the incidental inclusion of the photographs or films in another copyright work, and acts done under statutory authority.[227] This provision is not so much a matter of principle but a consequence of the change in first ownership of copyright in the 1988 Act. Under the *Copyright Act 1956*, section 4, the commissioner of the photograph was the first owner, and was consequently able to control any unauthorised exploitation of the copyright work. The shifting of first ownership from the commissioner to the author made it necessary to provide the commissioner with a limited right of privacy to maintain the same position as under the 1956 Act.[228]

The most important statutory provision in practice is the *Data Protection Act 1998*, which regulates many activities involved in the holding and processing of personal data.[229] Although not ostensibly concerned with personal privacy, the Act implements EU Council Directive 95/46, which makes explicit reference to the underlying object of national laws on the

[224] See generally M. Tugendhat and I. Christie (eds), *The Law of Privacy and the Media* (Oxford, 2002); Seipp, 'Right to Privacy'; R. Singh and J. Strachan, 'The Right to Privacy in English Law' [2002] *EHRLR* 129; Justice, *Privacy and the Law*, ch. 4.

[225] J. Steyn, 'Does Legal Formalism Hold Sway in England?' [1996] *CLP* 43, 54. Cf. R. Wacks, *The Protection of Privacy* (London, 1980), 5.

[226] *Report of the Committee on Privacy* Cmnd. 5012, 1972, para. 662.

[227] *CDPA* 1988, s. 85(2).

[228] An unsuccessful attempt was made to expand these limited provisions: see Photographs and Films (Unauthorised Use) Bill 1994. For the Lords debates see *Hansard, Fifth Series*, *HL*, vol. 552, cols 919–930, 28 February 1994; *Hansard, Fifth Series*, *HL*, vol. 553, cols 74–84, 18 March 1994; *Hansard, Fifth Series*, *HL*, vol. 554, cols 1625–36, 11 May 1994.

[229] See generally Tugendhat and Christie, *Privacy and the Media* Part II and A. White, 'Data Protection and the Media' [2003] *EHRLR* Special Issue 25.

processing of personal data: the protection of the right of privacy, as recognised by Article 8 of the European Convention on Human Rights, and 'the general principles of Community law'. The Act provides a right of access to personal data,[230] a right to prevent processing likely to cause damage or distress,[231] and a right to compensation. This right to compensation includes compensation for distress, regardless of damage, where the contravention relates to special purposes,[232] as defined in section 3, that is, journalistic, artistic or literary purposes. The Act provides that personal data should be processed fairly and lawfully and should not be processed unless the data subject has given his consent to the processing.[233] 'Personal data' means data that relate to a living individual who can be identified from the data or from the data and other information which is in the possession of, or is likely to come into the possession of, the data controller[234] and clearly includes photographs of an individual.[235] This is subject to a possible exception for special purposes such as the publication of journalistic, literary or artistic material, where the data controller reasonably believes that, having regard, in particular, to freedom of expression, publication would be in the public interest and that compliance would be incompatible with the special purposes.[236] This extends to the publication itself and is not confined to processing before publication, an approach which would radically restrict the freedom of the press.[237] This defence was available in a case involving the disclosure of details of a celebrity model's attendance at meetings of Narcotics Anonymous where the disclosure formed part of a journalistic package which revealed, contrary to her previous public pronouncements, the model's drug addiction and which would be reasonable to publish in the public interest.[238] However, this did not extend to magazine publications of photographs of a celebrity wedding, where there was no evidence of any reasonable belief on the part of the data controller that the publication, although possibly of public interest, would be in the public interest.[239]

[230] *Data Protection Act 1998*, s. 7. [231] *Data Protection Act 1998*, s. 11.
[232] *Data Protection Act 1998*, s. 13(2).
[233] See *Campbell* v. *MGN* [2002] *EWCA Civ* 1373 (the decision of the Court of Appeal was reversed, although purely on grounds of breach of confidence: *Campbell* v. *MGN Ltd* [2004] *UKHL* 22 and see 88 below).
[234] *Durant* v. *Financial Services Authority* [2003] *EWCA Civ* 1746 paras 21–31; [2004] *FSR* 573, 584.
[235] *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786 (Ch) and see generally, S. Boyd and R. Jay, 'Image Rights and the Effect of the *Data Protection Act 1998*' (2004) *Ent LR* 159.
[236] *Data Protection Act 1998*, s. 32(1).
[237] *Campbell* v. *MGN* [2002] *EWCA Civ* 1373, paras 108–28.
[238] *Ibid.*, paras 137 and 56.
[239] *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786 (Ch), para. 231.

Further, while the defendants did have a legitimate interest in including coverage of the claimants' wedding in their magazine, the processing of the data could not be regarded as fair given the circumstances in which the photographs were obtained and the prejudice to the rights and legitimate interests of the data subjects.[240] Thus there could be no defence to claims for compensation under section 13(1) of the Act.

Common law protection of privacy

Privacy and interests in property, trespass and nuisance Early English authorities denied the existence of a right of privacy relating to property.[241] For example, in *Chandler* v. *Thompson*,[242] Le Blanc J stated that, although an action for opening a window to disturb the claimant's privacy was to be found in the books, he had never known such an action to be maintained and later, in *Tapling* v. *Jones*, Baron Bramwell unequivocally stated that privacy was not a right, and that intrusion on it was no wrong or cause of action.[243] However, interests in privacy were seemingly, though not always explicitly, protected when a substantive cause of action such as trespass[244] or nuisance[245] could be established,[246] reflecting the primacy traditionally given to property interests.

Personal privacy and defamation

Interests in reputation, protected by the tort of defamation, have occupied a central position in relation to the problem of appropriation of personality in English law and the systems which follow it, to the extent that recovery for damage to any other interests such as privacy and freedom from mental distress has traditionally been parasitic upon the recovery for injury to reputation. In the United States, the tort of defamation has played a relatively limited role in this area,[247] although claims for

[240] *Ibid.*, para. 238.
[241] See generally P. H. Winfield, 'Privacy' (1931) 47 *LQR* 23, 24–30, and Seipp, 'Right to Privacy', 334–7.
[242] (1811) 3 *Camp* 80 at 82, 170 *ER* 1312, 1313.
[243] (1865) 11 *HLC* 290 at 305, 11 *ER* 1344, 1350.
[244] See, e.g., *Hickman* v. *Maisey* [1900] 1 *QB* 752; cf. *Bernstein* v. *Skyviews & General Ltd* [1978] *QB* 479 and see, also, *R* v. *Broadcasting Complaints Commission; Ex parte Barclay* [1997] *EMLR* 62.
[245] See, e.g., *Walker* v. *Brewster* (1867) *LR* 5 *Eq* 2, 26; cf. *Victoria Park Racing and Recreation Co.* v. *Taylor* (1937) 58 *CLR* 479, 495–6 and 517; *Hunter* v. *Canary Wharf* [1997] *AC* 655.
[246] See Tugendhat and Christie, *Privacy and the Media*, 4–6.
[247] See generally McCarthy, *The Rights of Publicity and Privacy*, § 5.97.

defamation have occasionally been made to substitute for claims of invasion of privacy[248] or to supplement claims for invasion of privacy where the conduct of the defendant injured both interests in reputation and interests in privacy.[249]

It has been noted that 'reputation is an integral and important part of the dignity of the individual . . .', which 'forms the basis of many decisions in a democratic society which are fundamental to its well-being'.[250] Damage to a person's reputation '[c]annot be measured as harm to a tangible thing is measured' and, special damages apart, reputation and money are not commensurables.[251] Moreover, a claimant in a defamation action is not compensated for his damaged reputation, but 'gets damages because he was injured in his reputation, that is, simply because he was publicly defamed'. Compensation by damages serves a twofold function: 'as a vindication of the claimant to the public and as a consolation to him for a wrong done. Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money'.[252] Historically, a cause of action for defamation arose 'for the economic or social damage done to the claimant through the withdrawal of third parties from some relationship with him',[253] rather than an insult or injury to the claimant's feelings. Since the common law remedy was an action on the case, damage was the gist of the action and was construed in a narrow, proprietary sense.[254] Consequently, it was necessary that there be publication to some third party, truth was a defence to the action, and the action died with the person.[255] These roots account for the fundamental difference between an injury to reputation and an invasion of privacy. The proprietary notion of reputation, focusing on the economic damage, formed the basis of the cause of action, and redress for damage to purely dignitary interests such as privacy or freedom from mental distress is a feature of rather more mature legal systems. In modern actions for libel it is not necessary for the claimant to prove that the words caused him actual damage, since the law

[248] See, e.g., *Sperry Rand Corp.* v. *Hill* 356 *F* 2d 181 (1966) (privacy claim failed on basis of estoppel).
[249] See, e.g., *Russell* v. *Marboro Books* 183 *NYS* 2d 8 (1959); *Newcombe* v. *Adolf Coors Co.* 157 *F* 3d 686 (9th Cir 1998).
[250] *Reynolds* v. *Times Newspapers* [1999] 3 *WLR* 1010, 1023, *per* Lord Nicholls.
[251] *Uren* v. *John Fairfax & Sons Pty Ltd* (1965–6) 117 *CLR* 118, 150 (High Ct of Aus.) *per* Windeyer J. (the case concerned the availability of punitive damages in defamation, where the High Court of Australia declined to follow the limitations placed by the House of Lords in *Rookes* v. *Barnard* [1964] *AC* 1129).
[252] *Ibid.* Cf. 2–3 above.
[253] J. H. Baker, *An Introduction to English Legal History* (3rd edn) (London, 1990), 509.
[254] W. S. Holdsworth, 'Defamation in the Sixteenth and Seventeenth Centuries' (1924) 40 *LQR* 302, 304.
[255] *Ibid.*

will presume that some general damage has resulted from the wrong,[256] although in cases of slander the claimant has to prove special damages, except in the limited cases where slander is actionable *per se*.[257]

The English case law relating to commercial appropriation of personality suggests that the tort of defamation has essentially been doing the work of more than one tort.[258] In some cases the notion of an injury to reputation has been stretched to encompass other interests, with two unfortunate consequences. First, there is a lack of realism when the facts of a particular case are stretched as far as possible in order to comply with the requirements of the tort of defamation, leading to exaggerated claims of injuries to reputation.[259] Second, where the facts of a case do not disclose a cause of action in defamation, or where the courts are not willing to take a liberal approach as to what constitutes an injury to reputation, claimants are denied a remedy which might otherwise be available under a different head of liability. Despite occasional expressions of disapproval of the conduct of the defendants[260] the English courts have been reluctant to go beyond the traditional causes of action.

There is no definitive or consistent definition of a defamatory statement,[261] and in cases of appropriation of personality the rather flexible

[256] *Ratcliffe* v. *Evans* [1892] 2 *QB* 524, 529 *per* Bowen LJ; *Hayward & Co.* v. *Hayward & Sons* (1887) 34 *Ch D* 198, 207, *per* North J.

[257] See B. Neill and R. Rampton, *Duncan and Neill on Defamation* (2nd edn) (London, 1983), 21.

[258] Cf. Barendt, 'Privacy and the Press', 26, making a similar argument in relation to privacy, defamation and the public disclosure of embarrassing private facts. See also Brittan, 'The Right to Privacy', 258–9.

[259] See, e.g., *Honeysett* v. *News Chronicle Times* 14 May 1935; *Hood* v. *W. H. Smith & Son Ltd Times* 5 November 1937. Of course, exaggerated claims of mental distress might be made under other bases of liability such as invasion or privacy, or appropriation of personality, for the purposes of maximising damages. Cf. *Roberson* v. *Rochester Folding Box Co.* 171 *NY* 538 (1902) 50–1 above.

[260] See, e.g., Greer LJ in the Court of Appeal in *Tolley* v. *Fry & Sons* [1930] 1 *KB* 467, 477–8; *Dockrell* v. *Dougall* (1899) 15 *TLR* 333, 334 (CA); *Sim* v. *H. J. Heinz & Co. Ltd.* [1959] 1 *WLR* 313, 317 (action for libel and passing off). See also *Charleston* v. *News Group Newspapers Ltd.* [1995] 2 *WLR* 450, 452 *per* Lord Bridge.

[261] See *Berkoff* v. *Burchill* [1996] 4 *All ER* 1008, 1011 *per* Neill LJ. A number of judicial formulations are commonly cited. See, e.g., *Sim* v. *Stretch* (1936) 52 *TLR*, per Lord Atkin '[w]ould the words tend to lower the plaintiff in the estimation of right thinking members of society generally?'; *Parmiter* v. *Coupland* (1840) 6 *M&W* 108, *per* Parke B (statement which exposes the claimant to 'hatred, contempt or ridicule'); *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 *TLR* 581, 584, *per* Scrutton LJ adopting Cave J's formulation in *Scott* v. *Sampson* (1882) 8 *QBD* 491, 503 (a man's 'right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit'. Cf. Faulks, *Report of the Committee on Defamation* (1975) Cmnd. 5909 paras 61–2 (notion of 'discredit' vague and imprecise). See generally, Neill and Rampton, *Defamation*, ch. 7; P. Milmo and W. V. H. Rogers, *Gatley on Libel and Slander* 10th edn (London, 2004), ch. 2.

notion of an injury to reputation has been stretched to cover what might be regarded as interests in personal privacy. In some cases a clear injury to reputation can be seen. For example, in the leading early case, *Tolley* v. *Fry & Sons*, a prominent amateur golfer successfully argued that the use of his caricature in an advertisement for chocolate was defamatory in that it suggested that he had compromised his reputation as an amateur sportsman (which was construed strictly at the time) by allowing his portrait to be used in the advertisement for payment or reward.[262] The decision prompted some commentators to advocate invasion of privacy as an alternative basis of liability in English law,[263] which, at the time, had been almost completely destitute of literature on the subject, even though invasion of privacy was firmly established as a cause of action in many jurisdictions in the United States at the time.[264] In other cases the courts seemed to be stretching the notion of injury to reputation to its limits, when a claim based on invasion of privacy might be more realistic, for example, where a claimant suffered from mockery and ridicule at being depicted in an advertisement, leading to injury to what might, at most be regarded as injured feelings.[265] The line between mockery and defamation is often difficult to draw and, when this is the case, the matter should be left to the jury to decide.[266]

The borderline between defamation and privacy is often difficult to draw, particularly 'false light' invasion of privacy which, like defamation, protects interests in personal reputation.[267] In many states in the United States a person giving publicity to a matter concerning another, which places the other before the public in a false light, is liable for an invasion of privacy if the false light in which the other was placed would be highly objectionable to a reasonable person and if the defendant acted

[262] *Tolley* v. *Fry & Sons Ltd* [1931] *AC* 333. See also *Honeysett* v. *News Chronicle, Times*, 14 May 1935; *Stockwell* v. *Kellog Company of Great Britain, Times*, 31 July 1973; *Debenham* v. *Anckorn, Times*, 5 March 1921; *Garbett* v. *Hazell, Watson & Viney Ltd & Others* [1943] 2 *All ER* 359; *Khodaparast* v. *Shad* [2000] *EMLR* 265. Cf. *O'Shea* v. *MGN Ltd and Free4internet.net Ltd* [2001] *EMLR* 943.

[263] See P. H. Winfield, 'Privacy' (1931) 47 *LQR* 23 (commenting on the decision of the Court of Appeal: [1930] 1 *KB* 467); Note (Anonymous) (1930) *ALJ* 359.

[264] See 48–53 above and see also 'Is this Libel? More About Privacy' (1894) 7 *HarvLRev* 492, commenting on *Monson* v. *Tussauds Ltd* [1894] 1 QB 671; and 'The Right to Privacy' (1898) 12 *HarvLRev* 207, commenting on *Dockrell* v. *Dougall* (1897) 78 *LT* 840. Both notes observed the English courts' reluctance to go beyond the bounds of the tort of defamation.

[265] See, e.g., *Plumb* v. *Jeyes Sanitary Compounds Co. Ltd, Times*, 15 April 1937.

[266] *Berkoff* v. *Burchill* [1996] 4 *All ER* 1008, 1011 *per* Millett LJ.

[267] For a detailed account of the development of this branch of privacy law see D. Zimmerman, 'False Light Invasion of Privacy: The Light That Failed' (1989) 64 *NYUL Rev* 364.

knowingly or in reckless disregard of the falsity of the publicised matter, and the false light in which the other would be placed.[268] Thus the interest protected by the false light tort of invasion of privacy is an individual's interest in not being made to appear before the public in an objectionable false light or false position. Although in many cases such false publicity might be defamatory, it is not necessary for the claimant to be defamed to maintain an action for false light invasion of privacy. It is enough that he is given unreasonable and highly objectionable publicity which places him in a false light in the eyes of the public, due to the attribution of false characteristics, conduct or beliefs.[269]

A false light privacy claim seems to add very little to the existing law of defamation. Many defamation cases could be recategorised as 'false light' cases, providing that the false light in which the claimants were placed would be such that a reasonable person would find offensive. Thus, some borderline cases that might not otherwise have been brought might succeed as false light claims. It would at least allow the courts to recognise the claims more openly as claims of 'invasion of privacy', rather than stretching the ambit of the tort of defamation through a benevolent interpretation of some of the claims. In turn, this would at least save the claimants from overstating injuries to reputation,[270] although such exaggerated claims might continue to be made in privacy actions in order to convince the courts that claimants might have suffered mental distress or indignity. Apart from the extra flexibility, which would spare the courts from having to construe claims in highly artificial ways (the benefits of which would obviously have to be balanced against the increased confusion and uncertainty accompanying a new alternative basis of liability), it would seem that little would be gained by the recognition of such a cause of action. Moreover, if the interests in question are interests in *reputation*, then protection should be secured through the tort of defamation, rather than through a nebulous and arguably superfluous new category.[271] Indeed, there is much scepticism concerning the utility of the false light category.[272] The prevailing view has been that 'false light' should be regarded as an aspect

[268] *Restatement, Second, Torts* (1977) § 652 E. [269] *Ibid.*, comment *b*.
[270] See note 259 above. [271] See Barendt, 'What is the Point of Libel Law?' 125.
[272] See R. Wacks, 'The Poverty of Privacy' (1980) 96 *LQR* 73, 84; G. Dworkin, 'The Common Law Protection of Privacy' (1967) 2 *U Tas LR* 418, 426. Zimmerman, 'False Light', argues that the false light branch of privacy lacks justification and resulted from the courts' desire to give claimants greater control over unwanted publicity, rather than through principled development, and is often at odds with the constitutional free speech guarantees.

of defamation, rather than privacy,[273] and that the two concepts should be kept separate, given concerns about threats to freedom of speech if the safeguards built into the law of defamation were put in jeopardy by the process of subsuming defamation into a wider tort, which was implied by the doctrine of false light. Indeed these reasons underlie the refusal of some United States jurisdictions to recognise the false light branch of the privacy tort.[274]

Personal privacy and breach of confidence

Breach of confidence has long protected a diverse collection of interests, ranging from primarily economic interests in trade secrets, government information, artistic and literary confidences through to personal information concerning an individual's dignity and autonomy.[275] As with many aspects of privacy, there is no 'bright line between the personal and the commercial'[276] and both economic and non-economic aspects will come into play. The role that the action for breach of confidence plays in protecting interests in privacy has long been openly acknowledged as offering the most effective protection for privacy interests.[277] The early English authorities on breach of confidence formed the principal basis of a right to privacy in the United States.[278] The English

[273] *Report of the Committee on Privacy* (Cmnd. 5012) (1972) paras 71–2. The Faulks Committee on Defamation shared the view that defamation and privacy should remain separate and that any definition of a defamatory statement would not be improved by the inclusion of the notion of being placed in a false light. However, it was noted that when a person is placed in a false light he may be defamed, although, equally, he may be accorded esteem which he does not deserve to enjoy. In this respect, the Committee argued, it is somewhat misleading to regard the placing of someone in a false light as an aspect of defamation (*Report of the Committee on Defamation* (London, 1975) Cmnd. 5909, paras 67–70). See also *Report of the Committee on Privacy and Related Matters* Cm 1102 (London, 1990) paras 7.1–7.2. (Calcutt Committee) noting the overlap between intrusions of privacy and defamation but stressing the fact that improvements in the law of defamation would not resolve many of the problems of intrusion into privacy since privacy and reputation are distinct interests.

[274] *Lake* v. *Wal-Mart Stores Inc.*, 582 *NW* 2d 231 (Minn 1998) (Minnesota); *Cain* v. *Hearst Corp.* 878 *SW* 2d 577 (Tex 1994) (Texas); *Renwick* v. *News and Observer Publishing Co.* 312 *SE* 2d 405 (NC 1984) (North Carolina). Cf. D. McLean, 'False Light Privacy' (1997) 19 *Comm & L* 63.

[275] See Tugendhat and Christie, *Privacy and the Media*, paras 6.26–7.

[276] *Douglas* v. *Hello! Ltd (No. 1)* [2001] 2 *WLR* 992, 1030.

[277] *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 *AC* 109, 255 *per* Lord Keith and see G. W. Paton, 'Broadcasting and Privacy' (1938) 16 *Can Bar Rev* 425, 433; *Report of the Committee on Privacy* Cmnd. 5012, 1972 (Younger Committee), para. 87 and cf. R. Wacks, 'The Poverty of Privacy' (1980) 96 *LQR* 73, 81–2.

[278] *Prince Albert* v. *Strange* (1848) 2 *DeG & Sm* 652, 64 *ER* 293; (1849) 1 *Mac & G* 25, 41 *ER* 1171 and see 49 above.

courts, on the other hand, extended protection to what may be regarded as privacy interests, typically in cases involving sensitive information relating to private domestic relationships,[279] while gradually becoming more explicit in acknowledging the role that breach of confidence plays.[280] In a more recent phase of development, breach of confidence has been given a new breadth and strength in the wake of the *Human Rights Act 1998* in a series of cases involving press intrusion and the disclosure of private facts,[281] although the courts have denied any need, or power, to develop a separate all-embracing cause of action for invasion of privacy.[282]

According to the classic formulation, three key elements are required to establish a breach of confidence action. The information concerned must have: (i) the necessary quality of confidence about it; (ii) been imparted in circumstances importing an obligation of confidence; and (iii) been used without authorisation, possibly to the detriment of the party communicating it.[283] However, the courts acknowledged the artificiality of relying on the violation of a confidential relationship,[284] which would obviously need to be abandoned to develop breach of confidence into an effective remedy for invasion of privacy. A broader general principle developed whereby a duty of confidence would arise when 'confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others'.[285] This principle

[279] See, e.g., *Argyll* v. *Argyll* [1967] *Ch* 302 (marital confidences); *Stephens* v. *Avery* [1988] *Ch* 449 (lesbian relationship); *Barrymore* v. *News Group Newspapers Ltd* [1997] *FSR* 600 (homosexual relationship); *Blair* v. *Associated Newspapers Plc* (*QBD*, 13 November 2000) (family life); *A* v. *B* [2000] *EMLR* 1007 (private diary). Cf. *Lennon* v. *News Group Newspapers Ltd* [1978] *FSR* 573 (marital confidences).

[280] See, e.g., *Hellewell* v. *Chief Constable of Derbyshire* [1995] 1 *WLR* 804, 807 (*per* Laws J); *R* v. *Department of Health, Ex parte Source Informatics Ltd* [2001] *QB* 424, 440, *per* Simon Brown LJ. See also R. Wacks, *Personal Information*, (Oxford, 1989), ch. 3; H. Fenwick and G. Phillipson, 'Confidence and Privacy: A Re-Examination (1996) 55 *CLJ* 447; N. L. Wee Loon, 'Emergence of a Right to Privacy From Within the Law of Confidence?' [1996] *EIPR* 307. Cf. W. Wilson, 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53 *MLR* 43.

[281] *Campbell* v. *MGN Limited* [2004] *UKHL* 22; *A* v. *B Plc* [2002] 2 All ER 545; *Theakston* v. *MGN Ltd* [2002] *EMLR* 398.

[282] *Wainwright* v. *Home Office* [2003] *UKHL* 53; *A* v. *B Plc* [2002] 2 *All ER* 545, para. 11 *per* Lord Woolf CJ.

[283] *Coco* v. *A. N. Clark Engineers Ltd* [1969] *RPC* 41, 47.

[284] See *Stephens* v. *Avery* [1988] *Ch* 449 and see *Campbell* v. *MGN Limited* [2004] *UKHL* 22, para. 46 *per* Lord Hoffmann.

[285] *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 *AC* 109, 281, *per* Lord Goff.

could cover surreptitiously obtained information, such as unauthorised photographs of a film set[286] and a photographic shoot.[287]

The case law following the HRA has involved more radical developments. In a case with rather exceptional facts an injunction was granted, *contra mundum*, preventing the threatened disclosure by the media of the identities and whereabouts of two young men convicted of murder, where there was a real risk of physical injury or death.[288] The injunction was granted regardless of the circumstances in which the information was obtained, in that there was no disclosure in breach of a relationship of trust or confidence and no surreptitious acquisition, and was based on the damage that would result from the disclosure of the information in question.[289] Further expansion has followed in cases of invasion of privacy by disclosure of private facts to the point where the need for the existence of a confidential relationship should not give rise to problems. Under the new formulation, a duty of confidence will arise whenever the party subject to the duty is in a situation where a person can reasonably expect his privacy to be protected.[290] While the necessary relationship can be expressly created its existence will more often be inferred from the facts, depending on the circumstances of the relationship between the parties at the time of the threatened or actual breach of the alleged duty of confidence.[291] An unjustifiable intrusion into an individual's informational autonomy in a situation where a claimant can reasonably expect his privacy to be respected will give rise to liability.[292]

Thus, the second limb of the classic formulation[293] (that the information is disclosed in circumstances importing an obligation of confidence) is practically subsumed by the first limb (that the information has the necessary quality of confidence).[294] This effectively makes breach of confidence virtually indistinguishable from a pure privacy tort.[295] Under the expanded approach it will, in most cases, be obvious

[286] *Shelley Films Ltd* v. *Rex Features Ltd* [1994] *EMLR* 134, 144–50.
[287] *Creation Films Ltd* v. *News Group Newspapers Ltd* [1997] *EMLR* 444, 451–5.
[288] *Venables* v. *News Group Newspapers* [2001] *WLR* 1038. Cf. *Mills* v. *News Group Newspapers Ltd* [2001] *EMLR* 145.
[289] See Phillipson, 'Towards a Common Law Right of Privacy', 745; Tugendhat and Christie, *Privacy and the Media*, 261.
[290] *Campbell* v. *MGN Limited* [2004] *UKHL* 22, para. 85, citing with approval *A* v. *B plc* [2002] 2 *All ER* 545, 553, paras 11(ix) and (x) *per* Woolf CJ.
[291] *Ibid.* [292] *Campbell* v. *MGN Ltd* [2004] *UKHL* 22, para. 21, para. 85 and para. 134.
[293] See text accompanying note 283 above.
[294] See *Douglas* v. *Hello! Ltd* [2005] *EWCA Civ* 595, para. 83 and for a detailed analysis see Phillipson, 'Towards a Common Law Right of Privacy', 746.
[295] See Phillipson, *ibid.*, 746 and see *Campbell* v. *MGN Ltd* [2004] *UKHL* 22, para. 21 *per* Lord Nicholls '[t]he essence of the tort is better encapsulated now as misuse of private information'.

where there is a private interest worthy of protection and where it is not, the weakness of the privacy claim will reflect the fact that it is outweighed by a claim based on freedom of expression.[296] One practical test, borrowed from an Australian case, is whether 'disclosure or observation of the information or conduct would be highly offensive to a reasonable person of ordinary sensibilities'.[297] However, such a test is not needed where the information can easily be identified as private and the individual concerned can reasonably expect his privacy to be respected.[298] In such a case it will not be necessary to consider whether it would be highly offensive for such information to be published and the relevant question would, in any case, be what effect such disclosure would have on the mind of the person affected by the publicity, rather than the mind of a reader.[299]

Information may appear in a variety of forms and media and the duty of confidence will clearly extend to photographic images[300] taken surreptitiously.[301] Special considerations apply to photographs, given that they are a particularly intrusive means of invading privacy, enabling a viewer to act as a spectator or voyeur. This is particularly true in cases where a telephoto lens can give access to scenes where those photographed could reasonably expect that their actions would be private.[302] In *Campbell* v. *MGN Limited*, photographs were taken of the claimant model, in a public place, outside the premises where she had been receiving therapy for drug addiction. While the taking of such photographs had to be seen as one of the ordinary incidents of living in a free community, the real issue was whether subsequent dissemination of the photographs in conjunction with the article could be regarded as offensive.[303] There would be no grounds of complaint if the photographs had been taken by a passer-by and published simply as a street scene. The mere fact of covert

[296] *A* v. *B plc* [2002] 2 *All ER* 545, 552 para. 11 (vii) *per* Lord Woolf CJ; *Campbell* v. *MGN Ltd* [2004] *UKHL* 22, para. 92 and see 217–24 below.

[297] *Campbell* v. *MGN Ltd* [2002] *EWCA Civ* 1373, para. 48; *A* v. *B plc* [2002] 2 *All ER* 545, 553 para. 11 (vii) citing the dictum of Gleeson CJ in *Australian Broadcasting Corp* v. *Lenah Game Meats Pty Ltd* (2001) 185 *ALR* 1, 13. Cf. *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786 (Ch) para. 192.

[298] *Campbell* v. *MGN Limited* [2004] *UKHL* 22, paras 94–6 (details of treatment of therapy for drug addiction at Narcotics Anonymous equally private as details of a condition administered by medical practitioners).

[299] *Ibid.*, para. 99.

[300] *Campbell* v. *MGN Limited* [2004] *UKHL* 22, para. 72.

[301] See *Creation Records Ltd* v. *News Group Newspapers Ltd* [1997] *EMLR* 444, 451–55; *Shelley Films Ltd* v. *Rex Features Ltd* [1994] *EMLR* 134, 148–50 and see R. G. Toulson and C. M. Phipps, *Confidentiality* (London, 1996), 103. Cf. R. Arnold, 'Circumstances Importing an Obligation of Confidence' (2003) 119 *LQR* 193, 196.

[302] *Douglas* v. *Hello! Ltd* [2005] *EWCA Civ* 595, para. 84.

[303] *Campbell* v. *MGN Limited* [2004] *UKHK* 22, para. 122 *per* Lord Hope.

photography is not sufficient to make the information contained in the photograph confidential and a picture of the claimant going about her business in a public street would not have given rise to a complaint.[304] However, the photographs in question were taken deliberately, in secret, by telephoto lens, with a view to their publication in conjunction with a newspaper article revealing details of drug therapy. Any person in the claimant's position (assuming that she was of ordinary sensibilities and also that she had been photographed surreptitiously outside the place where she had been receiving therapy) would be distressed on seeing the photographs and would have regarded this as a gross interference with her right of respect for her private life.[305] The House of Lords applied the same process of reasoning which had led to the findings in *Peck* v. *United Kingdom* that there had been a breach of the applicant's rights under Article 8, where the applicant had been denied a remedy in domestic law to prevent the dissemination of closed circuit television images of the events immediately following a suicide attempt in a public place.[306] The widespread publication of a photograph that reveals an individual to be in a situation of humiliation or severe embarrassment, even if taken in a public place, or the publication of a photograph taken by intrusion into a private place may be an infringement of the privacy of that individual's personal information.[307] The fact that the claimant is in a public place does not negate all elements of privacy.[308]

In *Douglas* v. *Hello! Ltd* the claimants had sold exclusive rights to the publication of wedding photographs to a magazine for a substantial sum of money. The photographs could clearly constitute information for the purposes of the law of confidence[309] and the test to be applied, following the House of Lords decision in *Campbell*, was whether the defendants, a rival magazine that had published surreptitiously taken photographs, knew, or ought to have known, that the claimants had a reasonable expectation that the information would remain private. The fact that the claimants had contracted to publish certain authorised selections of their wedding photographs did not negate their claim that the events at their wedding were private or confidential. The potential for distress at

[304] *Ibid*., para. 154 *per* Lady Hale, contrasting the position in France and Quebec (see ch. 5 below).
[305] *Campbell* v. *MGN Limited* [2004] *UKHL* 22, paras 122–4.
[306] [2003] *EMLR* 287.
[307] *Campbell* v. *MGN Limited* [2004] *UKHL* 22, para. 74 *per* Lord Hoffman. Cf. *Wainwright* v. *Home Office* [2003] *UKHL* 53, para. 51.
[308] Cf. 116 and 172 below.
[309] *Douglas* v. *Hello! Ltd* [2005] *EWCA Civ* 595, para. 95. Cf. *Theakston* v. *MGN Ltd* [2002] *EMLR* 398 paras 77–9 (publication of photographs depicting claimant's activities in a brothel restrained, but not a narrative account of what happened) and see Tugendhat and Christie, *Privacy and the Media*, 234.

seeing the publication of other photographs taken on the same occasion would, however, be reduced, a factor that would be relevant in considering damages (the modest awards of £3,750 for each of the claimants were not challenged), but not the question of liability. Significantly, the Court of Appeal in *Douglas* recognised that commercial interests could be protected from unauthorised exploitation. There was no reason why the law should not protect an individual's opportunity to profit from confidential information in the same way in which it would protect the opportunity to profit from confidential information in the nature of a trade secret. Where an individual: (i) has private or personal information which (ii) he intends to profit from commercially by using or publishing that information and (iii) where access to such information can be denied to third parties then a defendant who knows, or ought to be aware, of such matters and has knowingly obtained such information will be liable if he uses of publishes such information to the detriment of the individual concerned.[310]

Crucially, however, such a right could not be regarded as a property right that could be owned or transferred. According to the Court of Appeal, the claimants' interest in the private information about details of their wedding was not based on a proprietary or intellectual property right. The right (reflecting its equitable origins) was based on the effect on the publisher's conscience of the knowledge of the nature of the information and the circumstances in which the information was obtained. On a detailed analysis of the contract which granted exclusive photographic rights, entered into between the claimants and the magazine, it was held that the contract did not transfer or share the right to use any photographic information other than selected photographs approved by the claimants for publication. The grant of the right to use the approved photographs (copyright in respect of which was retained by the claimants) was simply an exclusive licence to exploit the photographs commercially for a nine month period. Such a licence did not carry with it the right to sue a third party for infringement. The unauthorised photographs published by the defendants invaded the area of privacy which the claimants had chosen to retain and it was they, rather than the licensees who had the right to protect this area of privacy or confidentiality.[311]

Privacy cases, particularly those involving disclosure of private facts, such as *Campbell* v. *MGN*, inevitably involve a delicate balancing exercise. The English courts have long emphasised the importance of freedom of

[310] *Douglas* v. *Hello! Ltd* [2005] *EWCA Civ* 595, para. 118.
[311] *Ibid.*, paras 122–37.

expression as a basic fundamental right[312] and it has, at times, been elevated to a higher position requiring exceptions to freedom of expression to be justified.[313] Where a 'court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression',[314] a balance must be struck between conflicting rights, on the merits, without giving additional weight to one right.[315] A court must have particular regard to freedom of expression when granting relief,[316] although, unlike the First Amendment jurisprudence in the United States, this does not give freedom of expression a presumptive priority.[317] Particular regard cannot be given to Article 10 without having equally particular regard to Article 8[318] and neither has any pre-eminence over the other. Neither is absolute nor in any hierarchical order, since they are of equal value.[319] The proportionality of interfering with one has to be balanced against the proportionality of restricting the other. Since each is a fundamental right there is evidently a pressing social need to protect it.[320] The practical effect of these provisions is that the right of privacy 'which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public', and this, in turn, has to be balanced against the respect that must be given to private life.[321]

In *Campbell* v. *MGN Ltd*, the House of Lords acknowledged the distinction between political, artistic and commercial expression and the fact that greater importance is accorded to political expression with rather less vigorous principles being applied to artistic and commercial expression.[322] The following factors needed to be weighed: on the one hand, the duty to impart information and ideas of public interest that the public has

[312] See, e.g., *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 *AC* 109, 283 *per* Lord Goff; *Derbyshire County Council* v. *Times Newspapers* [1993] *AC* 534, 551, *per* Lord Keith; *R* v. *Home Secretary; Ex parte Simms* [2000] 2 AC 115, 126 *per* Lord Steyn. See also *Imutran Ltd* v. *Uncaged Campaigns Ltd* [2001] 2 *All ER* 385, 389–90 *per* Morritt V-C and the references cited.

[313] *Reynolds* v. *Times Newspapers Ltd* [1999] 3 *WLR* 1010, 1029.

[314] Section 12(1) (this section was introduced specifically to meet concerns about press freedom: *Hansard, Sixth Series*, HC vol. 315 col. 538, 2 July 1998 and see generally, S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London, 2000), 99; R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford, 2000), 1095.

[315] *Douglas* v. *Hello! Ltd (No. 1)* [2001] 2 *WLR* 992, 1032 *per* Keene LJ.

[316] *Human Rights Act 1998*, s. 12(4).

[317] *Campbell* v. *MGN Ltd* [2004] *UKHL* 22, paras 55 and 106; *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786, para. 186 and see *Douglas* v. *Hello! Ltd (No. 1)* [2001] 2 *WLR* 992, 1027 *per* Sedley LJ; *Cream Holdings Ltd* v. *Banerjee* [2003] *All ER* 318, para. 54; *Mills* v. *News Group Newspapers* [2001] *EMLR* 957 para. 17 (Collins J).

[318] *Campbell* v. *MGN Ltd* [2004] *UKHL* 22, para. 111.

[319] *Ibid.*, para. 113.

[320] *Ibid.*, para. 140.

[321] *Ibid.*, para. 106.

[322] *Ibid.*, paras 117 and 148.

a right to receive[323] and the need for the court to leave it to journalists to decide what materials needed to be produced to ensure credibility[324] and, on the other hand, the degree of privacy to which the claimant was entitled under the law of confidence regarding details of her therapy. Thus, the right of the public to receive information about the details of the claimant model's treatment for drug addiction was of a much lower order than the undoubted right to know that she had misled the public in proclaiming that she did not take drugs. The more intimate the aspects of private life that are being interfered with, the more serious must be the reasons for doing so before the interference can be legitimate.[325] The press should be allowed to expose the truth and put the record straight and this justified the publication of the fact that the claimant had misled the public regarding her drug habit and the fact that she was receiving treatment. This did not, however, justify publishing further details of her treatment[326] and photographs of the claimant outside her therapy meeting, although the photographs were not objectionable in themselves.[327]

The tensions between freedom of expression and privacy are rather less acute in cases involving essentially commercial appropriation.[328] Moreover, the nature of the information will usually come fairly low in any hierarchy, often constituting non-political speech amounting to little more than celebrity gossip.[329] The individual interests in confidentiality or privacy are unlikely to be outweighed by considerations of freedom of expression and it will be difficult to show any public interest in the publication of unauthorised photographs which might justify an intrusion into an individual's private lives, having regard in particular (as required by section 12(4) of the *Human Rights Act 1998*) to any relevant privacy code, in this case the Press Complaints Commission Code. Although the Article 10 rights will usually be engaged in such circumstances they will not provide a trump card in any balancing exercise.[330]

[323] See *Jersild* v. *Denmark* (1994) 19 *EHRR* 1, para. 31.
[324] See *Fressoz* v. *France* (2001) 31 *EHRR* 28, para. 54.
[325] *Campbell* v. *MGN Ltd* [2004] *UKHL* 22, para. 117.
[326] *Ibid.*, paras 151–2.
[327] *Ibid.*, para. 154 and see 89 above.
[328] See ch. 6 below at 222–4.
[329] See G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *MLR* 726, 756. Cf. Posner, 'The Right to Privacy' 396 (arguing for the positive benefits of gossip in yielding information on the personal lives of wealthy and successful people thereby providing (not necessarily positive) role models in making consumption, career and other decisions).
[330] See, e.g., *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786 (Ch), para. 212 (balance fell against defendants' Article 10 rights). Cf. *Time Inc.* v. *Sand Creek Partners* 825 *F Supp* 213 (right of publicity did not prevent the publication of photos of actress Julia Roberts in her wedding dress appearing at a public performance, given that the event was newsworthy and of widespread public interest).

Conclusion

The shape of the action for breach of confidence has been radically altered and, in many respects, is tantamount to a tort of disclosure. Its potential for developing into a substitute for a right of publicity is more limited, however, given the fact that covert photography is not, in itself, sufficient to make the information contained in a photograph confidential: the activity itself must be private. Thus, for example, the publication, in an advertisement, of a press photograph of a celebrity not involved in any form of private activity will not be restrained unless some other cause of action is available, such as breach of copyright or breach of contract.[331] The scope for extending the action for breach of confidence is not limitless and it has been doubted whether such an approach is, in principle, valid since it involves the use of a cause of action 'to purposes quite alien to [its] original object',[332] although it reflects the incremental way in which the law has developed in other fields.[333] The English courts remain wary of developing a free-standing cause of action for invasion of privacy. While to breach of confidence might be regarded as providing the necessary protection for most infringements of privacy,[334] the courts have acknowledged that it is a somewhat ill-fitting cause of action for claims concerning the publication of unauthorised photographs of private occasions.[335] The traditional objections to the development of a right of privacy[336] continue to loom large. The problems of definition and conceptual indeterminacy are reflected in the judicial antipathy against development of a comprehensive tort.[337] The success of the reductionist approach in the United States shows that it may be difficult to accommodate a broad-based general right within the common law system.[338] That does not, however, prevent the principle of privacy (in the broadest sense) from being used as a basis for the development of discrete causes of action dealing with specific aspects such as commercial appropriation.

[331] *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786, para. 218 per Lindsay J, (*obiter*) citing *Pollard* v. *Photographic Co.* (1889) 40 *Ch D* 345.
[332] B. Neill, 'Privacy: A Challenge for the Next Century' in B. S. Markesinis (ed.), *Protecting Privacy* (Oxford, 1999), 1, 10.
[333] Bingham, 'Should There Be a Law to Protect Rights of Personal Privacy?' 461. See also D. Eady, 'Opinion: A Statutory Right to Privacy?' [1996] *EHRLR* 243, 246.
[334] *A* v. *B plc* [2002] 2 *All ER* 545, para. 11. *per* Lord Woolf CJ. See also R. Singh and J. Strachan 'Privacy Postponed' [2003] *EHRLR* Special Issue 12, 17–19.
[335] *Douglas* v. *Hello! Ltd* [2005] *EWCA Civ* 595, para. 53.
[336] See text accompanying note 211 above.
[337] *Wainwright* v. *Home Office* [2003] *UKHL* 53, paras 18–19; *Douglas* v. *Hello! Ltd (No. 2)* [2003] *EWHC* 786 (Ch), para. 229.
[338] See 54–8 above.

4 German law

Introduction

Cases concerning the commercial appropriation of personality have been decided by German courts since the early twentieth century. Generally, German judges have shown great sympathy for persons affected by unauthorised advertising or merchandising and have been prepared to grant effective protection, in contrast to the rather ambivalent attitude of the English courts. As early as 1910 the famous aviator, Count Zeppelin, could prevent the unauthorised registration of his name and portrait as a trade mark for tobacco.[1] Subsequently an extensive body of case law has firmly established that persons are entitled to an injunction, to damages or to compensation for unjust enrichment, if their name, portrait or reputation is exploited without their consent.[2]

Most of these judgments are based on the various personality rights recognised by German law. § 12 of the *Bürgerliches Gesetzbuch* (*Civil Code of 1900 – BGB*) prohibits the unauthorised use of another person's name,[3] § 22 of the *Kunsturheberrechtsgesetz* (*Act on Copyright in Works of Visual Arts of 1907 – KUG*) provides that a person's portrait may only be exhibited or disseminated with the depicted person's consent.[4] Along with the moral rights granted by copyright legislation, these rights to one's name and to one's image are known as 'specific personality rights' (besondere Persönlichkeitsrechte).[5] Before the 1950s, legal protection of

[1] *RGZ* 74, 308 – *Graf Zeppelin*.

[2] See generally Ahrens, *Die Verwertung persönlichkeitsrechtlicher Positionen* (Würzburg, 2002), 51 et seq.; Götting, *Persönlichkeitsrechte als Vermögensrechte* (Tübingen, 1995), chs 2 and 3; Ehmann in Ermann, *Handkommentar zum Bürgerlichen Gesetzbuch* (11th edn, Münster, 2004), Anh. § 12, paras 241 et seq., 317 et seq.; Hoppe, *Persönlichkeitsschutz durch Haftungsrecht* (Berlin, 2001), 56 et seq.; Larenz/Canaris, *Lehrbuch des Schuldrechts II/2* (13th edn, München, 1994), § 80 II 3 (p. 502); Magold, *Personenmerchandising* (Frankfurt, 1994), 377 et seq.; Peifer, *Individualität im Zivilrecht* (Tübingen, 2001), 151 et seq.; Rixecker in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (4th edn, München 2001), § 12 Anh., para. 113 et seq.

[3] See below 109 et seq.

[4] See below 105 et seq.

[5] See Helle, *Besondere Persönlichkeitsrechte im Privatrecht* (Tübingen 1991), 37 et seq.

the personality was limited to these specific rights. In 1954, however, the Bundesgerichtshof (Federal Supreme Court – BGH) held that these rights are supplemented by a 'general personality right' (allgemeines Persönlichkeitsrecht) which protects all aspects of a personality against violation.[6] Since then, both § 12 *BGB*, § 22 *KUG* and the general personality right have served as the doctrinal basis for protection against unauthorised commercial exploitation.

From a common law perspective, it may seem surprising that unfair competition law has not played a significant role in this context. Although § 3 of the *Gesetz zur Bekämpfung des unlauteren Wettbewerbs* (*Act Against Unfair Competition of 2004 – UWG*)[7] provides that 'acts of unfair competition, which are likely to affect competition to the detriment of competitors, consumers or other market participants to a more than immaterial extent, are prohibited' the courts have not resorted to this provision in order to enjoin the unauthorised use of celebrities' names and images. The reasons will be explored below.[8]

As a consequence of the doctrinal basis adopted by the courts, many of the older judgments emphasise the protection of ideal interests, even in cases with an evident commercial background. The *Zeppelin* case is a good example: the Count was himself involved in merchandising activities, which he used to sponsor his aviation projects. Nevertheless in enjoining the use of the Count's name and image in advertising the Reichsgericht (Supreme Court until 1945 – RG) argued that 'a sensitive person will object to the use of his name in relation to certain goods or to ill-reputed firms'.[9] Only gradually did the courts begin to recognise the economic aspects of personality rights. Some uncertainties remain. First, some judgments hold that substantial damages are not available in cases in which the celebrity affected would never have agreed to the use of his or her image.[10] Second, it is still far from clear whether German law permits personality rights to be licensed.[11] Academic writing, which is quite influential in the German legal system and which is regularly quoted in judgments, is also far from unanimous about the question whether personality merchandising should receive legal protection and about the nature of the relationship between personality rights and intellectual property rights.

The following analysis examines the historical development (2) and the present state (3) of the legal protection of the personality from unwanted

[6] *BGHZ* 13, 334 – *Schachtbrief*.
[7] The German *Act against Unfair Competition* was amended in 2004. Between 1909 and 2004, § 1 of the Act contained the general tort of unfair competition.
[8] See below 119 et seq. [9] *RGZ* 74, 308 at 311. [10] See below 110, 143.
[11] See below 129 et seq.

publicity. In particular, we will consider the disputed question of licensing and post-mortem protection of personality rights (4) and the remedies available against the unauthorised exploitation of aspects of personality (5).

History

Protection of personality in the Bürgerliches Gesetzbuch (1900)

The *BGB*, which entered into force in 1900, is the result of extensive legal research conducted largely by academics into the sources of both Roman law and German law. One of the issues discussed in the legal academic community of the nineteenth century was whether the law should recognise personality rights.[12] For the Pandektenwissenschaft (the Pandectist School), which dedicated its academic efforts to the modern application of Roman law, the *actio iniuriarum*, which protected not only a person's corporeal integrity but also honour and reputation, could have served as a model. However, most romanists considered this broad action to be too vague and too general to be applied by the judiciary.[13] Also, a personality right did not fit easily into the system of subjective rights, which was considered a cornerstone of legal theory by many jurists.[14] According to Savigny, one of the most distinguished legal academics of the nineteenth century, a subjective right was a relationship between a legal subject (the holder of the right) and a legal object which granted the holder the power to deal with the object according to his free will.[15] Whereas for Savigny property was the archetype of a subjective right,[16] he considered the idea of a 'right in oneself' which lacked an external object, as superfluous and

[12] See on this debate *RGZ* 51, 369 at 373 et seq.; Scheyhing, 'Zur Geschichte des Persönlichkeitsrechts im 19. Jahrhundert' *AcP* 158 (1959) 503 et seq.; Klippel, *Der zivilrechtliche Schutz des Namens* (Paderborn, 1985), 210 et seq.

[13] See Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, München, 1996), 1085–94.

[14] See Medicus, *Bürgerliches Recht* (18th edn, Köln, etc., 1999), para. 615; Baston-Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts* (Tübingen, 1997), 85 et seq.

[15] While Savigny stressed the relation between subjective right and free will, Jhering later defined rights as 'legally protected interests', see Savigny, *System des heutigen römischen Rechts* (Berlin, 1840 et seq.), vol. 1, 7; Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. III (4th edn) (Leipzig, 1888), § 60 (pp. 327 et seq., 339). Today, the definitions are usually seen as complementary; see Wagner, '*Rudolph* v. *Jherings* Theorie des subjektiven Rechts und der berechtigten Reflexwirkungen' *AcP* 193 (1993) 319 at 341.

[16] See § 903 *BGB* which provides: 'Unless the law or the rights of third persons are opposed, the owner of a thing can deal with the thing as he sees fit and can preclude others from any interference.'

misconceived.[17] Although other academic writers, notably Gierke, Kohler and Gareis,[18] developed a theory of personality rights, the prevailing opinion at the time rejected their position.

Among the drafters of the *BGB*, opinions were divided about which system of tort law to adopt.[19] Some were in favour of introducing a general clause modelled on Article 1382 of the French *Code civil*,[20] which provides that anyone who causes damage to another person by fault is liable to compensate this other person for the harm caused by the legal injury. Others favoured a system of specific torts. The result, which has remained valid until today, can be characterised as a compromise. There are three fundamental provisions which represent different systematic approaches to liability: § 823 I *BGB* protects absolute subjective rights, § 823 II *BGB* provides a private law remedy against the violation of a statutory provision and § 826 *BGB* affords protection against damage caused in an intentional and dishonest way (vorsätzliche sittenwidrige Schädigung). These three pillars of tort liability are supplemented by some specific torts such as trade libel (§ 824 *BGB*) and sexual assault (§ 825 *BGB*) and by some torts of presumed fault liability or strict liability (§§ 831 et seq. *BGB*).

§ 823 I *BGB* is based on a theory of subjective rights which has its roots in the legal philosophy of Immanuel Kant and the legal theory of Savigny:[21] subjective rights delimit certain spheres in which each individual can act according to his or her free will. The violation of these rights gives rise to tort liability. § 823 I provides:

> Who wilfully or negligently injures the life, body, health, freedom, property or any other right of another person illegally is bound to compensate him for any damage arising therefrom.

The subsection thus distinguishes between property and 'any other rights' on the one hand and certain non-material personality interests such as health and freedom on the other hand, which are deliberately not termed 'rights'. The wording of this section proved to be an obstacle for the development of a general personality right, since most jurists until the 1950s thought that 'other rights' only encompassed property-like

[17] Savigny, *System*, 336; see also Medicus (note 14 above).
[18] Gierke, *Deutsches Privatrecht*, vol. 1 (1895), § 81 II 2 (p. 706); Kohler, *Lehrbuch des Bürgerlichen Rechts*, vol. 2, part 1 (Berlin, 1906), § 190 VII (pp. 520 et seq.); Gareis, 'Das juristische Wesen der Autorenrechte, sowie des Firmen- und des Markenschutzes' *AdHWR* 35 (1877) 185 et seq.
[19] See Kötz/Wagner, *Deliktsrecht* (9th edn, Neuwied et al., 2001), para. 42.
[20] See 150 below (ch. 5).
[21] See Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 75 I 1 (p. 350).

economic rights, while all aspects of personality not explicitly mentioned such as honour and reputation were not protected under § 823 I *BGB*.

However, § 823 I *BGB* is supplemented by § 823 II *BGB* which can be regarded as the second pillar of German tort law. This subsection provides:

> The same obligation arises for anyone who violates a statutory provision intended to protect another person.

This explains why the drafters of the *BGB* did not include honour and reputation in the enumeration in § 823 I *BGB*: as the Drafting Committee explicitly pointed out, the crimes of libel and slander (§§ 185–7 of the *Criminal Code*) were to be regarded as 'statutory provisions intended to protect another person', thus giving rise to an action for damages.

Personality rights not protected by criminal law were thus largely excluded from the new code. There is, however, one important exception, which is not found among the provisions on tort law but in the part of the *BGB* entitled 'persons'. § 12 *BGB*, analysed in detail below, gives a right of action to everyone whose name is either denied or used without justification by another person.

The 'right to one's image' (1907)

Even before 1900, the judiciary felt the need to protect persons against the unauthorised publication of their image in a commercial context, instances of which increased due to the development of photography. However, the doctrinal basis was far from clear, as two examples from the late 1890s show. In 1898 the Reichsgericht decided a criminal case in which a young woman in a bathing costume had secretly been photographed. Afterwards the photograph had been copied and affixed to paperweights, which were offered for sale. The court held that this amounted to criminal libel because potential buyers would assume that she had deliberately posed for the photograph.[22] On 28 December 1899, literally a few days before the *BGB* entered into force, the Reichsgericht handed down another judgment which finally resulted in the creation of a statutory right to one's image. Two photographers had unlawfully entered the room where the corpse of the former German Chancellor Otto von Bismarck was lying in state and had photographed the corpse. Bismarck's heirs successfully applied for an order for destruction of the

[22] On this case see Götting, *Persönlichkeitsrechte als Vermögensrechte*, 18, note 30, who points out the affinity to the reasoning in *Tolley* v. *Fry & Sons* [1931] *AC* 333; see also 82–4 above (ch. 3).

photographs.[23] The court argued that every benefit obtained as a consequence of a trespass to land had to be surrendered to the landowner. While the result was welcomed by most commentators, the reasoning was not.[24] The legislature reacted in 1907, when a new *Act on Copyright in Works of Visual Arts* (*Kunsturheberrechtsgesetz – KUG*) was drafted. § 22 of the Act provides that images of persons may only be published or disseminated with the consent of the portrayed person.[25] § 23 provides for some exceptions, in particular it allows the publication of pictures 'from the sphere of contemporary history' without the depicted person's consent.[26] This exception was to make sure that media coverage of contemporary events was not unduly restricted. An alternative position which was in favour of limiting the provision to acts harmful to the depicted person's reputation was rejected. Already at that time commentators noted that the 'right to one's image' was not in any way related to copyright and argued that it should have been included in the *BGB*.[27] These systematic concerns, however, were not taken very seriously by the legislature. Although most provisions of the old *Copyright Act* were repealed in 1965, § 22 *KUG* has remained in force.

In the following years, the Reichsgericht rejected suggestions aimed at the judicial recognition of a 'general personality right', as they entailed the danger of legal uncertainty.[28] According to the court, the law only protected the specific personality interests recognised by statute. While, in consequence, the protection of privacy and of personal reputation remained deficient, § 12 *BGB* and § 22 *KUG* already provided quite efficient protection against the most common types of unauthorised merchandising. However, in some cases the defence provided by § 23 *KUG* was invoked by the respective defendants, as most celebrities could be regarded as 'persons of contemporary history'. Two different approaches are discernible. In Count Zeppelin's case, decided in 1910, the Reichsgericht held that § 23 I No. 1 served the public interest in information about social and political developments, not the private interest of traders in effective advertising.[29] In addition the court argued that it 'was certainly not according to everybody's taste to see one's image on the goods of any trader', thus

[23] *RGZ* 45, 170.
[24] Kohler, one of the most distinguished academics at the time, argued that even a trespasser did not necessarily act unlawfully, if he looked at pictures and took notes in the house illegally entered, see Götting, *Persönlichkeitsrechte als Vermögensrechte*, 19.
[25] For the full wording of the section and its interpretation in modern law see below 105.
[26] See below 107.
[27] See Götting in Schricker, *Urheberrecht* (2nd edn, München, 1999) § 60/§ 22 *KUG*, paras 1, 2.
[28] *RGZ* 51, 369 at 373. [29] *RGZ* 74, 308 at 313 – *Graf Zeppelin*.

referring to the Count's ideal interests. Some years later the Reichsgericht reached a different conclusion in a case concerning the distribution of football cards depicting a popular player.[30] The court held that since the cards were not distributed under disparaging circumstances, the claimant's personality was unaffected by the defendant's act.

The 'general personality right' (1954)

After 1945, the experience of the multifarious violations of personal dignity during the Nazi period changed public opinion towards a broad 'general personality right'. This shift was initiated by the proclamation of the *Basic Law* (*Grundgesetz – GG*), the *German Constitution of 1949*. Art. 1 *GG* provides that 'the dignity of man shall be inviolable. To respect it shall be the duty of all state authority' while Article 2 I provides that '[e]veryone has the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or the moral code'. In addition, the gaps in the protection provided by the specific personality rights became more obvious as new technologies and the development of mass media allowed violations hitherto unknown. What, as Canaris notes, had previously been regarded as a problem of legal policy which could only be resolved by legislation, was now increasingly seen as a gap in the law which had to be filled by the judiciary.[31]

In a judgment of 1954 the Bundesgerichtshof concluded that these constitutional rights also required the recognition of a 'general personality right' in private law.[32] A lawyer had written a letter to a newspaper, demanding on behalf of his client, the former cabinet minister Hjalmar Schacht, the correction of certain untrue political statements. The newspaper had published this letter as a 'letter to the editor' without explaining that it had been written on behalf of the client. This publication was held not to be defamatory but was held to show the claimant in a false light, namely as a lawyer who did not distinguish properly between his own political views and his professional duties. On the basis of the newly created personality right, the Bundesgerichtshof ordered the newspaper to publish a corrective statement. This was considered by many commentators to be a bold judgment.[33] First, it was unusual for the judiciary

[30] *RGZ* 125, 80 at 84, 85 – *Tull Harder*.
[31] Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 80 I 2 (p. 492).
[32] *BGHZ* 13, 334 – *Schachtbrief*.
[33] See Canaris, 'Grundrechte und Privatrecht' *AcP* 184 (1984) 201 at 231 et seq.; Ehmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 11; Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 80 I 3 (p. 492); Baston-Vogt, *Schutzbereich*, 16, 26.

to take the lead in a disputed question which had not yet been decided by legislation. Second, the prevailing view among academics considered that constitutional principles were not directly applicable between individuals (direkte Drittwirkung).[34]

However, the Bundesgerichtshof went even further. In the celebrated *Herrenreiter* (*gentleman rider*) case,[35] a brewery owner had been photographed while taking part in a riding contest. Later, the photograph was used without his consent in advertising for a sexual stimulant. The brewery owner, who had not suffered any material damage, claimed damages for injury to his feelings and to his reputation. However, § 847 *BGB* explicitly provided that 'damages for pain and suffering' (Schmerzensgeld) could only be awarded for violations of body, health or freedom.[36] Nevertheless the Bundesgerichtshof gave judgment for the claimant and held that a serious injury to personality interests was analogous to a violation of freedom. In later judgments, the court modified its reasoning and based its deviation from § 847 *BGB* not on an analogy but on the Constitution itself. Articles 1 I and 2 I, while not directly applicable, required effective private law protection of the personality. In cases not involving any substantial damage, such protection could only be provided by awarding a solatium.[37] In the following years several bills which attempted to introduce the general personality right into the *BGB* failed in parliament, mostly because of concerns voiced by the press about the restrictive effects that such sweeping provisions would have on free speech.[38]

While most commentators agreed that the scope of § 847 *BGB* was too narrow and that a solatium should be awarded for serious violations of the personality right, some criticised the Bundesgerichtshof for having neglected the clear wording of the statute, thus deciding *contra legem*.[39] Some years later a press company that had published a fictitious interview with Soraya, the former princess of Persia, and against which a

[34] On which see below at 208. [35] *BGHZ* 26, 349 at 351 – *Herrenreiter*.

[36] § 847 *BGB* was repealed in 2002. Surprisingly, § 253 II *BGB*, which replaced the former provision, still does not provide for immaterial damages in the case of violations of the general personality right. The section provides: 'In cases concerning damages for violations of body, health, freedom or sexual self-determination, compensation can also be claimed with respect to a non-pecuniary damage.' Some authors criticise the legislative for not having included violations of personality rights in this catalogue, see Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 378; Wagner, 'Ersatz immaterieller Schäden: Bestandsaufnahme und europäische Perspektiven' *JZ* 2004, 319–28.

[37] A detailed outline of this reasoning is given below at 144 et seq.

[38] See Baston-Vogt, *Schutzbereich*, 166 et seq.; Rixecker in *Münchener Kommentar*, § 12 Anh., para. 10.

[39] See Ehmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 378a; Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 80 I 4 (p. 494); Rixecker in *Münchener Kommentar*, § 12 Anh., para. 208.

solatium had been awarded, adopted this reasoning and appealed to the Bundesverfassungsgericht (Constitutional Court – BVerfG). The Bundesverfassungsgericht rejected the complaint and held that the step forward taken by the Bundesgerichtshof was in accordance with the constitution.[40] The Constitutional Court held that the judiciary was entitled to 'creative decision-making'. When a court detected a lacuna in the law it did not have to wait for legislation to intervene. Articles 1 and 2 I *GG* required effective protection of the personality and the Bundesgerichtshof had been right in granting such protection given that several legislative attempts at regulating the matter had failed.

While the award of a solatium was not easily reconcilable with the *BGB*, remedies for material damages and unjust enrichment created fewer problems. In 1956, the actor Paul Dahlke successfully claimed compensation for unjust enrichment because a press photo showing him on a motor scooter had been used in an advertisement without his consent.[41] The Bundesgerichtshof held that the advertiser had infringed the claimant's right to his own image (§ 22 *KUG*). This infringement not only gave rise to a liability in damages, but also to an action for restitution. Thus the claimant could recover a reasonable licence fee to which he would have been entitled, had the advertiser taken a licence. Further decisions established that the remedies available for infringements of intellectual property rights are also available in cases of unauthorised commercial use of personal images or names.[42] Thus the claimant can choose between damages calculated on the basis of lost profits, a reasonable licence fee or disgorgement of the profit achieved by the infringement.[43]

Recent developments: Caroline *and* Marlene

Judicial decisions on personality rights abound, and accounts of the relevant case-law fill many pages in textbooks and commentaries.[44] The details concerning the elements of liability and the various remedies are explored in the text below. First, however, a group of cases concerning two lady celebrities highlights the present state of the law and demonstrate some of the issues that are still unresolved: the *Caroline* cases and the *Marlene Dietrich* decisions.

[40] *BVerfGE* 34, 269 – *Soraya*. [41] *BGHZ* 20, 345.
[42] *BGH NJW* 1992, 2084 – *Joachim Fuchsberger*; *BGHZ* 81, 75 at 78 – *Carrera*; *BGHZ* 143, 214 at 232 – *Marlene Dietrich*.
[43] See below 142.
[44] See for example the commentaries by Rixecker in *Münchner Kommentar*, § 12 Anh. (118 pages) and by Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12 (89 pages), which consist mainly of a compilation of the relevant case-law.

For more than ten years, the struggle of Princess Caroline of Hannover, the former Princess of Monaco, against press invasions into her private sphere has preoccupied both the public and the courts. In the first case,[45] which closely resembles the *Soraya* case,[46] a magazine had published a fictitious interview with the princess. She sued for a violation of her general personality right and claimed damages calculated on the basis of the profits made by the sale of the edition of the journal containing the interview. Her action was only partly successful. The Bundesgerichtshof held that her personality right had been violated and awarded a solatium. According to the court, the function of this award was not only compensation, but also prevention. Thus the sum of 30,000 DM (around 15,000 €) awarded by the Court of Appeal was increased to 180,000 DM (around 90,000 €). On the other hand, the claim for disgorgement of the full profits achieved by the publishers through the sale of the journal edition was rejected. According to the court, an action for unjust enrichment would only have been successful if the claimant would have been willing to give her consent to the act complained of. Since this was inconceivable in the present case, the action failed. Several commentators have criticised this position, arguing that every profit made by means of an intrusion into another person's personal sphere should accrue to that person and pointing out that an action for unjust enrichment would be the more powerful sanction against press intrusions.[47]

While the fame of the first *Caroline of Monaco* decision only spread among legally interested circles, the second case caused discussions not only among legal commentators, but also in the media. This case concerned an action brought by the Princess against the publication of press photographs showing her during private activities such as shopping, cycling or horse-riding, which had been taken in public places, but without the Princess's consent. The Landgericht (District Court) and the Oberlandesgericht (Court of Appeal) Hamburg[48] took the view that the publication was legitimate since the claimant was in a public place. On appeal, the Bundesgerichtshof[49] reversed this judgment with respect to photographs taken in places such as a garden restaurant that, while publicly accessible, were secluded from the public eye. However, the Supreme Court affirmed the Court of Appeal's judgment to the extent to which it concerned photographs taken in the open street. The Bundesverfassungsgericht (Federal Constitutional Court), which was consequently seized by the Princess, confirmed the judgment of the

[45] *BGHZ* 128, 1 – *Caroline von Monaco I.* [46] See above 102. [47] See below 146.
[48] *OLG* Hamburg *AfP* 1996, 69. [49] *BGHZ* 131, 332 – *Caroline von Monaco II.*

Bundesgerichtshof in this respect.[50] The Princess lodged a complaint with the European Court of Human Rights, which held that Germany had violated the Princess's right of privacy, which is guaranteed by Article 8 of the European Convention on Human Rights.[51] The implications of this judgment on the protection against the commercial exploitation of aspects of personality in Europe is analysed in more detail in chapter 6.

The third judgment,[52] which was accompanied by two decisions in related cases,[53] concerned a more typical case of personality merchandising. The daughter of the late actress Marlene Dietrich applied for an injunction and damages against the producer of a musical about the life of Marlene Dietrich, who had not only sold various items of merchandise bearing her name and image but also granted a car manufacturer the right to produce a special model named 'Marlene'. In a very detailed and thorough judgment the Bundesgerichtshof stressed the two aspects of the personality right which protected not only ideal, but also economic interests. The image, the name and other aspects of a personality represented an economic value that was often the result of the particular person's achievements. The unauthorised commercial exploitation of this reputation often affected a person's material rather than ideal interests. Personality rights were absolute rights. Since every person was entitled to decide whether to permit the commercial use of aspects of personality, every unauthorised use could trigger an action for damages or unjust enrichment. While this passage of the judgment only restated the existing authorities, the first *Marlene* case raised the specific question whether the economic aspects of personality rights survived after the death of the person depicted or named. In earlier decisions the courts had granted post-mortem protection to ideal interests, particularly to the honour and reputation of deceased persons. Now the Bundesgerichtshof held that personality rights, as far as they protected economic interests, were descendible. Thus the heirs of a deceased celebrity inherited the

[50] *BVerfGE* 101, 361. With respect to another issue, however, the Constitutional Court reversed the Supreme Court's judgment. Some photos had also shown the Princess in public places in the company of her children. While the Supreme Court allowed the publication of these photographs, the Constitutional Court held that the protection of family life in Art. 6 GG required protection against the publication of all photographs on which the children were visible.

[51] *Von Hannover* v. *Germany*, Application No. 59320, 24 June 2004. On this decision, see Grabenwarter, 'Schutz der Privatsphäre versus Pressefreiheit: Europäische Korrektur eines deutschen Sonderweges?', *AfP* 2004, 309; Heldrich, 'Persönlichkeitsschutz und Pressefreiheit nach der Europäischen Menschenrechtskonvention', *NJW* 2004, 2634; Ohly, 'Harmonisierung des Persönlichkeitsrechts durch den Europäischen Gerichtshof für Menschenrechte', *GRUR Int.* 2004, 902.

[52] *BGHZ* 143, 214 – *Marlene Dietrich*.

[53] *BGH GRUR* 2000, 715 – *Der blaue Engel*; *BGHZ* 151, 26 – *Marlene Dietrich II*.

absolute right and were entitled to grant licences and to claim damages for unauthorised use. Reactions to the first *Marlene* decision were divided. While the majority of commentators welcomed it as a consistent development of personality rights,[54] others argued that the law should not lend its hand to the degradation of a personality to a merchandisable commodity.[55]

Substantive legal protection

Personality rights I: the right to one's image (§ 22 KUG*)*

Disseminating or exhibiting a person's image without his or her consent amounts to a violation of the specific personality right granted in § 22 *KUG*. However, according to § 23 *KUG* the act may be justified in the public interest. Since many types of commercial exploitation involve the publication of pictures of celebrities, these provisions are of fundamental relevance. §§ 22 and 23 *KUG* provide:

§ 22

Portraits may only be disseminated or exhibited with the consent of the person portrayed. Consent is deemed to have been given if the person portrayed has received a remuneration for having the portrait taken. For ten years after the death of the person portrayed, consent given by the relatives of that person must be obtained. Relatives within the meaning of this section are the surviving spouse and the portrayed person's children and, if neither a spouse nor children exist, the portrayed person's parents.

§ 23

1. Without the consent required by § 22 the following may be disseminated and exhibited:
   1. Pictures from the sphere of contemporary history;
   2. Pictures on which persons are only portrayed accidentally as parts of a landscape or any other location;
   3. Pictures of gatherings, processions or similar activities in which the persons portrayed participated;
   4. Pictures not having been made to order, if the dissemination or exhibition serves a higher interest of art.
2. This authorisation does not justify any dissemination or exhibition by which a justified interest of the person portrayed or, if the person is deceased, of his relatives is violated.

[54] See Götting, 'Die Vererblichkeit der vermögenswerten Bestandteile des Persönlichkeitsrechts – ein Meilenstein in der Rechtsprechung des BGH', *NJW* 2001, 585; Wagner, case-note, *GRUR* 2000, 717; Beuthien, 'Was ist vermögenswert, die Persönlichkeit oder ihr Image?', *NJW* 2003, 1220 (agreeing with the result while criticising a part of the reasoning).

[55] See Schack, case-note, *JZ* 2000, 1060; Peifer, 'Eigenheit oder Eigentum – Was schützt das Persönlichkeitsrecht?', *GRUR* 2002, 495.

§ 22 covers every type of image.[56] Examples are photographs, motion pictures, statues or even a death mask.[57] In one of the *Marlene* decisions the Bundesgerichtshof held that even a double or a parodist making use of the typical costume and typical gestures of a celebrity, for example the typical attire of Marlene Dietrich in her famous movie 'The Blue Angel', may infringe § 22 *KUG*.[58] Parodies, however, may be justified under § 23 *KUG*. The depicted person must be recognisable,[59] which may be the case even if the person is shown from behind, as long as typical features are discernible.[60] The picture must not be disseminated or exhibited in public. To take a photograph without a person's consent or even knowledge is not prohibited by § 22. However, in this case the general personality right supplements § 22 and grants protection,[61] for instance against press photographs taken with tele lenses and showing celebrities in their private sphere. There is some doubt as to whether the term 'consent' covers all types of commercial licences or whether 'consent' is a weaker, possibly even revocable, form of permission. This issue will be considered below.[62]

Given the wide ambit of § 22 *KUG*, the defence provided in § 23 *KUG* is of crucial significance for freedom of information. The most relevant exception is the one concerning 'pictures from the sphere of contemporary history' (§ 23 I No. 1). A significant number of court decisions give some guidance as to which persons belong to the 'sphere of contemporary history'.[63] Since the 1950s, the courts have drawn a distinction between 'absolute persons of contemporary history' (or 'public figures par excellence') who are famous in their own right and 'relative persons of contemporary history' who only become known in the context of a certain event. 'Absolute persons of contemporary history' may be depicted whenever there is a public interest in information. On several occasions, the German courts have held that this public interest is not limited to the political field but rather extends to entertainment and gossip.[64] It should

[56] For a detailed commentary of § 22 *KUG* see Dreier in Dreier/Schulze, *Urheberrechtsgesetz* (München, 2004), vor § 22 and §§ 22 (pp. 1541 et seq.); Götting in Schricker, *Urheberrecht*, § 60/§ 22 *KUG* (pp. 926 et seq.).

[57] KG *GRUR* 1983, 507 – *Totenmaske II*.

[58] BGH *GRUR* 2000, 715 – *Der blaue Engel*; see also Dreier/Schulze, *Urheberrechtsgesetz*, § 22, para. 2.

[59] *BGHZ* 26, 349 at 351 – *Herrenreiter*; BGH *GRUR* 1962, 211 – *Hochzeitsbild*; BGH *GRUR* 1979, 732 – *Fußballtor*.

[60] BGH *GRUR* 1975, 561 at 562 – *Nacktaufnahmen*.

[61] BGH *GRUR* 1957, 494 at 499 – *Spätheimkehrer*.

[62] See below, 129 et seq.

[63] For an overview, see Dreier/Schulze, *Urheberrechtsgesetz*, § 23, paras 3 et seq.; Götting in Schricker, *Urheberrecht*, § 60/§ 23 *KUG*, paras 6 et seq.

[64] See *RGZ* 125, 80 – *Tull Harder*; *BGHZ* 20, 345– *Paul Dahlke*; *BGHZ* 143, 214 – *Marlene Dietrich*; OLG Hamburg MMR 2004, 413 – *Oliver Kahn*.

be noted, however, that § 23 II *KUG* may nevertheless protect celebrities from intrusions into their private sphere: the publication of a celebrity's portrait is not justified when the publication violates his or her legitimate interest. Although media stars thus have not been denied protection, the European Court of Human Rights has recently criticised as too formal the distinction between 'absolute persons of contemporary history', 'relative persons of contemporary history' and persons unknown to the public[65] and has also indicated that the public interest in entertainment and gossip may deserve less protection than the public interest in political debates. It seems that the European Court has overestimated the importance of the concept of 'absolute persons of contemporary history' and has not given sufficient weight to the fact that § 23 II *KUG* always requires a balancing exercise between privacy and free speech. Nevertheless it seems possible that the German courts will react by giving up the traditional distinction.

One typical characteristic of advertising and merchandising cases caused some difficulties in the early cases: by definition, celebrities are 'absolute persons of contemporary history'. Thus it could seem as if any commercial use of their portraits was justified by § 23 I No. 1. However, the defence has been construed narrowly in this respect. The dissemination or exhibition must be justified in the public interest. Using the portrait of a celebrity in advertising, however, usually only serves the advertiser's interest. Thus § 23 I No. 1 can only be relied upon if the advertised product serves an informational purpose:[66] a portrait of a rock star may be printed on the cover of a book on rock music without the musician's consent, but it must not be sold as a poster.[67] Borderline cases are inevitable. The Bundesgerichtshof allowed the distribution of a football calendar showing pictures of well-known players[68] and the sale of a commemorative coin depicting the head of the former German chancellor Willy Brandt,[69] both without the respective persons' consent. Both judgments have been criticised for not giving enough weight to personality interests in comparison to commercial interests that had little to do with public information.[70] On the other hand, Oliver Kahn, the goalkeeper of the German national football team, could prevent the use of his likeness for a virtual player in a computer game.[71] The Oberlandesgericht

[65] *Von Hannover* v. *Germany*, Application No. 59320, 24 June 2004, paras 63, 65, 72.
[66] *BGHZ* 49, 288 at 293 et seq. – *Ligaspieler*; BGH *GRUR* 1979, 732 at 733 – *Fußballtor*.
[67] See KG *UFITA* 90 (1981) 163 – *Rocksänger*, see also 74–5 above.
[68] BGH *GRUR* 1979, 425 – *Fußballspieler*; a different result, however, was reached in the closely related cases BGHZ 49, 288 – *Ligaspieler* and BGH *GRUR* 1979, 732 – *Fußballtor*.
[69] BGH *GRUR* 1996, 195 – *Gedenkmedaille*.
[70] See Götting in Schricker, *Urheberrecht*, § 60, § 23 *KUG*, para. 7.
[71] OLG Hamburg *MMR* 2004, 413 – *Oliver Kahn*.

(Court of Appeal) Hamburg held that the defendant's primary purpose was not to inform the public but to derive a profit from the sale of a computer game which showed famous players as realistically as possible. The distinction made by the courts is illustrated further by the various *Marlene* decisions. The use of Marlene Dietrich's picture on memorabilia such as T-shirts, mugs and telephone cards was held not to be justified by § 23 I No. 1 *KUG*.[72] However, the broadcasting of a newsclip featuring Marlene Dietrich in an advertising spot for a newspaper's special edition on '50 years Germany' was held to be justified.[73] The Bundesgerichtshof construed § 23 I No. 1 *KUG* in the light of the freedom of the press protected by the Constitution (Art. 5 I *GG*) and held that the privilege not only permitted the publication of photos in the newspaper itself but also photos used in media advertising. Also, the photo used in the advertisement was not identical to the one shown in the newspaper. However, the Bundesgerichtshof indicated that the result might be different if the advertisement affected the depicted celebrity's personality right in any further respect, for example by showing her in an unfavourable light or by suggesting an endorsement when there was none.

Since the enactment of the *KUG* there has been a dispute about the interest served by § 22.[74] In the early years many authors thought that the section primarily protected the honour and reputation of the depicted person. Against this view it has been argued convincingly that the protection provided by § 22 *KUG* is not limited to disparaging pictures. Others think that the purpose of the section is the protection of privacy and anonymity. While this may be true in some cases, it does not explain why celebrities who deliberately seek publicity can rely on § 22 too. Thus the most convincing theory draws on the right of self-determination about all aspects of one's own personality, which the Constitution protects in Articles 1 *GG* and 2 I *GG*.[75] The decision concerning which personal images to publish is taken out of the public domain by legislation and allocated to each individual person. This right of self-determination regarding one's presentation in public is not restricted to the non-economic sphere. As the Bundesgerichtshof recently acknowledged in its *Marlene* decisions,[76] the right to one's image is a hybrid right protecting both non-economic and economic interests.

[72] *BGHZ* 143, 214 – *Marlene Dietrich I*. [73] *BGHZ* 151, 26 – *Marlene Dietrich II*.
[74] For an account of this discussion and further references see Dasch, *Die Einwilligung zum Eingriff in das Recht am eigenen Bild* (München, 1990), 10 et seq.
[75] Dasch, *ibid.* [76] *BGHZ* 143, 214; BGHZ 151, 26.

Personality rights II: the right to one's name (§ *12* BGB)

Another aspect of personality protected by a specific personality right is a person's name. § 12 *BGB*[77] provides:

> Whenever the right to the use of a name is disputed by another person or whenever the legitimate user's interest is violated by another person using the same name, the legitimate user can demand the cessation of the interference. If any further interference is to be expected, he may also apply for injunctive relief.

A name within the meaning of § 12 is every word or sign that distinguishes one person from another. The section covers family names, Christian names or pseudonyms,[78] but it has also been held to extend to visual signs such as coats of arms.[79] The name can either refer to a natural person or to a legal person such as a company, a political party, a professional association or a city.[80] Thus, § 12 *BGB* not only protects personal names but also distinguishing signs used in business, provided they refer to a person or entity rather than to goods or services. In recent years § 12 *BGB* frequently has been relied on to enjoin the registration and use of other persons' or entities' names as internet domain names.[81] English passing off cases in which the defendant's misrepresentation consists in using a name to which a goodwill belonging to another person is attached would prima facie be covered by § 12 *BGB* in German law,[82] at least in cases to which the protection of trade names provided by the *Markengesetz* (*Trade Marks Act of 1995 – MarkenG*) does not apply.[83]

§ 12 *BGB* distinguishes between two types of infringement. Under the first alternative, the defendant can be prevented from disputing the claimant's right to the legitimate use of his or her own name. Thus, German Rail was held to have infringed § 12 *BGB* by not using a town's correct name as a designation for the local railway station.[84] In practice, however, the second alternative is by far the more important one: the claimant can prevent the defendant from using a name which is identical or similar to the claimant's name if the claimant's interest is violated by this use. While § 12

[77] For a detailed commentary of § 12 *BGB* see Schwerdtner in *Münchener Kommentar*, § 12.
[78] *BGHZ* 155, 273 – *maxem.de*.
[79] *BGHZ* 119, 237 – *Universitätsemblem*.
[80] See Klippel, *Schutz des Namens*, 564 et seq.
[81] See *BGHZ* 155, 273 – *maxem.de*; BGH *GRUR* 2004, 619 – *kurt-biedenkopf.de*.
[82] See 15–35 above.
[83] The protection of trade names under §§ 5, 15 *Markengesetz* is largely similar to the protection afforded to trade marks (§§ 4, 14 *Markengesetz*). The Bundesgerichtshof has held that § 12 *BGB* is inapplicable where a trade name is already protected by §§ 5,15 *MarkenG*, see *BGHZ* 149, 191 – *shell.de*.
[84] *BVerwGE* 44, 351.

BGB itself only mentions injunctive relief, the right to one's own name is generally accepted to be an 'absolute right' within the meaning of § 823 I *BGB*, which provides for damages[85] if a person's 'life, body, health, freedom, property or another right' is violated. There is a three-stage test for the infringement of § 12, 1. The elements required are: (1) use of an identical or similar name causing a risk of confusion in a way which is (2) unjustified and which (3) results in a violation of the claimant's interest.

First, the defendant must cause a risk of confusion by using a name which is identical or confusingly similar to the claimant's name. In cases concerning the commercial appropriation of a celebrity's name, the defendant typically uses the identical name. As long as the celebrity himself is not involved in the same area of trade, it will often be argued that the mere use of the name in advertising or merchandising does not result in any confusion. However, German judges have not shown much sympathy for this argument. On the contrary, a risk of confusion is regularly assumed if the use of the name gives rise to the false impression in the minds of the public that the bearer of the name consented to the particular use.[86] This assumption is regularly made in cases of unauthorised use of celebrities' names in advertising; the courts do not appear to require witness statements or opinion polls as a proof of actual confusion. However, a claim based on § 12 *BGB* does not exist if it is evident from the facts that the person affected would never have consented. In a well-known case the name of the singer and actor Caterina Valente, who was very popular in the 1950s and 60s, was used in a newspaper advertisement for an adhesive creme for false teeth.[87] The Bundesgerichtshof held that there was no risk of confusion because it was evident that the singer had not consented to this advertisement. This interpretation of § 12 *BGB* has been criticised by many authors.[88] Indeed, it seems to lead to the strange result that claims based on § 12 *BGB* fail in the worst cases of abuse of another person's name.[89] However, it should be remembered that lacunae in the protection granted by the specific personality rights can be filled on the basis of the general personality right, which was indeed applied by the Bundesgerichtshof in the Caterina Valente case and in subsequent cases of disparaging advertising. Yet

[85] See below 142.
[86] *RGZ* 74, 308 at 310 et seq. – *Graf Zeppelin*; *BGHZ* 119, 237, 245 – *Universitätsemblem*.
[87] *BGHZ* 30, 7 – *Caterina Valente*.
[88] See Hoppe, *Persönlichkeitsschutz*, 54; Wagner, *JZ* 2004, 319 at 322; Westermann in Erman, *Bürgerliches Gesetzbuch*, § 12, para. 19.
[89] On the related problem whether damages and compensation for unjust enrichment equivalent to a reasonable licence fee can be granted in situations in which the claimant would never have consented, see below at 141, 143.

there remain good reasons for abandoning the requirement of confusion in § 12. The wording of the provision does not mention this requirement and it appears to be circuitous to construe § 12 *BGB* narrowly and to fill in the gap by applying the general personality right afterwards. The development of trade mark law could serve as a model: while trade mark protection was restricted to a use of the mark which caused confusion under the former *Warenzeichengesetz*, trade mark infringement has been extended by the *Markengesetz* of 1995. § 14 II No. 3, which implements Article 5 (2) of the EC *Trade Marks Directive*, now covers any use of a well-known mark which, while not creating confusion, is detrimental to the repute of the mark.

Second, the use of the name must be unjustified. One possible justification is consent given by the person entitled to use the name. Another defence is based on the principle that everybody is entitled to use his or her own name.[90] Thus, if two persons bear identical names, both persons are allowed to use them, both for private and business purposes. However, this rule requires qualification in two respects. First, the use must be bona fide, which is not the case if a person uses his own name in order to exploit the reputation of another well-known person bearing the same name. Second, both persons are required to avoid confusion as far as possible. When the names are used in a commercial context, the principle of priority generally requires the junior user to add distinguishing words to his name. Exceptionally, the senior user can be required to take such precautions if the conflicting name is associated with the junior user by the public. Thus, the German subsidiary of the petrol company Shell was successful with its action against one Andreas Shell who had registered the domain name 'shell.de' for himself and used it for his translating firm.[91] The Bundesgerichtshof proceeded from the rule that every person was entitled to register his name as an internet domain name. Conflicts about domain names among persons bearing identical names generally had to be resolved on the basis of the principle of priority. In conflicts concerning internet domain names the court held that generally earlier registration, rather than earlier use, of the domain was decisive. In this particular case, however, the court made an exception. Since the Shell company was world-famous and since internet users would expect to reach the Shell company's website under the domain 'shell.de', the defendant was not justified in using this domain name for himself.

[90] A thorough analysis of this defence is given by Knaak, *Das Recht der Gleichnamigen* (Köln, 1979); see also Schwerdtner in *Münchener Kommentar*, § 12, paras 221 et seq.
[91] *BGHZ* 149, 191 – *shell.de*.

Third, § 12 *BGB* only applies if the interests of the person entitled to use the name are violated. In a non-commercial context this may be the case if the use of the name creates the false impression of family links or commercial contacts or if the person's name is used in a context which suggests that this person endorses certain views which he or she in reality rejects. In a commercial context the risk of confusion or of dilution is regarded as a violation of the name bearer's interests. In cases concerning the commercial appropriation of a person's name in advertising the violation of interests will generally follow from the false impression of an endorsement of the advertised goods by the person named.

Personality rights III: the author's personality right (moral right)

Following the French tradition, German copyright scholars in the nineteenth century started advocating the protection of the author's moral rights.[92] Although the 'author's personality right', as the droit moral is usually termed in Germany, was not mentioned in the copyright statutes before 1965, it was already recognised in the case-law of the Reichsgericht.[93]

The *Copyright Act of 1965* (*Urheberrechtsgesetz – UrhG*) adopts a monistic approach. § 11 *UrhG* provides that the author's right is a single right which protects both the author's economic and ideal interests. According to Eugen Ulmer's well-known metaphor, copyright can be compared to a tree with a single trunk, with two roots – the one being property, the other one being personality – and with branches some of which are nourished only by one root, some by both roots.[94] The Act specifies the three fundamental moral rights in §§ 12–14 *UrhG*: the right to first publication, the right to recognition of authorship and the right to integrity of the work. Other provisions, while not mentioned in the part entitled 'the moral right' also serve the author's ideal interests.

While the categorisation of the moral right as a 'specific personality right' may be disputed,[95] the exploitation of a work which interferes with the author's moral right raises similar questions as the exploitation of other aspects of personality. In particular it is doubtful to what extent moral rights are licensable.[96]

[92] See on the historical development of the moral right in Germany Dietz, *Das Droit Moral des Urhebers im neuen französischen und deutschen Urheberrecht* (München, 1968) 15 et seq.; Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave*, vol. I (Stockholm, 1967), 25 et seq.

[93] See *RGZ* 79, 397 – *Felseneiland mit Sirenen*.

[94] Ulmer, *Urheber- und Verlagsrecht* (3rd edn, Berlin 1980), § 18 I 4 (p. 116).

[95] See Lucas-Schlötter, 'Die Rechtsnatur des Droit Moral' *GRUR* Int. 2002, 809 et seq.

[96] See Metzger, *Rechtsgeschäfte über das Droit Moral im deutschen und französischen Urheberrecht* (München, 2002), 20 et seq., 200 et seq.

Personality rights IV: the general personality right

The general personality right (allgemeines Persönlichkeitsrecht) was developed by the judiciary in a vast number of cases.[97] Several attempts to create a statutory basis have failed. Thus, unlike § 22 *KUG* or § 12 *BGB*, the general personality right does not have any clear boundaries and it is impossible to suggest a set of conditions which must be met in order to give rise to a claim. From the perspective of legal methodology, the general and highly abstract nature of this right is responsible for both its strength and its weakness.[98] On the one hand, since the categories of personality violation are never closed, the right is highly flexible, thereby allowing the courts to react to new types of violation immediately without having to wait for new legislation. On the other hand, legal certainty is severely reduced due to the vague character of the right. Nevertheless there is unanimity both in the political discussion and among judges and academics that the general personality right is indispensable for a personality protection which satisfies the standard required by the constitution. However, some authors argue that the uncertainty of the sweeping right should be reduced as far as possible, either by creating new specific personality rights through legislation[99] or by proposing specific tests for typical situations of personality right violations.[100]

It should be noted at this point that every codified legal system depends on flexible and open-textured provisions which allow the courts to adapt the law to new situations. For this reason, the *BGB* contains several 'general clauses', for example the duty to perform contractual obligations in accordance with 'good faith' (§ 242 *BGB*), the nullity of contracts which are contrary to the 'good morals' (§ 138 *BGB*) or the tort of unfair competition (§ 3 *UWG*). The vague language of these provisions makes them impossible to apply by mere reference to the wording. Rather, these rules provide a frame for case-law the development of which has, in terms of legal methodology, a striking resemblance with the application of common law rules and principles.[101] Although there is no doctrine of binding precedent in German law, judgments handed down by the Bundesgerichtshof have a high persuasive authority. When applying general provisions, lawyers therefore refer to Supreme Court decisions and courts analyse and apply them.

[97] On the historical development see above, 100.
[98] See Ohly, *Richterrecht und Generalklausel im Recht des unlauteren Wettbewerbs* (1997), 234 ff., and 'Generalklausel und Richterrecht' *AcP* 2001 (201), 1 et seq.
[99] See Helle, *Besondere Persönlichkeitsrechte*, 8 et seq.
[100] See Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 80 III (517 et seq.).
[101] See Ohly, *Richterrecht*, 235 ff. and *AcP* 201 (2001); Langenbucher, 'Argument by Analogy in European Law' [1998] *CLJ* 481 et seq.

The general personality right can be compared to the statutory provisions mentioned above. It is impossible to apply without any knowledge of the relevant Supreme Court decisions which are compiled and systematised in commentaries. Most commentaries and textbooks distinguish between several clusters of cases (Fallgruppen) according to the various types of violation. While some clusters have reached a degree of precision that allows the statement of a detailed rule governing the cases, others remain vague. Viewed from this perspective, the specific personality rights provided in §§ 22 *KUG* and 12 *BGB* are statutory rules governing two clusters of personality violations. Over time, legislation may react by creating new specific personality rights on the basis of the rules developed by the courts on a case-by-case basis. The attribution of a case to one of these clusters does not yet determine whether the right has been violated. Rather, the various interests at stake have to be balanced by taking into account all relevant circumstances of the particular case. In particular, many decisions hinge on the balancing of freedom of speech and information, guaranteed in Art. 5 I *GG*, and the protection of the personality, guaranteed in Art. 1 I and 2 I *GG*.

Sometimes the general personality right is said to be subsidiary to the specific personality rights. This proposition is misleading. While it is true that the specific provisions are to be applied with priority, it has to be determined in each case whether the specific rule is intended to rule out any supplementary protection or whether the general personality right can be applied in order to fill gaps left by the specific rules. As seen above,[102] § 22 *KUG* only provides for relief against the dissemination and exhibition of portraits, not against secret photography as such. As early as 1957 the Bundesgerichtshof held that § 22 *KUG* did not rule out additional protection against secret photographs based on the general personality right.[103] Another example in point is the *Caterina Valente* case.[104] As will be recalled, § 12 *BGB* did not apply in the case of a disparaging advertising in which the singer's name was used. However, the Bundesgerichtshof filled this gap on the basis of the general personality right. On the other hand, the balance of interests which is the basis of § 23 *KUG*, will generally be the same under the general personality right. Thus, the publication of a politician's portrait in a newspaper, which is justified under § 23 I No. 1 *KUG*, does not violate his or her general personality right either.

Of the various factual situations in which the general personality right might apply, only some are relevant for present purposes. Different clusters of cases are proposed in the literature, but the most important

[102] See above, 106. [103] *BGHZ* 24, 200 at 208–*Spätheimkehrer*. [104] See above, 110.

clusters[105] seem to be (1) intrusion into the private sphere, (2) the publication of personal information (3) defamation cases, (4) 'false light cases' and, finally, (5) appropriation of personality cases.[106] There is no clear borderline between these categories, and some of them may overlap. Moreover, the categories are not closed and some further categories may exist.

The first category deals with the protection of privacy in the narrow sense of the word. A person's private sphere is protected against secret photographing,[107] surveillance by microphone or camera, telephone-tapping and the like.[108] Also, a person's secrets are protected against spying. The general personality right is therefore violated when a person's letters are opened, his or her secret diaries are read[109] or his or her genes or blood samples are analysed without consent.[110] A person's private sphere is also protected against nuisance and disturbance by others. Persistent harassment by telephone has been held to be a violation of the personality right.[111] Under the same principle, advertising by telephone, sometimes referred to as 'cold calling', directed at private persons in their homes has been held to violate the general personality right.[112] Frequently a distinction is drawn between the intimate sphere, the private sphere and the individual sphere ('doctrine of spheres').[113] The intimate sphere covers sexual life, health and confidential private information as expressed in diaries or private letters, whereas life at home, with family and friends generally falls within the private sphere. The individual sphere concerns the personal sphere in public. While the intimate sphere is said to receive absolute protection and the private sphere is prima facie protected against intrusion, information concerning the individual sphere

[105] With minor differences this structure follows *Larenz/Canaris*, § 80 II (pp. 498 et seq.); see also the categories suggested by Baston-Vogt, *Der sachliche Schutzbereich*, 207 et seq.; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, paras 5, 8; Rixecker in *Münchener Kommentar*, § 12 Anh.

[106] Cf 55 above (categorisaton of privacy cases in US law).

[107] *BGHZ* 24, 200 at 208 – Spätheimkehrer; OLG Hamburg *AfP* 1982, 41.

[108] See *BGHZ* 27, 286; BGH *NJW* 1981, 1366.

[109] *BVerfGE* 80, 367 – *Tagebuch II*; Amelung, 'Die zweite Tagebuchentscheidung des BVerfG', *NJW* 1990, 1753 et seq.

[110] See Deutsch, VersR 1994, 1 et seq.; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 151, see also BGH *NJW* 2005, 497 (secret DNA paternity test).

[111] See Baston-Vogt, *Schutzbereich*, 467; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 285.

[112] KG Berlin *AfP* 2003, 434; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 286; Köhler/Piper, *UWG*, § 1, para. 141; in the majority of cases 'cold calling' has been enjoined on the basis of the tort of unfair competition, see *BGHZ* 54, 188 – *Telefonwerbung I*, BGH *GRUR* 2000, 818 – *Telefonwerbung VI*; BGH *GRUR* 02, 637, 638 – *Werbefinanzierte Telefongespräche*; Köhler/Piper, *ibid*., para. 143. Meanwhile the question is governed by legislation, see § 7 *UWG*.

[113] See *BVerfGE* 54, 148 – *Eppler*; *BVerfGE* 80, 376 – *Tagebuch II*; BGH *GRUR* 1987, 464.

may be published if the public interest in free speech and information carries more weight than the privacy interest. However, this distinction is frequently criticised as too formal.[114] Indeed, in every single case it is necessary to weigh the privacy interest against the public interest. Within this balancing exercise, several factors have to be taken into account, including the weight of the public interest and the degree of intimacy the information carries for the particular person but also the means by which the information was obtained. Princess Caroline's action against the publication of press photographs showing her during private activities in public places is an example in point. The Bundesgerichtshof (Federal Supreme Court)[115] held that a person can also be in a private area outside the purely domestic environment. Thus the court was prepared to prohibit the publication of photographs which showed the Princess holding hands with her partner in a garden restaurant. In the court's opinion, the public interest in obtaining the information weighed relatively little, since the story contained only gossip. What is more, the pictures had been taken secretly by means of a tele-lens while the claimant believed herself to be unobserved. On the other hand, Princess Caroline was unsuccessful in her attempt to have the publication of some other photographs prohibited, which showed her while shopping, walking or riding in public. The court held that a well-known person could not object to being shown in the press outside her official functions, in the role of an ordinary citizen. The Bundesverfassungsgericht (Federal Constitutional Court) balanced the right of privacy against the freedom of the press and confirmed the Supreme Court's judgment in most respects. This result did not find favour with the European Court of Human Rights, which preferred to examine the contribution the photographs make to a debate of public interest. The implications of this judgment on the harmonisation of the law of privacy in Europe will be considered in more detail below. At this point, however, it should already be noted that this case relates to press law in general rather than to the commercial exploitation of personality in the narrower sense analysed in this study. Thus, the protection of privacy by means of the general personality right will not be explored in greater detail here.

Second, personal information is protected not only by specific statutory provisions on confidentiality, but also by the general personality right. Specific provisions can be found in the Criminal Code which protects personal secrets revealed to certain professionals such as doctors or lawyers,[116] in the *Bundesdatenschutzgesetz* (*Data Protection Act*) and in

[114] See Amelung, 'Die zweite Tagebuchentscheidung des BVerfG' *NJW* 1990, 1753 at 1756; Baston-Vogt, *Der sachliche Schutzbereich*, 180 et seq.; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 7.

[115] *BGHZ* 131, 332. [116] §§ 202 *StGB* et seq.

several other statutes.[117] Outside the ambit of these specific provisions the general personality right may apply.[118] Thus, a person can prevent the publication of confidential information concerning his or her private life regardless of how the person relating the information to the public obtained it. Even the publication of true information about a person's past can violate his or her personality right unless the public interest in information prevails. However, as well as in the privacy cases the person's interest in the secrecy of the information has to be balanced against the public interest in information. Many judgments handed down both by courts in private law cases and by the Constitutional Court have dealt with this balancing exercise. In a well-known case, for example, a person convicted of aiding murder who was about to be released on parole sought to prohibit the broadcast of a television programme about the crime which would have mentioned the claimant's name and shown his portrait.[119] The Constitutional Court held that while in cases concerning press coverage of crime the public interest in information generally prevailed, exceptions had to be allowed. Thus the offender's name could only be published when serious crimes had been committed. Even in serious cases the offender's names could not be presented to the public years after the crime had been committed. At some point the offender had to be allowed to be re-integrated into society. A similar line was taken by the Bundesgerichtshof in a case concerning the publication of a list of 'unofficial collaborators' of the former East German secret service.[120] The court held that a distinction had to be drawn between persons who had occupied higher ranks in the secret service or who still held offices in present-day Germany on the one hand and other persons on the other hand. Again, this balancing exercise mainly concerns press law rather than the commercial exploitation of personality.

Third, defamation is a criminal offence according to §§ 185, 186 of the *Criminal Code*.[121] As seen above, § 823 II *BGB* provides a private law remedy in these cases.[122] However, the general personality right may go further, in particular because criminal law only prohibits wilful libel and

[117] See for example § 4 *Bundesdatenschutzgesetz* (*Data Protection Act of 2003*): protection of personal data; §§ 17 *UWG* et seq.: protection of trade secrets.

[118] See Baston-Vogt, *Schutzbereich*, 353 et seq.; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, paras 146 et seq., 200 et seq.; Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 80 II.

[119] BVerfG 35, 202 – *Lebach*.

[120] BGH *GRUR* 1995, 913 – *Namensliste*.

[121] § 186 *StGB* prohibits the public statement of false facts which are likely to denigrate a person in the public opinion, § 185 *StGB* prohibits libel and slander as such, thereby covering both false factual statements made in private and non-factual denigratory statements regardless of whether they were made in public or private.

[122] See also § 824 *BGB* and §§ 14, 15 *UWG* which grant protection against various forms of trade libel.

slander, whereas under the general personality right a negligent defamation may give rise to a private law action. In some decisions the Bundesgerichtshof did not even apply §§ 185, 186 of the *Criminal Code* in private law cases, although they would have been applicable.[123]

Closely related to the defamation cases, but more relevant to the subject of commercial appropriation, is the fourth category. As in US law, a person prima facie has a legal remedy against being presented in a false light in public, even if the presentation is not defamatory.[124] Examples have already been mentioned above: the advertisement in the *gentleman rider* case[125] suggested that a brewery owner endorsed a sexual stimulant, the advertisement in the *Caterina Valente* case suggested that the singer had false teeth.[126] Another example is provided by the *ginseng root* case.[127] A professor of ecclesiastical law had brought a ginseng root back from a holiday in Korea and given it to a friend who needed it for research purposes. Later, the professor's name was mentioned in an advert for yet another sexual stimulant of which ginseng was one ingredient. Further cases in this category include the publication of false quotations and the publication of a person's photograph in an advertising campaign for a political party not supported by the person portrayed.[128]

Although many cases of commercial appropriation can be regarded as 'false light' cases, this category does not cover all possible situations. As seen above, the right to one's own image goes further. § 22 *KUG* does not require proof of any negative context but grants every person the right to decide for himself or herself which use of the image to permit. It is well established that this rule can be generalised: the general personality right grants a right of self-determination concerning the commercial use of all aspects of personality. Since the unauthorised use of another person's image or name already comes within the ambit of §§ 22 *KUG*, 12 *BGB*, respectively, the general personality right only needs to be referred to whenever other aspects of personality such as the voice, typical gestures or other characteristic personal traits are used commercially. Instances are few, however, since most cases involved the use of either name or portrait of the person affected. One example is provided by a case in

[123] See for example *BGHZ* 39, 124 – *Fernsehansagerin*: In a newspaper article a TV programme presenter had been compared to a 'milked-out goat' who would belong into a 'cheap second-class night club in St Pauli'. This statement constituted libel according to § 185 of the *Criminal Code*. However, the judgment was based on the general personality right, see also Larenz/Canaris, *Lehrbuch des Schuldrechts II/2*, § 80 II 2 a (p. 501, n. 27).

[124] For 'false light cases' in US law see 56 and 84 above.

[125] See above 101.

[126] See above 110.

[127] *BGHZ* 35, 363 – *Ginsengwurzel*.

[128] BGH *GRUR* 1980, 259 – *Wahlkampfphoto*.

which the typical style and voice of Heinz Erhard, a well-known comedian, had been adopted in an advertisement after his death. Apart from the problem of post-mortem protection, which will be considered in detail below, the Oberlandesgericht (Court of Appeal) Hamburg held that the case was analogous to the unauthorised exploitation of another person's name or portrait.[129]

Unfair competition

Whereas in common law jurisdictions various meanings have been attributed to the term 'unfair competition',[130] the meaning in German law is specified by statute. The *Act Against Unfair Competition* (*Gesetz zur Bekämpfung des unlauteren Wettbewerbs – UWG*) of 2004[131] proscribes several types of behaviour in trade which are qualified as unfair. In German law, the term 'unfair competition' is not restricted to the misappropriation of a competitor's trade values. Rather, it is a general term which covers all acts made for purposes of competition that are contrary to the honest practices generally accepted in trade. § 3 of the Act provides:

> Acts of unfair competition, which are likely to affect competition to the detriment of competitors, consumers or other market participants to a more than immaterial extent, are prohibited.

While the former *UWG* of 1909 gave little guidance as to the application of the general tort of unfair competition to individual cases, the new Act specifies the meaning of 'unfair competition' by giving a list of examples (§ 4), among them the exertion of duress and undue influence on consumers (No. 1), the exploitation of the commercial inexperience of children (No. 2), surreptitious advertising (No. 3), trade libel (Nos. 7, 8), certain kinds of product imitation (No. 9), the intentional obstruction of a competitor's business (No. 10) or the breach of a statutory duty which aims at regulating market behaviour. Specific provisions concern misleading advertising (§ 5), comparative advertising (§ 6), aggressive and molesting advertising (§ 7) and the disclosure of trade secrets (§ 17).

[129] OLG Hamburg *GRUR* 1989, 666 – *Heinz Erhardt*. [130] See 13 above.

[131] The Act of 2004 replaces the former *Act of Unfair Competition of 1909*, which generally prohibited all acts made for purposes of competition which were contrary to honest practices (§ 1), and which contained only few specific provisions, i.e. a provision on comparative advertising (§ 2) and a prohibition of misleading advertising (§ 3). The purpose of the Act of 2004 is to modernise and liberalise German unfair competition law and to enhance legal clarity by specifying in more detail which acts are considered as unfair.

Among the instances of unfair competition which are proscribed in § 4 *UWG*, No. 9 at first sight seems to be a suitable legal basis for prohibiting the unauthorised commercial exploitation of aspects of personality. According to this provision, the imitation of products or services is deemed to be unfair if it (a) causes confusion in the market as to the commercial source of the products or services, (b) exploits a competitor's reputation in an unreasonable way or (c) if the knowledge that is necessary for the imitation has been obtained by unfair means. § 4 No. 9 *UWG* codifies a principle which had formerly been acknowledged judicially by the Federal Supreme Court under the general tort of unfair competition (§ 1 of the Act of 1909). Relying on this principle, the owner of the Rolex trade mark could prevent a chain of coffee shops from offering a watch for sale which looked like a genuine Rolex.[132] Some cases of character merchandising have also been decided by reference to this principle.[133] In the *Bambi* case, the owner of the copyright in the 'Bambi' character and Disney Productions could prevent a trader from registering the trade mark 'Bambi' for sweets and from selling 'Bambi' chocolate. While the word 'Bambi' was not protected by copyright, the defendant made unfair use of the reputation attached to the name and prevented the copyright owner from extending his merchandising activities to this field of trade.

Nevertheless it seems that German courts have never relied on unfair competition law to grant protection against the exploitation of aspects of personality. The reason is hinted in a sentence at the end of the Marlene Dietrich decision. Having given reasons why the defendant's merchandising activities infringed Marlene Dietrich's personality right, the Bundesgerichtshof explains that there is no need to examine an action based on the *UWG*:

> At any rate, unfair competition law would not allow a solution of this case without reference to the personality right. Even if a competitive relationship between the parties should exist, the allocation of marketing possibilities is not possible on the basis of unfair competition law, but only on the basis of the personality right.[134]

This brief passage points towards two arguments. First, an action for unfair competition can only be brought by a competitor (§ 8 III No. 1 *UWG*) or by certain trade or consumer organisations (§ 8 III Nos. 2–4

[132] BGH *GRUR* 1985, 876 – *Tchibo/Rolex I*.

[133] BGH *GRUR* 1960, 144 – *Bambi*; BGH *GRUR* 1963, 485 – *Micky-Maus-Orangen*; OLG Frankfurt *GRUR* 1984, 520 at 521 – *Schlümpfe*; see also Pagenberg, 'Protection of Get-Up and Character Merchandising Under German Law' [1987] IIC 457 at 466 et seq.; Ruijsenaars, *Character Merchandising in Europe* (Gaithersburg, 2003).

[134] BGH *GRUR* 2000, 709 at 715 (*BGHZ*, the official reports of the judgments of the Federal Supreme Court, do not contain this passage).

UWG). The term 'competitor' is defined as a trader who is in 'a competitive relationship' with the defendant (§ 2 No. 3 *UWG*). The requirement of a 'competitive relationship' is reminiscent of the 'common field of activity' required in older English passing off cases.[135] In cases concerning the exploitation of another trader's reputation the competitive relationship regularly exists if both traders are interested in benefiting from the goodwill commercially. In this respect, a competitive relationship could even exist between a celebrity and a trader involved in merchandising activities. However, when a celebrity is not involved in any merchandising or advertising activities, this test may not be met in cases concerning the appropriation of personality.

Second, unfair competition law does not grant any positive rights, but only prohibits certain acts. Protection against unauthorised exploitation of personality, on the other hand, builds on the idea of self-determination: every person should decide for himself or herself about which use of his persona to permit or to prohibit. This idea of self-determination is easier to reconcile with the notion of a subjective right than with the prohibition of certain acts considered unfair in trade. The use of another person's portrait without a person's consent, for example, is only 'unfair' if the person concerned has an exclusive right to decide about the publication of his or her image. Thus the crucial question is not whether the unauthorised commercial appropriation of personality is fair or unfair, but, as the Bundesgerichtshof points out, whether the relevant marketing possibilities have been allocated to the person.

Trade mark law

A person's name or portrait can be protected as a trade mark. A search in the database of the German Patent and Trade Mark Office conducted in March 2003 resulted in ten hits for marks containing the name 'Boris Becker' and in seven hits for the name 'Franz Beckenbauer'. In most respects, registration and infringement of these marks follows the general principles of trade mark law.

The German *Trade Marks Act of 1995* (*Markengesetz – MarkenG*) implements the EC *Trade Marks Directive*. Many of the substantive provisions of this Act are therefore similar to those in the UK *Trade Marks Act, 1994* or in the respective Acts of other EU member states. Unlike the UK Act,[136] however, the German *Markengesetz* extends to unregistered marks and to other distinguishing signs such as business

[135] See 20 above. [136] See *Trade Marks Act 1994*, s. 2(2).

names (§ 5 II *MarkenG*), work titles (§ 5 III *MarkenG*) or geographical indications of origin (§§ 126 et seq. *MarkenG*). Thus there are two ways in which a person's name or portrait can acquire trade mark protection: by registration (§ 4 No. 1 *MarkenG*) or by the acquisition of goodwill through use (§ 4 No. 2 *MarkenG*). The registration requirements are identical to those laid down in the EC Directive. Since personal names and images will regularly be capable of distinguishing and since there are no specific absolute grounds for refusal concerning aspects of personality, trade mark registration is usually possible. A trade mark consisting of the name or portrait of a famous person from history, however, would arguably be devoid of a distinctive character.[137] Thus, an application for a trade mark consisting of Leonardo da Vinci's Mona Lisa was rejected by the Bundespatentgericht (Federal Patent Court).[138]

Should a name or portrait of a person be registered without his or her permission, this person can rely on § 13 *MarkenG* in order to oppose the registration or bring a claim for declaration of invalidity and cancellation from the register. Whereas §§ 9–12 *MarkenG* list the relative grounds of refusal based on senior trade mark rights, § 13 *MarkenG* adds other rights to the list which allow their holder to prohibit the use of the mark. § 13 II *MarkenG* lists examples of such rights, including the right to one's name and the right to one's image. There has been some discussion both among jurists and in the press about the trade mark registration of the names and portraits of famous persons from history whose personality rights have elapsed. In a case decided by the Oberlandesgericht (Court of Appeal) Dresden,[139] the defendant had registered the name and the portrait of Johann Sebastian Bach for a number of classes. When the celebrations commemorating Bach's death in 1750 approached, the claimant threatened to sue the Meissen Porcelain Manufactury and the Thomaskirche Leipzig, which both intended to sell products bearing Bach's portrait, for infringement. Had the case concerned the name of a living person or a person deceased shortly before, the trade mark could have been cancelled according to § 13 *MarkenG*. Bach, however, had died 250 years ago, so that his name and image were no longer protected by any subjective right.[140] The Court of Appeal held that due to a lack of trade mark use and for lack of confusion there was no infringement. An alternative route would have been § 50 I No. 4 *MarkenG*, according to which a mark can

[137] See Götting, 'Persönlichkeitsmerkmale von verstorbenen Personen der Zeitgeschichte als Marke' *GRUR* 2001, 615 at 619.
[138] *BPatGE* 40, 6 = *GRUR* 1998, 1021 – *Mona Lisa*.
[139] OLG Dresden *NJW* 2001, 615 – *Johann Sebastian Bach*.
[140] But see Götting, *GRUR* 2001, 615 at 623, suggesting post-mortem protection for four generations after the person's death.

be cancelled if the application was made in bad faith. It has been decided that applications made for the sole purpose of suing other traders for trade mark infringement are usually made in bad faith.[141] If, however, the applicant intends to use the mark himself or to license it to others the trade mark will be valid. In the wake of the Bach case, which aroused public protests, the government of the State of Saxonia unsuccessfully suggested an amendment to the *Markengesetz* providing that the names and portraits of famous persons from history are excluded from trade mark registration.[142]

A trade mark can be revoked if it has not been used for the past five years (§§ 26; 49 *MarkenG*). A specific issue concerning trade marks which contain the name or image of a celebrity is whether the use of a mark on memorabilia constitutes 'use' within the meaning of this provision. The Oberlandesgericht München (Munich Court of Appeal) held that the use of the mark 'The Beatles' on memorabilia such as T-shirts and mugs did not constitute a use that indicated trade origin but rather an ornamental use referring to the pop group rather than to the producer of the souvenirs.[143] However, the borderline between ornamental use and trade mark use has been shifted in favour of the latter[144] by the decision of the European Court of Justice (ECJ) in *Arsenal Football Club plc* v. *Reed*,[145] where the famous English football club sought to prevent the sale of unofficial clothing merchandise bearing its registered trade marks. The ECJ, following a reference from the English High Court, had to determine whether such unauthorised soccer merchandise fell outside an action for trade mark infringement on the basis that such use of the marks was as 'badges of support, loyalty or affiliation' rather than as 'trade mark use', indicating the origin of the goods in question. The ECJ held that registration of a trade mark gave its owner a proprietary right exclusively to use that mark to indicate trade origin and to prevent unauthorised use of that mark where damage to that property right was likely to occur. A trade mark must offer a guarantee that the goods or services are supplied under the control of a single undertaking and the proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the mark by selling products illegally bearing the mark. Although

[141] BGH *GRUR* 2001, 242 – *Classe E*. [142] See Götting, *GRUR* 2001, 615 at 623.
[143] OLG München *NJW-RR* 1996, 1260 et seq. – *The Beatles*; see also Peifer, *Individualität im Zivilrecht*, 297. For the similar situation in English law see *ELVIS PRESLEY Trade Marks* [1999] RPC 567 and see 22–3 above.
[144] See also BGH *GRUR* 2002, 1072 – *SYLT-Kuh*, where the Federal Supreme Court held that the sale of a sticker showing a cartoon character constituted a use of the mark consisting of this character for the purposes of § 26 *MarkenG*.
[145] *Arsenal Football Club plc* v. *Reed* [2003] *All ER* (EC) 1.

a purely descriptive use of a mark would not be liable to damage the interests of the trade mark owner, this would not be the case where the use of a trade mark is such as to give the impression that there was a material link in the course of trade between the goods sold by the defendant and the trade mark owner.[146] Once it is found that such use is liable to affect the guarantee of origin of the goods, it is immaterial that in the context of that use the sign is perceived as a badge of support for or loyalty or affiliation to the owner of the mark. This is a considerable strengthening of the scope of trade mark protection against unauthorised merchandisers and allows a trade mark proprietor to protect the exclusivity of the mark, almost regardless of whether or not customers are confused as to whether they are buying the 'official' merchandise of the trade mark proprietor.

It has been argued that trade marks, because of their character as freely assignable intellectual property rights, constitute a more suitable way of protection for aspects of personality and that the personality right should be limited to the protection of non-economic interests.[147] While it is true that aspects of personality may be protected by trade marks and that it may be advisable for a celebrity to apply for a trade mark in his or her name, trade mark protection remains deficient if it is not supplemented by the personality right. Even after the *Arsenal* decision it remains doubtful whether the unauthorised use of a celebrity's picture or name on a souvenir will always amount to an infringement or whether such use with the consent of the owner of the mark will be sufficient in order to avoid revocation for non-use. The European Court of Justice's judgment was based on the assumption that consumers regarded the indicia of a soccer club on merchandise as an indication of origin. While the public may assume soccer merchandise to originate from the respective club, it is much less likely that a picture of the Beatles on a T-shirt will be regarded as an indication of origin by the relevant section of the consuming public. Personality rights are better suited to protect a person's economic interests in his or her persona, since they protect a person's self-determination about his or her aspects of personality in general without being restricted to an indication of origin.

Post-mortem protection

Commercial exploitation is not limited to the name, portrait or image of living persons. The fame of a celebrity often survives his or her death.

[146] *Ibid.*, 30. [147] Peifer, *Individualität im Zivilrecht* (2001), 294 et seq.

Indeed, the 'cult status' of a celebrity, which makes merchandising particularly worthwhile, may develop as a consequence of his or her premature death, as the examples of Marilyn Monroe or James Dean show. The decision in favour of protecting living persons against unauthorised commercial exploitation of personality is in no way prejudicial to the question of whether similar protection should be granted to deceased persons.

German law has been in favour of post-mortem protection since the beginnings of personality protection.[148] It will be recalled that the debate which finally led to the drafting of § 22 *KUG* was triggered by the unauthorised publication of a photograph showing the corpse of the former German chancellor Bismarck on his death bed.[149] As seen above, § 22 *KUG* explicitly deals with portraits of deceased persons: for ten years after the death of the person portrayed, the portrait may only be published with the consent of the deceased person's relatives.

Three well-known decisions extended and confirmed this principle. The *Mephisto* case[150] concerned a book written by Klaus Mann in 1936 while in exile in Amsterdam. The main character of the book is an actor named Hendrik Höffgen who achieves fame in the role of Mephisto in Goethe's drama *Faust*. Höffgen is pictured as a sexual pervert and as an opportunist who, initially a socialist, changes his views after 1933 and becomes a follower of the Nazi Party. It is evident from the story that the person actually portrayed is the well-known actor Gustaf Gründgens, whose adopted son successfully sought to prevent the publication of the book in Germany. The Bundesgerichtshof held that the personality right had effect even after a person's death. This followed not only from specific statutory provisions such as § 22 *KUG*, but also from Art. 1 of the *Constitution*: since Art. 1 declared that human dignity was inviolable, it could not be regarded as violable after a person's death. Even a living person could not rely on the protection of his dignity if he had to expect libel and slander after his death. The court referred to the post-mortem personality right as a dwindling right, which vanishes over time to the extent the public memory of the deceased person fades. As for the novel *Mephisto*, it was defamatory and showed Gründgens in a false light. Although works of literature were protected by the freedom of art provided in Art. 5 III of the *Constitution*, this freedom, on balance, could not justify the deliberate distortion of another person's biography. The

[148] See, however, *RGZ* 41, 43 at 50 – *Wagnerbriefe*. In this judgment handed down in 1898, the Reichsgericht held that the name of Richard Wagner could not be protected after his death. On the academic discussion in the nineteenth and early twentieth century see Klippel, *Schutz des Namens*, 549.

[149] See above. [150] *BGHZ* 50, 133 – *Mephisto*.

Constitutional Court, which was consequently seized by the defendant, confirmed this decision.[151]

The second case in point[152] concerned watercolours falsely attributed to the expressionist painter Emil Nolde, who died in 1956. After the pictures had been discovered in 1984, Nolde's widow sought the removal of the artist's forged signature from the pictures. The Bundesgerichtshof held that the moral rights granted in the *Copyright Act of 1965* were not applicable, since they only concerned the relation between an author and his works, whereas the pictures in question were someone else's works. However, the court was prepared to grant the author's right to object to the false attribution of works, in French doctrine referred to as the 'droit de non-paternité', on the basis of the general personality right. This right could still be asserted thirty years after the death of the painter. It was impossible, according the court, to set a fixed time limit at which post-mortem personality protection expired. Rather, the court held, referring to the *Mephisto* decision, that the right dwindled to the extent the memory of the person in the public faded. Since Nolde was among the best-known German expressionist painters and given the intensity of the violation of the artist's personality the right had not lapsed yet.

The *Mephisto* and *Emil Nolde* decisions concerned non-economic interests. For a long while it was unclear whether economic interests in personality also survived the person's death. In the *Heinz Erhardt* case[153] mentioned above, the Oberlandesgericht (Court of Appeal) Hamburg approved this view: an artist's personality could not be subjected to commercial exploitation immediately after his death. Both his claim to dignity and the necessity to reserve the commercial exploitation to the artist's heirs were adduced as arguments by the court. In the *Marlene Dietrich* case, the Bundesgerichtshof adopted the same standpoint. For the first time, the court clearly distinguished between ideal and economic interests which were both protected by the personality right. It was well established that non-economic interests were protected after a person's death. The same had to apply in relation to economic interests. First, effective post-mortem protection of personality required that not only defamation but also unwelcome commercial exploitation could be prevented. Second, there was no reason why the economic value created by the personality during her lifetime should not pass on to her heirs together with all other assets. As a consequence the Bundesgerichtshof held that the economic aspects of the personality right were descendible whereas the non-economic interests were not. Therefore in cases

[151] *BVerfGE* 30, 173. [152] *BGHZ* 107, 384 – *Emil Nolde*.
[153] OLG Hamburg *GRUR* 1989, 666 – *Heinz Erhardt*.

concerning commercial exploitation the deceased person's heirs could bring an action for an injunction or damages, whereas in cases concerning non-economic interests only the person's relatives had standing in court.

While most authors agree that post-mortem protection should be granted there is disagreement about its doctrinal basis and about the extent to which economic interests should be protected post mortem.[154]

The first problem results from the fact that personality rights are subjective rights. However, according to the prevailing view among legal authors, a subjective right requires a subject, which no longer exists once the owner of the right is dead. One possible solution might be to regard a violation of the deceased person's personality as a violation of the subjective rights of the surviving relatives. As far as economic interests are concerned, this reasoning has been adopted by the Bundesgerichtshof: the economic interests are seen as descendible;[155] therefore they become a part of the estate. To this extent the rights are inherited by the heirs who can consequently rely on their own rights in order to fight violations. Non-economic interests, however, are considered as inseparable from the personality. Thus they are not descendible. Some authors argue that whenever the memory of a dead person is disparaged, his or her relatives are personally affected. Post-mortem protection thus becomes protection of living persons' interests.[156] However, the position adopted by the judiciary and the prevailing view among legal authors is that a distinction has to be made between cases in which the relatives' reputation is affected and cases in which it is not. If the relatives' own reputation is affected, there is no doubt that they can apply for an injunction or bring an action for damages in their own name. Thus, the Bundesgerichtshof held that the denial of the holocaust can even be regarded as a violation of the personality of Jews born after 1945.[157] In a case concerning a libellous article in a right-wing newspaper concerning a former member of the communist resistance against Hitler, however, the Bundesgerichtshof decided that while his daughter could successfully apply for post-mortem protection in the form of an injunction, she could not recover damages for pain and suffering, since her own reputation was not affected by the

[154] See Beuthien, 'Postmortaler Persönlichkeitsschutz auf dem Weg ins Vermögensrecht' *ZUM* 2003, 261 et seq.; Baston-Vogt, *Schutzbereich*, pp. 292 et seq.; Gregoritza, *Die Kommerzialisierung von Persönlichkeitsrechen Verstorbener* (Berlin, 2003); Klippel, *Schutz des Namens*, 550 et seq; Larenz/Canaris, *Schuldrecht II/2*, § 80 VI (pp. 531 et seq.); Rixecker in *Münchener Kommentar*, § 12 Anh., paras 22–9; Seifert, ‚Postmortaler Schutz des Persönlichkeitsrechts und Schadensersatz – Zugleich ein Streifzug durch die Geschichte des allgemeinen Persönlichkeitsrechts' *NJW* 1999, 1889 et seq.

[155] *BGHZ* 143, 214 – *Marlene Dietrich*, on this aspect see the next paragraph, below.

[156] See Klippel, *Schutz des Namens*, 553; Schwerdtner, 110 et seq.

[157] *BGHZ* 75, 160.

article.[158] Most authors agree with this distinction,[159] which renders it impossible to base post-mortem personality protection as such on the relatives' subjective rights. The more convincing view therefore holds that a dead person retains some rights which are held in trust by the surviving relatives.[160] A largely similar position taken by other authors is that, while the personality right as such ceases to exist with the person's death, society is still under a general duty to respect the memory of deceased persons.[161] Post-mortem protection thus does not result from a violation of a subjective right, but from a duty of care which applies irrespective of the existence of a right.

Discussion of the second question has been fuelled by the *Marlene Dietrich* decision.[162] Some authors criticise the decision, arguing that the personality right should not be developed into an intellectual property right. While they agree that it is justified to grant remedies against unauthorised commercial exploitation of personality during a person's lifetime, they disagree with the Bundesgerichtshof's view that the exclusive right to the economic value created by a celebrity should pass to his or her heirs.[163] The prevailing view, however, agrees with the reasoning of the *Marlene Dietrich* decision.[164] Indeed, there are several good arguments for allowing the descendibility of the economic aspects of personality rights in German law. First, most specific personality rights which are protected under a statutory regime 'survive' the person's death. In particular, the right to one's image is protected for ten years after the person's death (§ 22 *KUG*) and the author's personality right exists for seventy years after the author's death. Secondly, aspects of personality have a factual economic value which is protected under German law during a person's lifetime. Since all economically valuable rights are descendible as a rule (see § 1922 *BGB*), it is difficult to find reasons why an exception should be made in this case. Finally, even the authors who criticise the *Marlene Dietrich* judgment agree that a person's reputation should be protected after his or her death. The protection of ideal interests, however, is more

[158] BGH *GRUR* 1974, 797 – Fiete Schulze.
[159] See Gregoritza, *Kommerzialisierung*, 76 et seq.; Larenz/Canaris, *Schuldrecht II/2*; § 80 VI 1 (p. 531); Rixecker in *Münchener Kommentar*, § 12 Anh., para. 29.
[160] Heldrich, 'Der Persönlichkeitsschutz Verstorbener' in *Festschrift für Lange* (1970), 163 at 170 et seq.
[161] Larenz/Canaris, Schuldrecht II/2, § 80 VI (p. 532); Rixecker in *Münchener Kommentar*, § 12 Anh. para. 26.
[162] *BGHZ* 143, 214.
[163] Schack, *case-note*, *JZ* 2000, 1060 at 1062; Peifer, *Individualität*, 309.
[164] See Götting, *case-note*, *NJW* 2001, 585; Gregoritza, *Kommerzialisierung*, 108; Wagner, *case-note*, *GRUR* 2000, 717.

efficient if the heirs can bring an action for damages against unauthorised merchandising.

Assignment and licensing

Historical development

Traditionally, German doctrine used to draw a strict distinction between economic rights and personality rights.[165] While economic rights were assignable, personality rights were seen as inseparably linked to the person. One of the scholars who elaborated this distinction in the nineteenth century was Josef Kohler. He distinguished between three categories: property in tangible objects (movables and land), rights in intangible objects (Immaterialgüterrechte) and personality rights.[166] Although Kohler noted many parallels between rights in intangible objects and rights in tangibles, he avoided the term 'property' for intangible objects for fear of confusion between the two categories. Kohler regarded patents as typical rights in intangible objects which were fully assignable and licensable. As for copyright, Kohler favoured a dualistic approach and distinguished between the author's economic right which he regarded as an assignable right in an immaterial object and the author's personality right. The principal function of trade marks, in Kohler's view, was to protect the owner's personality. According to this view, which also influenced the judiciary in the early twentieth century, trade marks were personality rights which were not assignable. Thus, the doctrinal explanation of a trade mark licence created problems. According to the prevailing view at that time, the owner of a trade mark could only waive his right to an injunction and to damages.

The theory of intellectual property law has developed considerably since Kohler's day. Today, trade marks are regarded as genuine intellectual property rights which are both assignable and licensable.[167] As far as the author's right is concerned, the *Copyright Act of 1965* adopts a monistic approach: the author's right (*Urheberrecht*) is a single right which protects both the author's economic and ideal interests.[168] Thus copyright is a hybrid between property and personality right. As a consequence, copyright is not assignable inter vivos in German law,[169] but the owner can grant all types of licences.[170]

[165] Götting, *Persönlichkeitsrechte als Vermögensrechte*, 1 et seq.
[166] *Kohler*, 'Die Idee des geistigen Eigenthums' *AcP* 82 (1894) 141.
[167] See §§ 27, 30 *MarkenG*. [168] See § 11 *UrhG*. [169] § 29 I *UrhG*.
[170] § 31 *UrhG*.

Most of the uncertainties that existed in intellectual property doctrine at the beginning of the twentieth century still surround commercial agreements concerning the exploitation of aspects of personality. While the *Marlene Dietrich* judgment has established that the economic elements of the personality right are descendible, the courts have not yet expressed a conclusive view on the possibility of licensing. Thus this question has mainly been dealt with by legal literature. Up until the 1970s most authors agreed that personality rights were inalienable, which not only excluded assignment but also licensing of personality rights. Even today this view is still held by many legal writers. On the other hand, even among the proponents of this traditional view, there is general agreement that a person can permit certain acts which would otherwise violate his personality right.[171] However, the legal nature of this 'permission' remains unclear: some regard it as a waiver, others as a type of consent similar to the patient's consent in medical law.[172] The prevailing view can also be characterised as a 'consent theory', which, however, allows certain modifications from the medical law model such as an 'irrevocable consent'.[173] In modern literature there is a strong tendency towards allowing genuine licences.[174] Most authors who adopt this approach look at copyright licences for orientation.

Waiver

The traditional view, which is still held by many authors and which has been adopted by the courts in a number of judgments, insists that personality rights cannot be separated from the person.[175] They are thus neither assignable nor licensable. However, even on the traditional approach every person is free to permit acts affecting his personality by means of a waiver. Unlike consent, a waiver excludes the remedies rather than the claim as such. Technically, this 'waiver' is a contract which, according to one view, excludes the right to an injunction and damages, while, according to another construction, it obliges the person waiving his rights to refrain from taking legal action against the act.

[171] See Peifer, *Individualität*, 307.
[172] See Baston-Vogt, *Der sachliche Schutzbereich*, 236.
[173] See Dasch, *Einwilligung*, 85 et seq.; Götting, *Persönlichkeitsrechte als Vermögensrechte*, 142 et seq.; Helle, 'Die Einwilligung beim Recht am eigenen Bild' *AfP* 1985, 93 et seq.
[174] See Ahrens, *Verwertung persönlichkeitsrechtlicher Positionen*, 528 et seq.; Forkel, Lizenzen an Persönlichkeitsrechten durch gebundene Rechtsübertragung, *GRUR* 1988, 491 et seq.; Ohly, '*Volenti non fit iniuria*' – *Die Einwilligung im Privatrecht* (Tübingen, 2002), 160 et seq.; Ullmann, 'Persönlichkeitsrechte in Lizenz?' *AfP* 1999, 209 et seq.
[175] See OLG München *AfP* 1982, 230 at 232– *amerikanische Liebesschulen*; OLG München *ZUM* 1985, 448 at 450 – *Sammelbilder*; Peifer, *Individualität*, 314.

While this view, which in the early twentieth century served to explain the legal nature of trade mark licences, has the advantage of allowing a binding contract between both parties in which one party waives his rights while the other promises a remuneration, it has rightly been pointed out that this view has a serious theoretical flaw: since a waiver only affects the remedies, the act itself remains illegal. Thus, if celebrity X allows Y to use her picture for an advertising campaign for cosmetics, X is contractually bound by her promise and will not be able to obtain an injunction against Y or to claim damages. Strictly speaking, however, Y still violates X's right, thus acting illegally.

Consent I: the medical law model

The second approach draws on the theory of consent in medical law. A patient's consent justifies an act that would otherwise have amounted to a battery. Compared to the theory analysed above, this view has the advantage that consent provides full justification rather than just affecting the remedies. However, a patient's consent is not binding but freely revocable. In particular, it is not given as a part of a contract. Rather, it must be distinguished from the contract concluded between doctor and patient. Some of the authors who draw an analogy between personality merchandising and medical law insist that this model safeguards personal freedom.[176] While conceding that every person can promise to give his or her consent and can even promise to do so in a binding contract, these authors insist that consent in itself does not become a part of that contract, thus remaining freely revocable. In the example given above, X could revoke her consent before the start of the advertising campaign. The campaign would have to be cancelled, but X might be liable for breach of contract. The disadvantage of this approach is evident: the consentee acquires a position which is weaker than intended by the parties. Thus this theory is paternalistic: it seeks to protect an individual from the consequences of his or her own decisions.[177] While it may be right to protect a patient from binding permissions affecting his health, there is much less reason for protecting a model or a celebrity from granting the binding permission to publish her photograph.

[176] See Baston-Vogt, *Schutzbereich*, 236; see also Schack, *Urheber- und Urhebervertragsrecht* (3rd edn) (Tübingen, 2005), para. 566.

[177] See the discussion between Peifer, *Individualität*, 284, 327, and Ohly, '*Volenti non fit iniuria*', 158.

Consent II: irrevocable consent

Another group of authors[178] also starts from an analogy to consent in medical law, but modifies the medical law doctrine in some important aspects. First, according to this view, consent can be binding. If given in binding form, it can only be revoked in case of a change of fundamental circumstances. Such factors allowing revocation in exceptional cases can either relate to the consentor's personal development (change of religious, political, artistic conviction, change of professional position) or to the type of commercial exploitation envisaged by the consentee (disparaging context, serious loss of reputation of the consentee's products). Second, this theory allows the transfer of consent from the consentee to a third person. Third, the consentee can be enabled to take legal action against persons violating the consentor's personality right. While the consentee does not have a right of action in his own right, he can, according to German law of civil procedure, be authorised by the consentor to take legal action on his behalf.

This theory achieves reasonable practical results, but it can be criticised for using the traditional rhetorical references to consent while in fact allowing the licensing of personality rights. This attempt to reconcile the inalienability of personality rights with the demands of the advertising and merchandising business is hard to sustain doctrinally. First, unilateral promises are generally not binding in German law. The *BGB* even regards a gift as a contract between donor and recipient. Since consent, according to this theory, is supposed to be both unilateral and binding, it conflicts with basic axioms of contract law. Second, the use of the term 'consent' rather than 'licence' may cause confusion since it encourages the application of principles developed for the doctor–patient relationship to commercial dealings in the merchandising business.

Personality licensing

For these reasons, an increasing number of authors are prepared to accept personality licensing.[179] They point out that the traditional view which

[178] See Dasch, *Einwilligung*, 85 et seq.; Götting, *Persönlichkeitsrechte als Vermögensrechte*, 142 et seq.; Helle, 'Die Einwilligung beim Recht am eigenen Bild' *AfP* 1985, 93 et seq.; a similar reasoning is adopted by the Federal Supreme Court in *BGHZ* 119, 237 at 240 – *Universitätsemblem*; see, however, discussion of the more recent judgments *Nena* and *Marlene Dietrich* in the following section (134 below).

[179] See Forkel, Lizenzen an Persönlichkeitsrechten durch gebundene Rechtsübertragung, *GRUR* 1988, 491 et seq.; Ohly, '*Volenti non fit iniuria*', 160 et seq.; Ullmann, 'Persönlichkeitsrechte in Lizenz?' *AfP* 1999, 209 et seq.

insists on the inalienability of personality rights does not distinguish properly between a complete assignment by which the assignor gives up the entire right, and the partial transfer resulting from a licence. Provided that a licence is revocable under exceptional circumstances and strictly limited to the permitted acts, the core of the licensor's personality is not, according to this view, unduly affected. Two alternative constructions of this approach can be envisaged.

Some authors favour a dualistic distinction between the personality right as such, which only protects non-economic interests, and an intellectual property right in certain aspects of personality, which can be separated from the person, such as name or image.[180] While the personality right thus remains non-assignable and non-licensable, the intellectual property right is freely assignable.

The prevailing view among those who favour the licensing of personality rights, however, is a monistic approach which draws on the copyright model. On this view, the personality right is regarded as one single right, which protects both economic and non-economic interests. A licence transfers one piece of this cake to the licensee. However, since the licence can be revoked under exceptional circumstances and since the licence usually expires after a certain time, the 'daughter right' granted to the licensee is not entirely separated from the 'mother right'. This type of licence has therefore been aptly termed a 'tied transfer'.[181]

Since this model also underlies copyright licences, some provisions of the *Copyright Act* can be applied by analogy. Like the author's right the personality right is not assignable inter vivos in its entirety (§ 29 *UrhG*), but licences may be granted (§ 31 I-III *UrhG*). Whenever the acts permitted by the licence are not specified in the agreement, the scope of the licence is determined by the purpose of the agreement (§ 31 V *UrhG*). The licensee can only transfer his position to a third person with the agreement of the licensor (§ 34 I *UrhG*). Finally, a copyright licence can be terminated in case of a change of the author's artistic views (§ 42 I *UrhG*). If the author, however, makes use of this power, he is under a duty to compensate the licensee for his frustrated expenses (§ 42 III *UrhG*).

As mentioned earlier, the courts have not yet decided whether personality licences are possible. However, in two recent judgments the

[180] See Beuthien and Schmölz, *Persönlichkeitsschutz durch Persönlichkeitsgüterrechte*, (München, 1999), 25 et seq.; Klippel, *Schutz des Namens*, 497 et seq., 533 et seq. (distinguishing between a property and a personality right to one's name).

[181] See Forkel, *Gebundene Rechtsübertragungen* (Köln, 1977), 44 et seq., and *GRUR* 1988, 491 et seq.

Bundesgerichtshof showed a tendency towards allowing the licensing of personality rights. In the *Nena* case,[182] the singer, whose claim to fame is the song 'Ninety-nine red balloons', had 'assigned all rights necessary for the exploitation of all visual and acoustical circumstances' to a merchandising agency. The agency took legal action against third persons who had offered Nena posters and T-shirts for sale. The Bundesgerichtshof gave judgment for the claimant, but did not explain the doctrinal basis of its view. The judgment can either be explained on the basis of a licence theory or by reference to the model of a procedural authorisation explained above. In the *Marlene Dietrich* case, the court explained in an *obiter dictum* that the economic interests protected by the personality right are not as closely linked to the personality as the non-economic interests.[183] While the court did not express a view on the possibility of licensing, one of the judges has argued, extra-judicially, in favour of licences.[184]

All aspects considered, the licence model seems preferable. It gives the licensee a reasonable degree of certainty while, by allowing revocation under certain circumstances, making sure that the non-economic aspects of the licensor's personality remain unaffected. Unlike the 'modified consent approach' adopted by many authors, this theory rests on a sound and convincing doctrinal basis. However, it should be pointed out that a unilateral, revocable consent remains possible if the consentor does not wish to be bound. A permission to exploit aspects of personality can thus be granted to different degrees. On this view, an exclusive license, a non-exclusive license and a bare, revocable consent are steps on what may be called the 'ladder of permissions'.[185] In the following text, the term 'permission' is used in this general sense.

Validity requirements

All the approaches discussed above have to formulate certain requirements which have to be met for the permission to be valid. The first book of the *BGB* contains general provisions valid for all kinds of legal transactions. Part 3 (§§ 104 et seq.) is entitled 'Rechtsgeschäfte'. This term, which is a typical product of nineteenth century codification, is highly abstract and thus difficult to translate. The English terms 'legal transactions' or 'legal dealings' come close. There are bilateral and unilateral 'Rechtsgeschäfte', the former consisting of two 'declarations of will' (Willenserklärungen) the latter consisting of one declaration only. A typical example of a

[182] BGH *GRUR* 1987, 128. [183] *BGHZ* 143, 214 at 221.
[184] Ullmann, *AfP* 1999, 209 et seq. [185] See Ohly, '*Volenti non fit iniuria*', 143 et seq.

bilateral 'Rechtsgeschäft' is a contract, whereas examples of a unilateral 'Rechtsgeschäft' are a notice terminating a contract (Kündigung) or an authorisation to act as an agent (Vollmacht). §§ 104 ff. *BGB* contain detailed validity requirements for 'Rechtsgeschäfte', concerning inter alia transactions made by minors, requirements of form, transactions in conflict with public policy and specific requirements for offer and acceptance. The concept of 'Rechtsgeschäft' is not limited to commercial dealings, as two examples may demonstrate: both a marriage and a will are also 'Rechtsgeschäfte'.

For almost 100 years there has been a controversial discussion about whether a consent concerning personality rights is a 'Rechtsgeschäft' and whether §§ 104 et seq. *BGB* apply.[186] One position, first exposed by Zitelmann in 1906, is that both questions should be answered affirmatively. According to Zitelmann, consent is a declaration which has the immediate legal effect of allowing the act consented to. Zitelmann concluded that all statutory provisions on 'Rechtsgeschäfte' apply. In consequence consent given by minors is only effective if the legal guardians agree, consent which conflicts with public policy is invalid, the general provisions on agency and on mistake and misrepresentation apply. This view prevailed until well into the 1960s. In 1965, however, the Bundesgerichtshof held that a patient's consent to an operation was not a 'Rechtsgeschäft'.[187] Thus consent given by a minor was effective, provided he was able to understand the nature and risks of the operation. Most authors agree that, at least in medical law, §§ 104 et seq. *BGB* cannot be applied schematically, but that the highly personal nature of the right to corporeal integrity requires some modifications. Given this agreement, it does not make a big difference whether one regards §§ 104 et seq. as prima facie applicable but subject to modifications or whether one thinks that these provisions as prima facie inapplicable but that they may be applied by analogy according to the circumstances of the particular case. However, consent to commercial exploitation of aspects of personality causes additional problems, because it involves non-economic and economic interests at the same time. Thus there is some degree of confusion in case-law: some courts apply the *BGB* provisions on 'Rechtsgeschäfte', others follow the model of medical law, while others combine both requirements. In legal literature, the number of opinions almost equals the number of authors. It is submitted that the approach in both situations should be identical. Starting-points for the discussion of every single validity requirement are the provisions in

[186] *Ibid.*, 35 et seq., 201 et seq., with further references to the discussion outlined below.
[187] *BGHZ* 29, 33 at 36.

§§ 104 et seq. *BGB*. These provisions, however, may require modification whenever non-economic personal interests are involved.

On this basis, minors cannot by themselves give an effective permission to the commercial exploitation of their personality. § 107 *BGB* provides that a legal declaration made by a minor is only effective if the legal guardians agree, unless the declaration only confers a legal advantage on the minor. Due to the commercial nature of the permission discussed here, this provision is applicable. However, unlike purely commercial dealings, the permission also has a personal element which requires an important modification of § 107 *BGB*: if the minor is capable of understanding the nature of the planned activities, the legal guardians cannot give a valid permission without the minor's consent. Thus it is submitted that, in the case of minors, a double consent is required. This view is probably the prevailing view in legal literature. Some court judgments, while not settling the issue conclusively, also point in this direction.

The permission must be given explicitly or impliedly. Usually there will be a written agreement, but an oral permission is equally effective. The term 'implied permission' or 'implied consent' requires a qualification. If the permittor, while not explicitly consenting, behaves in a way which clearly shows his intention to permit the act, his permission is valid. If a model, for example, takes part in a fashion show, he or she cannot complain afterwards that photographers were present and that the photographs are published in fashion magazines. One step further, § 22, 2 *KUG* contains a presumption that a person, by accepting a remuneration for allowing the portrait to be taken, also gives his or her permission to publish the portrait. However, when no clear signs of a person's intention to grant permission are in evidence, the courts are very reluctant to imply a permission. If an employee submits a handwritten CV, the employee does not receive the implied permission to obtain a graphological evaluation. If an attorney sells his firm and informs his clients about this transaction, mere inactivity on the part of a client is not an implied permission to transfer confidential information concerning the client to the attorney's successor. Generally it can be stated that mere tolerance of an act does not amount to a permission. A different rule may only apply in cases of emergency when the person's permission cannot be obtained in time. These situations often occur in medical law, but it is difficult to imagine a commercial exploitation of aspects of personality justified under this exception.

The scope of the permission is limited by the purpose for which it was given. Many judgments support this proposition. An actor who allows journalists to take his photo while sitting on a motor scooter does not

allow the use of this photo in advertising for the scooter. A woman posing naked for a book on sexual education does not allow the use of the photo in a men's magazine. However, a croupier who poses for photographs taken during his work on the instructions of his employer cannot complain about the publication of these photos in a brochure advertising his casino.

As explained above, there is considerable dispute about the revocation of the permission. The better view is that a binding permission can be granted, which nevertheless is revocable under exceptional circumstances. Revocation is possible when the permittor changes his religious, political or artistic views and if this change affects the acts which he or she had permitted earlier. Thus a pop singer who converts to a strict sect may revoke the permission to publish his photo. A violinist can prevent the publication of photos showing him as the primas of a gipsy band once he joins the national philharmonic orchestra. Revocation may also be possible if the circumstances of the intended exploitation change. Thus a celebrity can revoke the use of his or her name in an advertising campaign when it turns out later that the advertised products are damaging to the health of consumers. However, the permittor will have to compensate the permittee unless the reason for the revocation is the latter's responsibility. Thus the pop singer would be liable to compensate the permittee while the celebrity in the case of the advertising campaign for dangerous products would not.

It is still a very open question whether a permission can be valid if it conflicts with public policy. Particularly, it is disputed whether a person can also consent to acts violating his or her dignity. In a celebrated case, the Bundesverwaltungsgericht (Federal Supreme Administrative Court) ruled that a peep show featuring consenting adult women could be prohibited because it violated the women's human dignity. Some authors took issue with this judgment, arguing that the state was not allowed to protect a person from himself or herself. Similar issues are raised by several modern media phenomena such as reality television shows. It is far from clear if a participant who suffered psychological damage could sue the producers for damages on the basis of a personality right violation. It is submitted that, in the judgment of private law, a person who is informed about all relevant details of the envisaged project and who is free to revoke his permission at any time can also permit acts that would otherwise have violated his or her dignity. While it is recognised that the result in public law may be different, private law leans against paternalism and tends to take legal declarations seriously as long as they were not given under misrepresentation or duress.

Remedies[188]

Injunction

§ 12 *BGB* explicitly provides that a person whose right to his or her own name was violated is entitled to injunctive relief.[189] While similar provisions exist in all intellectual property statutes, there is no comparable provision for the right to one's own image or the general personality right. However, according to § 1004 *BGB* an injunction is available as a remedy against trespass to property and nuisance. This section provides:

> (1) If property is interfered with otherwise than by a deprivation of possession, the owner can bring an action for elimination of the interference against the person interfering. If further interference is to be expected, the owner can apply for an injunction.
> (2) This claim is excluded if the owner is under an obligation to tolerate the interference.

Shortly after the *BGB* had entered into force, it turned out that there was a gap in the code. While according to § 823 I *BGB* damages were available for all violations of absolute rights, the only provision on injunctions was limited to wrongful interferences with property. However, in German law a statutory provision can be applied by analogy if there is an unintentional gap in the code and if the balance of interests underlying the statutory provision is comparable to a situation which is not anticipated. Since it is clear from the legislative history that this gap is unintentional, the application of § 1004 *BGB* by analogy to all other absolute subjective rights is generally accepted.[190] § 1004 *BGB* provides for two different remedies: an order for elimination or removal (Beseitigung) of the interference (§ 1004 I 1), which will be considered below, and an injunction (§ 1004 I 2).

There are two preconditions for the grant of an injunction. First, there must be an objective violation of an absolute right such as a personality right. Whereas in an action for damages under § 823 *BGB* the claimant must prove that the defendant acted intentionally or negligently, § 1004 *BGB* does not require fault. Second, there must be the danger of further interferences. As for this requirement, two situations are usually

[188] For an overview over the remedies available against the infringement of personality rights see Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, paras 317 et seq.; Rixecker in *Münchener Kommentar*, § 12 Anh., paras 179 et seq.
[189] See above 109.
[190] See Bassenge in Palandt, *Bürgerliches Gesetzbuch* (63rd edn, München, 2004), § 1004, para. 4.

distinguished. If violations have happened before, the danger of further violations will be presumed. This presumption is rebuttable, particularly by an undertaking given by the defendant. If there have not been any violations, the claimant must show that an imminent danger of a violation exists. When these conditions are established, the claimant is entitled to an injunction. In German law there is no rule to the effect that damages are the principal remedy or that the grant of an injunction is a discretionary remedy.

The conditions for the grant of an interlocutory injunction are laid down in §§ 935, 940 of the *Code of Civil Procedure* (*Zivilprozeßordnung – ZPO*). First, on a summary assessment of the case, the court must reach the conclusion that the applicant's claim is well-founded. Second, the grant of an interlocutory injunction must be necessary in order to prevent a significant detriment. This rule can be compared to the 'balance of convenience' test in English law:[191] the court will look at the interests of both parties and will not grant an interlocutory injunction if it is likely to cause damage to the defendant which is out of proportion to the applicant's advantage.

Destruction, correction

The second remedy provided by § 1004 *BGB* is an order for elimination or removal (Beseitigung) of the interference. The classical example concerns property law: if the defendant dumps his waste on the claimant's land, the court will order the defendant to remove the refuse.

Applied by analogy to violations of property rights, 'elimination of the interference' can consist of the destruction of copies of a newspaper, but also the publication of a court order against the defendant. In recent years there have been several court decisions about corrective statements. It is generally accepted, that § 1004 I 1 *BGB* allows a court to order the correction of factual statements, but not the revocation of value judgments.[192] Such corrections of false factual statements must be made in the same form as the statement itself. Thus a magazine which had published a fictitious interview with Caroline of Monaco had to publish a corrective statement on the cover page; the court order even prescribed the size of the letters.[193]

[191] See 18 above.
[192] See BGH *GRUR* 1974, 797 at 798 – *Fiete Schulze*; BGH *GRUR* 1982, 318 at 319 – *Schwarzer Filz*; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 335.
[193] *BGHZ* 128, 1 at 8 – *Caroline von Monaco I*.

Apart from § 1004 *BGB*, there are specific provisions for destruction and delivery-up concerning the violation of the right to one's own image (§§ 37, 38 *KUG*) and in the various intellectual property statutes.

Publication of a counter-statement

Several media law statutes put the media under a duty to publish counter-statements against allegations of fact. Since media law falls into the competence of the federal states, these provisions differ in their details.[194]

Unlike corrective statements, counter-statements are published in the complainant's own name and the media are not obliged to endorse the statement. On the other hand, the statement does not have to be false. In practice, these statements are usually followed by an explanation to the effect that the newspaper, radio or television station is under an obligation to publish the counter-statement regardless of its truth.

Unjust enrichment

In German law there is a general action for unjust enrichment. According to § 812 I *BGB*, anyone who obtains a benefit at another person's expense without legal cause is obliged to surrender this benefit to the other person. If the benefit cannot be transferred in nature, particularly if it is of an intangible nature, the defendant must pay a sum of money representing the value of the benefit in compensation (§ 818 II *BGB*). In intellectual property cases this value is equivalent to a reasonable licence fee.

There are various categories of unjust enrichment, most of which can be traced back to the various *condictiones* in Roman law. The category relevant in this context is unjust enrichment resulting from the violation of another person's rights or, more precisely, from the encroachment on a legal position that attributes certain commercial benefits to its holder (Eingriff in eine Rechtsposition mit Zuweisungsgehalt).

While it is clear that property confers certain commercial benefits to the owner, notably the right to use and to sell the object, it is far from clear whether personality rights only protect ideal interests or whether they also attribute commercial benefits. The fundamental discussion about the interests protected by personality rights resurfaces at this point. As already mentioned above, German courts recognised the commercial aspects of personality rights at a relatively early stage. In the *Paul Dahlke* case decided in 1956, in which the portrait of a famous actor had

[194] See, e.g., Art. 10 *Bayerisches Pressegesetz* (*Bavarian Press Act of 2000*).

been used in advertising without his permission, the Bundesgerichtshof held that Dahlke could claim compensation for unjust enrichment:[195] since actors usually did not grant such permissions gratuitously, the defendant had obtained a benefit at the cost of the claimant. This decision has been confirmed on many subsequent occasions.[196]

However, the rule that the unauthorised exploitation of aspects of personality triggers an action for unjust enrichment is subject to one important qualification: as the courts have repeatedly stressed, the action fails if the claimant would have never been prepared to permit the defendant's act. In particular, a remedy for unjust enrichment will not be available if the personality aspect is used under disparaging circumstances. Thus, the gentleman rider in the celebrated *gentleman rider* case[197] was not awarded compensation on the basis of a reasonable licence fee for the use of his picture in advertising for a sexual stimulant.[198] In this judgment and on several other occasions the Bundesgerichtshof argued that personality right could only be said to attribute commercial benefits if a person could be assumed to be engaged in personality licensing.[199] Recognising the economic potential of aspects of personality in cases showing the person in a disparaging context, however, would be equivalent to implying that the claimant would have been prepared to sell his or her good reputation, had the offer only been high enough. Thus the grant of compensation for unjust enrichment would only add additional injury to the claimant's feelings.

This reasoning is frequently criticised by academic authors who point out that it is almost cynical to deny a claim for unjust enrichment out of respect for the claimant's feelings in the very worst cases of personality violation.[200] The recognition of a claim for unjust enrichment, it is added, does not require the implication of a subjective intention to grant licences. Rather, it is a hypothetical device. It is submitted that this view, which is the prevailing one among legal authors, is correct. Unlike the law of damages, the law of unjust enrichment does not look at the claimant's loss, but only at the defendant's gains.[201] When the defendant exploited the aspects of the claimant's personality without permission, there can be no doubt that he obtained a benefit at the expense of the claimant.

[195] *BGHZ* 20, 345 at 354 et seq. – *Paul Dahlke*.
[196] See BGH *GRUR* 1979, 732 at 734 – *Fußballtor*; BGH *GRUR* 1987, 128 at 129 – *Nena*; BGH 1992, 557 at 558 – *Talkmaster*.
[197] See above 101. [198] *BGHZ* 26, 349 at 353.
[199] See also *BGHZ* 30, 75 at 78 – *Caterina Valente*; BGHZ 35, 363 – *Ginseng*.
[200] See Götting, 'Sanktionen bei Verletzung des postmortalen Persönlichkeitsrechts' *GRUR* 2004, 801 at 803; Beuthien and Schmölz, *Persönlichkeitsschutz durch Persönlichkeitsgüterrechte*, 44; Lieb in *Münchener Kommentar*, § 812, para. 219.
[201] See Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 355; Götting, *Persönlichkeitsrechte als Vermögensrechte*, 282.

The action for unjust enrichment does not require fault on the part of the defendant. However, if the defendant has acted unintentionally, the claim will be limited to the objective value of the benefit obtained (§ 818 II *BGB*) which is equivalent to the amount of a reasonable licence fee. However, in cases of intentional violation of other person's rights, § 687 II *BGB* provides an additional cause of action, which allows the claimant to recover all profits made by the defendant as a consequence of the violation. Thus, if the claimant can prove that the defendant violated his personality rights intentionally, the court will not only assess the amount of a reasonable license fee, but will order a full account of profits.

Damages

According to § 823 I *BGB*, anyone who intentionally or negligently violates another person's life, body, health, freedom, property or another right is liable for damages. As explained above, both the specific personality rights to one's own name and to one's own image and the general personality right are recognised as absolute rights within the meaning of § 823 I *BGB*. Damages for a violation of intellectual property rights, including the author's moral right, however, are available under specific provisions.

§ 823 I *BGB* requires fault on the part of the defendant. Whenever the defendant knows that he is exploiting a personality aspect without the person's permission, he will regularly act intentionally. Negligence may be an issue in cases involving false press information. According to § 276 II *BGB*, negligence is defined as a lack of usual care. Many judgments define the standard of care that is to be expected for press investigation.[202] In particular, both a journalist and an editor are under a duty to investigate a story for potential violations of personality rights.

The general rule for the assessment of damages is that the claimant must be put into the position in which he would have been, had the damaging act not occurred (§ 249 I *BGB*). In cases concerning the violation of health or of property, the usual method of computing damages is a *concrete assessment* of all losses suffered because of the violation. This method is also available for violations of personality rights.

However, the unauthorised exploitation of aspects of personality is comparable to the infringement of intellectual property rights. In both situations it is often difficult to establish evidence of a substantial loss. Therefore, the courts allow the claimant to claim damages computed on

[202] See BGH NJW 1997, 1148 at 1149 – *Chefarzt*; *NJW* 1996, 1131 at 1134 – *Lohnkiller*; for an overview see Peters, 'Die publizistische Sorgfalt' *NJW* 1997, 1334 et seq.

the basis of a reasonable licence fee.[203] This method is often referred to as the *abstract* rather than the concrete method of assessment of damages. In particular, the claimant does not have to give evidence that the defendant would in fact have been willing to take out a licence on the usual terms. It may be objected that the 'reasonable licence fee approach' is easier to reconcile with the law of unjust enrichment, because it helps to assess the benefit obtained by the defendant rather than the loss suffered by the claimant. Applied to the law of damages, this approach rests on the assumption that the claimant would have earned the licence fee, had the claimant not violated his rights.

For this reason, the 'reasonable licence approach' to the assessment of damages is subject to the same qualification as in the law of unjust enrichment: it is only permitted by the courts if, hypothetically, the claimant would have been willing to grant a licence for the particular act. Thus the singer Caterina Valente, whose name had been used in advertising for false teeth,[204] or the professor of ecclesiastical law, who had been alleged to propagate the ginseng root as a sexual stimulant, could not recover substantial damages but only a solatium.[205] As in the law of unjust enrichment, this state of the case law is criticised by many commentators.[206] It must be conceded that the reasoning adopted by the courts seems more convincing here than in the law of unjust enrichment, because in the law of damages the 'reasonable licence fee approach' rests on the hypothesis that the claimant would have earned the licence fee, had the infringing act not occurred, whereas the law of unjust enrichment does not look at the claimant's loss. Nevertheless, there are two important arguments against the court's position. First, the 'reasonable licence fee approach' does not require the implication of a subjective intention to grant licences. Rather, it is a hypothetical device. Second, as already mentioned above, the courts deny adequate compensation in the most serious cases of personality right infringement. While it is true that the courts attempt to compensate victims of serious personality violations by granting solatium, it will be seen in the following paragraph that this approach has some serious drawbacks.

In intellectual property infringement cases, a third method of assessing damages is generally accepted, which is why intellectual property lawyers usually refer to the 'triple method of assessing damages'. This method consists of equalling the amount of damages to the profit made by the

[203] See *BGHZ* 20, 345 at 353 – *Paul Dahlke*; OLG München *NJW-RR* 2003, 767.
[204] See above, 110. [205] On which see below, 144.
[206] See Schwerdtner in *Münchener Kommentar*, § 12, para. 279; Ehrmann in Erman, *Bürgerliches Gesetzbuch*, Anh. § 12, para. 375.

defendant.[207] According to the *Marlene Dietrich* judgment, this method is also available in cases concerning the unauthorisesd commercial exploitation of personality rights,[208] although the practical relevance of this approach is apparently limited.[209] By allowing this method the Bundesgerichtshof has taken a further step towards treating personality rights like copyright.

Solatium

The development of the general personality right has often been characterised as 'creative law-making' by the courts. As seen earlier in the historical overview above, the courts had to develop the law in two aspects on which the *BGB* remains silent. First, the code does not provide for a general personality right as such. Second, the possibility to award a solatium is explicitly limited to cases of trespass to the person. Until 2002, § 847 *BGB* provided: '[i]n the case of a violation of body or health or in the case of false imprisonment, the violated person can also claim compensation for non-pecuniary damage'.[210]

Shortly after the Bundesgerichtshof had recognised the general personality right, it became evident that the newly created protection would remain fragmentary if damages were limited to economic loss. This was clearly borne out in the *gentleman rider* case:[211] the claimant, a brewery owner, had not suffered any pecuniary loss from the publication of the picture showing him on a horse during a show jumping tournament in an advertisement for a sexual stimulant. It might have been possible to grant substantial damages on the basis of the 'reasonable license fee approach', but, as seen in the preceding paragraph, this approach was refused by the Bundesgerichtshof. Thus the court faced a dilemma: either the claimant would have lost his case or the court had to cross the line clearly drawn by § 847 *BGB*. The Bundesgerichtshof took the second route and applied § 847 *BGB* by analogy. Since the section permitted the award of a solatium in cases of false imprisonment, the court argued that the violation of a personality right could be qualified as a 'violation of intellectual freedom'.

While many authors agreed that personality protection would remain deficient without the possibility of solatium, the court's reasoning received general criticism on the basis that the parallel between a violation

[207] See, e.g., BGH *GRUR* 2001, 329 at 331 – Gemeinkostenanteil.
[208] *BGHZ* 143, 214. See also Beuthien and Schmölz, *Persönlichkeitsschutz durch Persönlichkeitsgüterrechte*, 50.
[209] See Götting, *GRUR* 2004, 801 at 803.
[210] In 2002, § 847 *BGB* was replaced by § 253 II *BGB*, see n. 36 above.
[211] *BGHZ* 26, 349 – *Herrenreiter*.

of the personality right and false imprisonment was not much more than a thin veil covering judicial law-making contra legem.[212] The Bundesgerichtshof reacted to this criticism in the *ginseng root* case[213] which was very similar to the *gentleman rider* case. Again, the court granted solatium, but this time it based its decision not on an analogy to § 847 *BGB*, but on the requirements of Articles 1 and 2 I of the constitution. Since these articles required the private law to grant effective personality protection and since protection remained deficient if limited to compensation for pecuniary damage, private law had to allow the award of solatium. This judgment has been confirmed on many occasions, not only by the Bundesgerichtshof itself, but also by the Federal Constitutional Court. While the majority of authors accept this position, criticism has not completely stopped. First it is argued that § 847 *BGB* could indeed have been applied by analogy, if only on a slightly different reasoning: the kinds of trespass to the person mentioned in § 847 *BGB* were only specific examples of violations of the general personality right. The general principle could not have been expressed by legislation in 1900, because at that time the general personality right had not yet been recognised. Second it is said that the interests of victims of personality right violations could be served more effectively by extending the reasonable licence approach. In 2002, legislation extended solatium to some further categories, particularly to strict liability torts, to violations of the right to sexual self-determination and to breaches of contract resulting in personal injury or false imprisonment. It seems surprising that the case law which had been developed by the courts since the cases mentioned above was not codified. Legislation, however, did not intend to abolish solatium but only meant to confirm the legal reasoning of the Bundesgerichtshof, which does not draw on the *BGB* but on the constitution. A change of the *BGB* provisions, it was feared, would have changed this doctrinal basis.

There has been some debate about the function of solatium. The courts have repeatedly stressed that its primary purpose consists in giving satisfaction to the claimant. However, for some time the question remained open whether solatium also serves the purpose of preventing further violations. On the one hand, the traditional view is that tort law only aims at compensation whereas prevention is the aim of criminal law.[214] On the other hand, there is no doubt that high awards of damages may cause the press to avoid personality violations, particularly in

[212] See above, 100. [213] *BGHZ* 35, 363 – *Ginsengwurzel*.
[214] See Steffen, 'Schmerzensgeld bei Persönlichkeitsverletzungen durch Medien' *NJW* 1997, 10 et seq.

cases not covered by criminal law.[215] In the first *Caroline* case, the Bundesgerichtshof adopted the latter view. Without an adequate amount of compensation the claimant would be helplessly subjected to a ruthless forcible exploitation of her personality. The preventive function of compensation resulted from the need to protect the personality right effectively. While the claimant was not entitled to 'cream off' the defendant's profits, these profits had to be taken into account when assessing the amount of damages. Thus, the Bundesgerichtshof increased the award made by the Hamburg Court of Appeal from 30,000 DM (around 15,000 €) to 180,000 DM (around 90,000 €).

It is submitted that the unjust enrichment approach would be better suited to reach this aim.[216] First, the calculation made by the Bundesgerichtshof rests on an uncertain basis whereas an account of profits would be more precise. Second, the sum awarded in an action for unjust enrichment would regularly be higher, as was acknowledged both by the Bundesgerichtshof and by the claimant in the *Caroline* case. Third, while it is admitted that damages serve a preventive function, there is no basis for aggravated or even punitive damages in German law. In various cases the Bundesgerichtshof has denied recognition to US judgments awarding punitive damages, because these awards conflict with the constitutional guarantees granted to the accused in criminal law proceedings. Finally, the approach based on § 687 II *BGB* fits in well with the system of the *BGB*, whereas the Bundesgerichtshof's approach rests on judicial law-making.

Even on this view the possibility of awarding solatium for violations of personality rights should be retained. It is regrettable that the legislature missed the opportunity to clarify this point. However, in cases of unauthorised commercial exploitation of the personality, the other approaches outlined above seem more effective and convincing.

[215] See Wagner, 'Prominente und Normalbürger im Recht der Persönlichkeitsverletzungen' *VersR* 2000, 1305 et seq.

[216] See Canaris, 'Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts' in Ahrens et al. (eds), *Festschrift für Erwin Deutsch zum 70. Geburtstag* (1999), 85 et seq.; Ullmann, Eike, 'Caroline v., Marlene D., Eheleute M. – ein fast geschlossener Kreis' *WRP* 2000, 1049 at 1052.

5 French law

Framework and history

The term 'privacy' used in the common law literature corresponds in France to the topic of 'protection of the personality' or 'rights of personality'. This concept is relatively new in French legal history, since it appeared only in the second half of the nineteenth century. Indeed, the French civil code, or *Code Napoléon* of 1804, does not contain any provision concerning the protection of the personality. Rather, the most important theme of the *Code civil* is 'property', even if it has a philosophical connotation stemming directly from the natural rights doctrine.

As early as the middle of the nineteenth century, the reproduction of a person's likeness began to attract the attention of jurists and was soon considered to be the subject of an exclusive right, the exact nature of which remains, however, unclear. The judicial decision in the *Rachel* case, concerning a famous actress who was portrayed on her deathbed, is seen as the birth of the right to one's image in France. In this judgment, dated 16 June 1858, the civil court stated that

> no one may, without the express consent of the family, reproduce and make available to the public the features of a person on his deathbed, however famous this person has been and however public his acts during his life have been; the right to oppose this reproduction is absolute; it flows from the respect the family's pain commands and it should not be disregarded; otherwise the most intimate and respectable feelings would be offended.[1]

Before the beginning of the twentieth century, numerous judgments reaffirmed the rule that the reproduction or exhibition of a portrait required the consent of the portrayed person[2] or, after his death, the

[1] Tribunal civil de la Seine (hereafter Trib. civ. Seine) 16.6.1858, *Rachel*, Dalloz (hereafter D.) 1858, 3, 62.

[2] E.g. Trib. civ. Seine 20.6.1884, Annales de la propriété industrielle (hereafter *Ann. prop. ind.*) 1888, 281. – Cour d'appel (hereafter CA) Paris 8.7.1887, *Ann. prop. ind.* 1888, 287. – Trib. civ. Seine 30.4.1896, D. 1896, 2, 376. – CA Paris 26.7.1900, *Ann. prop. ind.* 1902, 174.

consent of his heirs.[3] None of the judgments decided what was the basis of the right of the subject to oppose such publication. Neither did the doctrine analyse the nature of the right, stating only that 'this right is absolute and may not be violated'.[4] Some authors, however, defended the idea of a property right of every human being in himself.[5] In the last years of the nineteenth century, the opinion developed that the right of every person to oppose the reproduction of her likeness had its origin in the notion of personality: 'it should be based, not on the rules of property, whether material or artistic, but on the right every human being has to have his personality respected'.[6] Furthermore, both courts[7] and legal writing[8] considered that the (sur)name was protected by a property right, although in the last years of the nineteenth century some authors disputed this and proposed to link the right to one's name with the nascent category of personality rights.[9] This opinion imposed itself on the doctrine, but did not find any recognition from the courts, which continued to regard the right to one's name as a property right.[10]

Thus, from the middle of the nineteenth century it was admitted in France that name and likeness were the subjects of an exclusive right, and discussion only focused on the question of its legal nature. As regards private life, on the other hand, the situation was quite different. The right of every person to have his privacy respected was not discussed either by the courts or by the doctrine of civil law. It was protected, but only by criminal provisions that prohibited trespassing or breach of the secrecy of correspondence. From the enactment of the *Press Act of 11 May 1868*, which provided in section 11 that 'every publication

[3] E.g. CA Lyon 8.7.1887, D. 1888, 2, 180. – CA Paris 4.8.1896, Ann. prop. ind. 1897, 112.

[4] *Pouillet*, Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation, Paris 1879, No. 194 p. 182.

[5] E.g. *Couhin*, La propriété industrielle, artistique et littéraire, Sirey 1898, t.2, p. 43: 'this property involves for each individual the right to prevent every reproduction or representation of his features and, in particular, every exhibition of his effigy or his image'.

[6] *Vaunois*, comment to Trib. civ. Seine 20.6.1884, *Alexandre Dumas*, Ann. prop. ind. 1888, 284.

[7] Conseil d'Etat 23.12.1815, Sirey (hereafter S.) 1815–1818, 2, 83. – Cass. civ. 16.3.1841, S. 1841, 1, 535. – CA Paris 27.12.1893, D. 1894, 2, 96.

[8] *Calmels*, Des noms et marques de fabrique et de commerce et de la concurrence déloyale, Paris 1858, No. 113 p. 73. – *Pouillet*, Traité des marques de fabrique et de la concurrence déloyale en tous genres, Paris 1883, No. 375 p. 361.

[9] *Labbé*, note under Trib. civ. Seine 15.2.1882, S. 1884, 2, 22. – *Maunoury*, Du nom commercial, Paris 1894, p. 162. – *Maillard*, Du droit au nom patronymique, Ann. prop. ind. 1894, 345.

[10] E.g. Trib. civ. Havre 9.2.1924, Gazette du Palais (hereafter Gaz. Pal.) 1924, 1, 643: 'in spite of the serious objections of the doctrine, the case law of the first instance and appeal courts, confirmed by the Supreme Court, is laid down in that the surname is a property'.

about privacy in a periodical is regarded as a summary offence punishable with a fine of 500 francs', this criminal prohibition began to have an influence in civil law. The 1868 Act, which was quite short-lived[11] but was considered by Warren and Brandeis to have established a right of privacy in France,[12] gave rise to some judicial decisions and doctrinal discussions of the principle and the conditions of protection of privacy.[13] But French law did not at that point recognise a real 'right' of privacy, since the protection was only founded on the general rules of tort law.[14] As regards the particular field of written correspondence, however, the rule of inviolability was well acknowledged and the existence of a real right to the secrecy of letters was recognised.[15] This right would later, at the beginning of the twentieth century, be connected with the category of personality rights and would finally become the starting point for the acknowledgement of the right of privacy in France.

The protection of honour has its origin in the *actio injuriarum* of Roman law. Its sanction was, until the beginning of the twentieth century, principally a criminal one. In addition to the offences of libel and slander provided by the criminal code, the Act of 29 July 1881 on the freedom of the press also prohibited defamation, defined as 'every allegation or imputation of a fact which offends the honour or the esteem of the person or of the body the fact is imputed to'.[16]

Since most attributes of personality seemed to be protected in a satisfactory way at the end of the nineteenth century, there was no question at this point of 'rights' of personality. In addition to the right of property, the protection of name, likeness or private facts was founded on the general principles of tort law. The very broad formulation of Article 1382 of the

[11] It was repealed by the 1881 *Act on the Freedom of the Press*.

[12] Warren & Brandeis, The right to privacy (1890) 4 HarvLRev 214: 'The right to privacy, limited as such right must necessarily be, has already found expression in the law of France' and see 48 above.

[13] E.g., Cass. crim. 28.2.1874, S. 1874, 1, 233, about the publication by a journalist of a list of persons who have participated to a pilgrimage. See also, after the repeal of the 1868 Act, Trib. civ. Seine 28.1.1896, *Ann. prop. ind.* 1897, 89. – CA Paris 2.12.1897, Ann. prop. ind. 1899, 63.

[14] Hauch, 'Protecting Private Facts in France: The Warren and Brandeis Tort is Alive and Well and Flourishing in Paris', 68 (1994) Tul. L. Rev. 1219, 1237: 'In French legal parlance a "right" refers to a legal interest that is protected absolutely from any and all encroachments. The French contrast this with "tort" protection of a legal interest, for which the motives and manner of defendant's conduct, as well as the existence and scope of any injury, may be relevant to plaintiff's recovery'.

[15] E.g. Trib. civ. Seine 11.3.1897, D. 1898, 2, 359, concerning the exchange of letters between George Sand and Alfred de Musset.

[16] Section 29 of the 1881 *Act on the Freedom of the Press*.

French *Code civil*[17] allowed most of the conflicts arising from the unauthorised use of name or likeness to be solved without it being necessary to determine the precise nature of the power which each person had over his personal attributes. This relatively effective protection secured in France through tort law has certainly curbed the development of the theory of the personality rights, in contrast to the situation in Germany, for example.[18]

Apart from a few writings during the two last decades of the nineteenth century, which were more concerned with the philosophy of law than positive law,[19] the theory of personality rights really appeared in France only at the beginning of the twentieth century. *Perreau* is commonly seen as the first to have definitively rooted the expression in French law.[20] In his famous article published in 1909 in the *Revue trimestrielle de droit civil* under the title *Des droits de la personnalité*, Perreau defined the new category of rights as those which were not patrimonial, that is those 'whose main object is not the use of external things'.[21] The personality rights had effect *erga omnes* and could not be estimated in money; as a consequence they were inalienable, imprescriptible and undescendible and could only be exercised and enforced by the owner himself and not by another.[22]

Despite the increasingly frequent use of the expression 'personality rights', it remained unclear at this time whether they were true subjective rights. The most famous writings on the subject come from authors who deny them the quality of subjective rights, such as *Nerson*, whose thesis

[17] Art. 1382 C. civ. is the basic provision of tort law which establishes a general rule of liability: 'any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it'.

[18] Zweigert & Kötz, *An Introduction to Comparative Law* (2nd edn) (Oxford: Clarendon Press, 1987) 733: 'It will be obvious that a legal system can adopt a very flexible approach to the problem of protecting the human personality if its law of tort applies whatever legal interests have been affected (*contra* § 823 para. 1 *BGB*) and it can give damages quite freely for immaterial harm (*contra* §§ 253, 847 *BGB*). Accordingly, the French courts have never hesitated to characterize as "faute" the publication of confidential letters, the dissemination of facts about a person's private life, or the unauthorised use of a person's name, and to award the plaintiff damages for the moral harm as well as the economic harm.'

[19] See for ex. *Beaussire*, Les principes du droit, Paris 1888, p. 50, who mentions the 'right to respect' which 'consecrate our person, that is our life, our freedom, our honour'. – *Roguin*, La règle de droit, Lausanne 1889, No. 131 p. 252: 'right of the person upon himself'. – *Boistel*, Cours de philosopie du droit, Paris 1889, t.1, p. 18: 'the rights the man brings with himself by coming into the world'.

[20] See nevertheless *Bérard*, Du caractère personnel de certains droits et notamment du droit d'auteur dans les régimes de communauté, Paris 1902, who demonstrates the existence of the personality rights in French positive law, and not only on a philosophical point of view as his predecessors did.

[21] *Perreau*, Des droits de la personnalité, RTD civ. 1909, 503.

[22] *Perreau*, Des droits de la personnalité, RTD civ. 1909, 514.

entitled *Les droits extrapatrimoniaux* remained, for a long time, the standard work. In his opinion, personality 'rights' only entitle their owner to sue: 'one cannot talk about a right to one's life or one's corporal integrity, to one's honour, to one's image, etc . . .; before the damage or injury has been suffered, the injured person, entitled to the protection of Article 1382 C. civ., has no 'abstract' right at all; his right arises only at the moment when the damage has been caused'.[23] This opinion is shared by *Roubier* in his famous study *Droits subjectifs et situations juridiques* published in 1963: 'these alleged "personality rights" don't have the usual appearance of subjective rights, as it is out of the question to appropriate such elements like image, honour, etc. . . ., which are not appropriable'.[24]

From the middle of the twentieth century, however, the opinion that personality rights should be seen as a new category of subjective rights started gaining ground. This point of view was in particular supported by the Belgian author *Dabin*, whose definition of personality rights is still used today: '[t]hese are the rights whose subject is the component elements of the personality considered under its manifold aspects, physical and moral, individual and social'.[25] At that time, a proposal to amend the *Code civil* was in preparation containing a chapter dealing with personality rights.[26] This chapter was divided into eighteen sections, the last two of which are of particular interest: section 164 provides that 'personality rights cannot be traded. Every intentional limitation of the exercise of these rights is null and void if it is contrary to law and order'. According to section 165, 'every unlawful infringement of these rights entitles the injured person to injunctive relief, irrespective of the damage which can arise from it'. While this proposal was never enacted, it nevertheless shows the importance which the personality rights had gained by the middle of the century.

As far as case law was concerned in many decisions the courts sanctioned the disclosure of details of private life or the publication of an image made without the consent of the person concerned on the basis of the general provision of Article 1382 C. civ. In the 1960s the courts often used the notion of 'moral patrimony', which seems to have been used for the first time in a case concerning the unpublished memoirs of

[23] Nerson, Les droits extrapatrimoniaux, Lyon 1939, p. 363.
[24] Roubier, Droits subjectifs et situations juridiques, Dalloz 1963, p. 375.
[25] Dabin, Le droit subjectif, Dalloz 1952, p. 169. See also Decocq, Essai d'une théorie des droits sur la personne, LGDJ 1960; Kayser, Les droits de la personnalité. Aspects théoriques et pratiques, RTD civ. 1971, 445–509.
[26] Houin, Report, in 'Travaux de la Commission de réforme du Code civil', Sirey 1950–1951, t.6, p. 3 s.

Marlene Dietrich.[27] In this case, the Paris Court of Appeal stated that 'the memories of each person's private life belong to his moral patrimony; nobody shall publish them, even if not maliciously, without the express and unequivocal consent of the one whose life is told'.[28] The notion of 'moral patrimony' is sometimes associated with that of 'continuation of the personality', as in the *Bernard Blier* case, where the court stated that 'privacy belongs to the moral patrimony of every physical person and constitutes, like his image, the continuation of his personality'.[29] But even before the 1970 Act, which legally recognised the right of privacy, the courts acknowledged in some cases the *right* to one's personal sphere, as in the *Trintignant* case, where the Paris Court of Appeal stated that 'everyone has a right to the secrecy of his private life and is entitled to claim for its protection'.[30]

The most famous case of this time is certainly the *Gunther Sachs* case, which was decided by the *Cour de cassation* in 1971. Gunther Sachs, an industrial tycoon and the then husband of Brigitte Bardot, sued the men's magazine *Lui* which published details about his sex life under the heading 'Sexy Sachs'. The information published by *Lui* had already been published in other magazines with the express or tacit consent of the plaintiff. *Lui* had merely summarised these stories and edited them to form a complete story. Sachs claimed that his private sphere had been invaded and demanded the withdrawal of the relevant issue and damages from its publisher. The *Cour de cassation* confirmed the judgment of the appeal court against the publisher and stated that the fact that the plaintiff had previously tolerated reports and even his agreement to their publication in the press did not mean that he had irrevocably, and without limit, authorised any periodical to re-publish the information.[31] Thus the Court recognised the right to a private sphere and granted, even without any evidence of fault or causally related damage, remedies in the form of damages and the withdrawal of the offending issue. 'By so doing, the Court dispensed in several respects with the usual requirements for liability under Article 1382 of the Civil Code'.[32]

[27] Not to be confused with the *Marlene Dietrich* cases in German law and subsequent decision of the European Court of Human Rights, on which see 104 above and 216 below.
[28] CA Paris 16.3.1955, *Marlene Dietrich*, D. 1955, jur., 295. For others examples of the use of the notion of 'moral patrimony', see CA Paris 30.6.1961, D. 1962, jur., 208; CA Paris 6.7.1965, *Picasso*, Gaz. Pal. 1966, 1, 39; TGI Paris 18.3.1966, D. 1966, jur., 566.
[29] TGI Seine 23.6.1966, *Blier*, JCP 1966, II, 14875.
[30] CA Paris 17.3.1966, *Trintignant*, D. 1966, jur., 749.
[31] Cass. civ. 2.1.1971, *Gunther Sachs*, D. 1971, jur., 263.
[32] Gounalakis, *Privacy and the Media: A Comparative Perspective* (Munich 2000), ed. Beck, p. 67.

The *Law of 17 July 1970* 'intending to reinforce the guarantee of individual rights of citizens' was a milestone in the history of the protection of the personality in France. This is true even though the French legislature merely adopted into the Civil and Criminal Codes the law developed by the courts relating to the protection of the private sphere, by enacting, amongst others, a new Article 9 *Code civil*, the wording of which is almost identical to that of Article 8 of the European Convention on Human Rights (ECHR) of 1950.[33] Thus, the right of privacy is the first, and only, of the personality rights to be officially recognised by the French legislature. The right to one's name and the right to one's image are nevertheless firmly established in French law notwithstanding their purely jurisprudential origin. These three rights (private life, name, image) form the core of the theory of the personality rights in France. The category contains other 'rights', such as the 'right to one's voice' or the 'right to one's honour', whose content and outlines remain uncertain.

There has been some debate as to whether the duly recognised different personality rights are to be considered as manifestations of a general personality right like the one found in German or Swiss law. This view, held by the drafters of the proposal to amend the *Code civil*, was quite rapidly abandoned by the main body of French legal opinion, and in 1959 *Nerson* wrote: 'one thing is accepted: nobody in France still believes in the existence, on a technical level, of a general personality right'.[34] This was the prevailing opinion until the 1990s, when some authors began to revive the discussion and began to plead for the recognition of a general personality right in France.[35]

It seems, however, that the conception of a general personality right does not fit into French law. The personality may be unique and worthy of protection in all its aspects, but this does not mean that such protection should and could be secured by means of a subjective right. Many interests are protected by law without being the subject of such rights. The vague and diffuse nature of this so-called general personality right, which does not have a special attribute as its subject, seems to be difficult to reconcile with the definition of a subjective right. A subjective right

[33] Art. 8 al. 1 ECHR: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Comp. Art. 9 al. 1 C. civ.: 'Each individual has the right to the respect of his privacy'.

[34] Nerson, De la protection de la personnalité en droit français, Travaux de l'Association Capitant, t. 13, Dalloz 1963, p. 86.

[35] Beignier, L'honneur et le droit, Paris 1995, LGDJ, p. 54. – Marino, Responsabilité civile, activité d'information et média, PUAM-Economica 1997, p. 210. – Saint-Pau, annotation to Cass. civ. 16.7.1998, D. 1999, jur., 541. – Caron, annotation to Cass. civ. 25.1.2000, D. 2000, somm., 271.

means, in French legal language, a power conferred by the law on an individual that entitles him to do, to forbid, or to claim something in his own interest.[36] The notion 'refers to a legal interest that is protected absolutely from any and all encroachments. The French contrast this with "tort" protection of a legal interest for which the motives and manner of a defendant's conduct, as well as the existence and scope of any injury, may be relevant to a plaintiff's recovery'.[37] Thus, the existence of a subjective right requires that the subject be precisely determined. The personality as such is too broad and vague a concept to serve as a subject. In fact, French law does not recognise a general personality right but a general principle of protection of the personality. Such protection is achieved by means of real subjective rights for those attributes which have a certain 'materiality' (name, image, voice, private sphere), and by means of tort law for all other interests such as honour, dignity and feelings.

Personality rights, in the traditional French conception, are extrapatrimonial rights, that is, rights that can not be evaluated financially. Their purpose is to protect the person in his individuality; they only confer upon their owner the power to defend himself against a publication of his image, a disclosure of his private life or a use of his name made without his consent. The traditional assertion, according to which personality rights are extrapatrimonial on the basis that the person is not a marketable commodity, seems to be giving way, however, since some attributes of the personality are increasingly marketed. In most of the cases decided by the courts the issue is not so much the safeguarding of the moral integrity of an individual as the profit-making exploitation of his name, his image, his voice or his private life. This undeniable movement towards marketing of the human being, even if it is not new,[38] seems to question the dogma of the extrapatrimoniality of the personality rights. Since one can nowadays sell one's image, voice, name or details of one's private life, does this mean that personality rights, at least to some extent, have become patrimonial? Are they still merely rights to prohibit the use of attributes of personality, or do they now contain the power for the owner to take advantage of the commercial exploitation of his personality?

For a long time French authors have remained very cautious when dealing with the problem of the marketing of personality attributes. Most

[36] Cornu (ed.), Vocabulaire Juridique, PUF 1987, V° Droit, p. 287.
[37] Hauch, Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris, 68 *Tul. L. Rev.* (1994) 1219, 1237.
[38] See already Trib. com. Seine 8.6.1886 and CA Paris 18.4.1888, *Ann. prop. ind.* 1894, 351, about the use of the name and the image of the famous actress Sarah Bernhardt for the marketing of perfumery products.

of them either did not even mention this subject and stuck to the dogma of the extrapatrimoniality of personality rights,[39] or merely observed this marketing without drawing any conclusion from it on a theoretical level.[40] The few who dared tackle the problem did so only in connection with the right to one's image but not on a general level. Thus, *Gaillard* speaks in 1984 about 'the dual nature of the right to one's image',[41] a view shared by *Acquarone* pleading for 'a patrimonial right of exploitation of one's own image' under a regime similar to copyright.[42] Since then this opinion has been supported in several civil law handbooks,[43] and in an increasing number of monographs[44] and articles.[45] These publications, which argue for the recognition of an exclusive right of exploitation of attributes of the personality in French law, were until recently based on a mere *de lege ferenda* point of view. An evolution seems to have taken place in the last few years as the existence of such an exclusive right is nowadays described as an established fact in French legal writing.[46]

As for the courts, an evolution can be observed in the handling of the problems arising from an unauthorised marketing of personality

[39] See, e.g., Carbonnier, Droit civil. Les personnes, 19th ed. 1994, PUF, p. 130. – Weil & Terré, Droit civil. Les personnes, la famille, les incapacités, 5th ed. 1993, Dalloz, p. 37. – Larroumet, Droit civil. Introduction à l'étude du droit privé, Economica 1987, p. 253.

[40] See for ex. Terré & Fenouillet, Droit civil. Les personnes, la famille, les incapacités, 6th ed. 1996, Dalloz, p. 95. – Mazeaud & Chabas, Leçons de droit civil. Les personnes, by Laroche-Gisserot, 8th edn 1997, p. 389. – Viney & Jourdain, Les conditions de la responsabilité, in Ghestin (ed.), Traité de droit civil, 2nd edn 1998, LGDJ, p. 33.

[41] Gaillard, La double nature du droit à l'image et ses conséquences en droit positif français, D. 1984, doct., 161. This author questions about 'the existence of an economic right to one's image, distinct from the extrapatrimonial right to one's image, as well as from the general principles of tort law'.

[42] Acquarone, L'ambiguïté du droit à l'image, D. 1985, chr., 133.

[43] Goubeaux, Les personnes, in Ghestin (ed.), Traité de droit civil, LGDJ 1989, p. 294. – Malaurie, Cours de droit civil. Les personnes, les incapacités, 3rd ed. 1994, Cujas, p. 134. – Teyssié, Droit civil. Les personnes, 3rd ed. 1998, Litec, p. 56.

[44] See e.g. Kayser, La protection de la vie privée par le droit, 3rd ed. 1995, Economica, p. 197. – Zanella, Les marques nominatives, Litec 1995, p. 55. – Serna, L'image des personnes physiques et des biens, Economica 1997, p. 161. – Loiseau, Le nom objet d'un contrat, LGDJ 1997, p. 471. – Luciani, Les droits de la personnalité: du droit interne au droit international privé, Paris I thesis, 1997, p. 201. – Bichon-Lefeuvre, Les conventions relatives aux droits de la personnalité, Paris XI thesis, 1998, p. 447.

[45] Logeais, The French Right to One's Image: A Legal Lure?, 5 Ent L Rev (1994) 168. – Pollaud-Dulian, Droit moral et droits de la personnalité, JCP 1994, I, 3780, No. 16. – Loiseau, Des droits patrimoniaux de la personnalité en droit français, 42 Mc Gill L. Rev. (1997) 319.

[46] Bertrand, Droit à la vie privée et droit à l'image, Litec 1999, p. 147: 'it is well established that the right to one's image is a patrimonial transferable right'. – de Haas, France, in Henry (ed.), International Privacy, Publicity and Personality Laws, Butterworths 2001, p. 153: 'Whatever the basis may be, this is indeed an exclusive right very close to an intellectual property right.' – Lepage, Les beaux jours du référé, Communication-Commerce Electronique (hereafter CCE) 2001, comm., p. 28.

attributes. In a first step, during the 1980s, French judges awarded substantial damages to redress the loss of profit suffered by people whose attributes had been used without their consent, sums amounting to much more than the symbolic 1 Franc awards, which were thus far usual in such cases.[47] Subsequently, since the beginning of the 1990s, the French courts have expressly affirmed in many decisions the existence of a patrimonial right to one's image, distinct from the traditional personality right to one's image.[48] Even so, some recent judicial decisions in such cases still solely refer to the economic *damage* suffered by the person whose image has been used without his consent, and not to an economic *right* which would have been infringed.[49] One may thus question whether French jurisprudence does in fact acknowledge the existence of an economic right to one's image, as it is often asserted. As for the other attributes of personality, the situation is even less clear than for the image, since the courts either did not have the opportunity to decide expressly on the existence of a patrimonial right to one's voice or one's private life, for example, or they have recognised such a patrimonial right to one's name, but only if used as a trade mark or trade name which then gives rise to a classical intellectual property right.[50]

Protection of economic interests

Even if the majority of the courts and legal authors seem to support the recognition of a patrimonial right of exploitation of attributes of personality, such a right has not yet become positive law in France and its acknowledgement faces many difficulties. The protection of economic

[47] See for an example of acknowledgment of the loss of profit and the economic damage resulting from the unauthorised commercial exploitation of the personality, TGI Paris 3.12.1975, Piéplu, D. 1977, jur., 211. – TGI Lyon 17.12.1980, D. 1981, jur., 202. – CA Paris 9.11.1982, D. 1984, jur., 30. – TGI Marseille 6.6.1984, D. 1985, somm., 323. – TGI Paris 30.4.1986, Gaz. Pal. 1987, 1, 30. – CA Nîmes 7.1.1988, JCP 1988, II, 21059. – CA Paris 11.5.1994, D. 1995, jur., 186.

[48] See e.g. TGI Aix-en-Provence 24.11.1988, Raimu, JCP 1989, II, 21329, confirmed by CA Aix-en-Provence 21.5.1991, Images Juridiques 1991, No. 89, p. 3. – TGI Paris 25.1.1989, Gaz. Pal. 1992, 1, somm., 66. – CA Paris 2.2.1993, D. 1993, inf. rap., 118. – TGI Paris (réf.) 4.8.1995, 167 RIDA (1996) 291. – CA Versailles 2.5.2002, Légipresse 2002, No. 192, I, 69. – TGI Nanterre 23.10.2002, Légipresse 2003, No. 199, I, 23.

[49] See e.g. CA Paris 11.5.1994, D. 1995, jur., 186. – TGI Nanterre 6.4.1995, Gaz. Pal. 1995, 1, 285. – CA Paris 10.9.1996, 171 RIDA (1997) 353. – TGI Paris 22.9.1999, CCE 2000, Comm. No. 59, p. 28. – CA Versailles 21.3.2002, Légipresse 2002, No. 193, III, 137.

[50] See nevertheless Cass. com. 6.5.2003, Ducasse, D. 2003, jur., 2228; JCP 2003, II, 10169, which seems to aknowledge the existence of a real property right to one's name independently of its use as trade mark or trade name.

interests without a monopoly on attributes of personality therefore needs to be discussed.

The characteristics of the patrimonial right of exploitation of the personality de lege ferenda

The so-called patrimonial right of exploitation of the personality should, according to its supporters, be construed on the same principles as copyright. The arguments proposed are simple: attributes of personality have long since acquired an economic value and have become the subject of contracts. They may not be totally detached from (the person of) the right-owner, but they can be marketed. A comparison with copyright is therefore easy to draw: personality rights in their classical meaning are said to be comparable with moral rights, and the new patrimonial right of personality is said to be of the same nature as the economic rights of an author. At the same time, most of the authors who argue for the recognition of such a patrimonial personality right in French law are aware that the situation is quite different from copyright, as there is no real intellectual creation as required by copyright. Thus, the patrimonial right of the personality is qualified by its supporters either as a neighbouring right of copyright,[51] such as the right of performers, or more generally as a new intellectual property right[52] or as a *sui generis* right that does not fit well with the existing categories.[53]

As regards ownership of this new right, French authors do not agree on the question of whether everyone may be the owner of such a right or whether it is limited to celebrities. As the market(able) value of the image, the name, the voice or the private life of an individual often depends on his fame, it has, in the past, been asserted that unknown persons do not have any economic right to the attributes of their personality since these attributes do not have any marketable value.[54] Nowadays, it is argued, nonetheless, that every person may, one day, achieve some fame or notoriety, which would confer some marketable value on the individual's attributes, and that this value does not always depend on whether a

[51] See Bertrand, Un nouveau droit voisin du droit d'auteur: le droit à l'image, 32 Cahiers du droit d'auteur (1990) 1. – Bichon-Lefeuvre, Les conventions relatives aux droits de la personnalité, Paris XI thesis, 1998, p. 467.

[52] See Loiseau, Le nom objet d'un contrat, LGDJ 1997, p. 480.

[53] See Serna, L'image des personnes physiques et des biens, Economica 1997, p. 161. See also implicitly Kayser, La protection de la vie privée par le droit, 3rd edn Economica-PUAM 1995, p. 197.

[54] See e.g. Acquarone, L'ambiguïté du droit à l'image, D. 1985, chr., 133, No. 25. – Malaurie, Cours de droit civil. Les personnes, les incapacités, Cujas 1994, No. 334 p. 134. – Tallon, Droits de la personnalité, Répertoire Droit civil Dalloz 1996, No. 125.

person has fame or notoriety in the first place. Thus, the opinion currently prevailing is that everyone is potentially the owner of such a right but that only celebrities can enforce it in practice.[55]

Objections to the acknowledgement of a patrimonial right of the personality

Lack of conclusive arguments[56] The proponents of a French 'right of publicity' argue that only the assumption of such a right could legally explain the contracts which are concluded for the marketing of the name or the image of a celebrity. It is said that without any patrimonial right over attributes of personality, such contracts are invalid since they do not comply with the principle of inalienability of the traditional extrapatrimonial rights of the personality. But the mere fact that contracts are concluded for the marketing of attributes of personality does not necessarily mean that they must be interpreted as a licence or an assignment of an exclusive right to these attributes. When, for example, an employment contract is signed, its subject is the labour power of the employee, who does not own any subjective right to it. Similar considerations apply to attributes of personality: the agreement according to which a person allows the commercial exploitation of his attributes does not constitute the assignment or the licence of any exclusive right to these attributes, but rather an innominate contract[57] creating the obligation of the owner of the marketed attributes not to oppose such a marketing, and possibly the obligation of the authorised person to pay the agreed fee. A comparison may be made with contracts concerning the disclosure of know-how. Such contracts may impose certain obligations on the contracting parties, such as the duty to exploit the disclosed know-how, but are characterised as contracts for services under French law, rather than as a licence agreement.

[55] Bichon-Lefeuvre, Les conventions relatives aux droits de la personnalité, Paris XI thesis, 1998, p. 453. – Loiseau, Le nom objet d'un contrat, LGDJ 1997, p. 481. – Collet, La notion de droit extrapatrimonial, Paris II thesis, 1992, p. 262. Cf. 69 above (right of publicity applies both to famous and unknown individuals, although celebrities most likely to assert such a claim in practice).

[56] Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' 81 *CalifLRev* (1993) 125, 146: 'Proponents of the right of publicity should be required to make a clear and convincing showing that important interests will be served by recognizing a property right in a celebrity's identity.'

[57] See *Black's Law Dictionary*, 6th ed, West Publishing Co. 1990, V° Innominate contracts, p. 789: 'Literally, are the "unclassified" contracts of Roman law. They are contracts which are neither *re, verbis, literis*, nor *consensu* simply, but some mixture or variation upon two or more of such contracts.'

Lack of theoretical foundation One may question whether the mere fact that attributes of personality have a commercial value means that one can infer the existence of an exclusive right to them. In French law the use of the legal technique of an exclusive right is exceptional: the 'right' (the French would say 'liberty') of free enterprise and trade can only be restrained for good reasons. In the field of 'intangible values', these are of two kinds: the monopoly either constitutes a legal reward for those who enrich society with new or original creations or inventions, such as in patent or copyright law, or the monopoly is granted for reasons of public policy, such as in trade mark law, which aims to avoid confusion among consumers.[58]

As far as attributes of personality are concerned, the latter of these two kinds of justifications obviously does not fit: the point here is not to avoid possible confusion in relation to direct competitors, but to prevent anybody from marketing an attribute without the consent of its owner. The notion of a direct competitor, which is essential for trade mark law, due to the principles of speciality and territoriality, becomes meaningless here, since the person concerned is rarely involved in trade and only wishes to benefit from the commercial value of his own name, image, voice or private life. Thus, it is the second kind of exclusive right that may play a role in the context of attributes of personality, that is, the rights in intellectual creations. In fact, only copyright can serve as a model as it is the only one that protects interests of an economic and a non-economic nature simultaneously.

The acknowledgement of this new intellectual property right to attributes of personality still faces a serious difficulty: the lack of a creation. Whatever the differences between various intellectual property rights may be, their purpose is always the protection of a creation or an invention, either novel or original. This requirement of creation is essential: the reasoning is that a creative intellectual effort should be rewarded and that the advantage conferred upon the creator by the exclusivity is justified by the service he renders to society. As far as attributes of personality are concerned, there is neither a creative intellectual effort, nor a service rendered to society. It seems, indeed, more than doubtful whether any

[58] Cf. Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, (1993) 81 *CalifLRev* 201: 'But despite the renewed vigor of the so-called "misappropriation doctrine", there is still no general common law prohibition against benefiting from the commercial efforts of others ... Absent some special and compelling need for protection – such as the need to prevent consumer deception (passing off), or the need to provide adequate incentives for creation (copyright) and innovation (patent, trade secrets) – intangible products, once voluntary placed in the market, are as free as the air to common use'.

creative effort may be seen in this field, and even if such an effort is assumed it does not concern all individuals (but only celebrities), nor all attributes of personality (but only the image),[59] so that this new system of protection of economic interests would not in any case be homogeneous. Moreover, the creation giving rise to existing monopolies (such as patents or copyright) has in one way or another a social benefit. But how do personality attributes enrich society? What benefits does society gain from the exploitation of these attributes? The recognition of a monopoly in attributes of personality would be that of a right not only individualistic, but also totally egoistic,[60] a right which therefore cannot be justified.

Problems of definition The recognition of an exclusive right to attributes of personality also leads to many definitional problems, such as duration, ownership and requirements of protection. The proponents of a French 'right of publicity' do not pay much attention to the question of duration. The only author who discusses this issue takes the view that 'it is not necessary to limit the duration of the patrimonial right of the personality like copyright'.[61] Such arguments are however not convincing. It is argued, first, that the limitation of a monopoly is always justified by the public interest and that the commercial exploitation of attributes of the personality affects the interest of only a limited number or people. However, even if only a limited number of people are concerned, the principle remains the same for these as for all other people, that is, the right of free enterprise and trade. It seems difficult to accept that this right could be restrained without any time limitation. The second argument to justify the absence of temporal limitation of the French 'right of publicity' consists of the statement that 'the publicity value, that is, the commercial value of fame often declines swiftly after the death of the person, which, in

[59] See however Barnett, 'The American Right of Publicity and Visual Art: Solutions for the Growing Conflict', Paper prepared for Congress of ATRIP, New Delhi, October 6–8, 2002, p. 12 seq.: 'one's appearance is a fact. It may not be entirely natural, but it is basically a fact of nature, and hence uncopyrightable. (. . .) If one cannot copyright one's appearance, one should not be able to monopolise it under the banner of the right of publicity'.

[60] Flagg, 'Star Crazy: Keeping the Right of Publicity Out of Canadian Law', (1999) 13 IPJ 179, at 190: 'Celebrities do not always work hard for their fame (. . .). And even if one starts from the premise that fame results from hard work, awarding a property right in the persona for this reason alone is inconsistent with the *quid pro quo* requirement of intellectual property law that the celebrity also contribute something of value to the society'. See also, on the consumer protection arguments for publicity rights, Madow (fn. 58 above), 233: 'The focus of the right of publicity is not the interest of the consuming *public* in freedom from deception but rather the *celebrity's* interest in controlling and benefiting from the economic value of his identity.'

[61] Loiseau, 'Le nom objet d'un contrat', (1997) LGDJ, p. 490.

most cases, makes it unnecessary to limit the duration of the monopoly'.[62] But, as the author himself observes, this is not a rule but a mere presumption, which does not suffice to justify a monopoly in attributes of personality without any limitation of duration.

The second problematic issue is that of ownership and, an issue which is closely linked, the conditions under which such a monopoly is granted. It has been argued that this monopoly appears when the attribute of personality concerned has acquired an economic value. But how may the moment when this economic value starts to exist be determined and how, therefore, may the existence of a monopoly be assumed without there being any means to determine the precise moment of such a monopoly's inception.

It has been suggested that fame or celebrity should be the criterion for awarding a patrimonial right to attributes of personality. This opinion is not convincing. The economic value of such attributes does not depend solely on the fame of the person concerned: mere physical beauty, without any celebrity, may make a person's image very valuable. Moreover, the notion of fame is too vague to be used as a criterion: from which point may a person's fame be sufficiently significant to justify such a monopoly? Finally, taking this approach, the subject of such a monopoly would not be the attribute of the personality in itself, but the fame of the right-owner. It seems that fame is too elusive a notion to be the subject of a subjective right.

The protection of the economic interests without any patrimonial right to personal attributes: acknowledging a new tort of appropriation

The debate concerning the recognition of a patrimonial right of exploitation of attributes of personality that exists in most of the European countries is strongly influenced by the evolution of US law within the last fifty years. It is well known that, apart from the right of privacy, a right of publicity has been recognised which confers a monopoly in the commercial exploitation of the personal attributes of the owner of those attributes.[63] Such a right should also, in the opinion of most authors, be recognised in Europe. It should, however, not be forgotten that there are many differences between common law and civil law systems: in the US the need to acknowledge a new right of exploitation of attributes of personality is due to the inability of the established torts to solve the

[62] Loiseau, *ibid.* [63] See above ch. 3.

problems arising from such marketing. In contrast, the civil law countries, especially France, do not face such problems, since the general principle set down in Article 1382 *Code civil* enables the courts to solve most difficulties without the use of the notion of subjective right.[64]

In fact, French law does not need to recognise a new intellectual property right to attributes of personality to solve the problems arising from increasing commercial exploitation. Judges who deal with these questions have two mutually exclusive options from which to choose.

Tort law and the 'parasitism' doctrine In French tort law, a successful claim requires evidence that the victim has suffered damage which is attributable to a 'faute', and that a causal link exists between the wrongful behaviour of the defendant and the damage suffered by the plaintiff. French private law has a very broad conception of the notion of 'faute', which is not limited to the violation of an absolute right such as in German law, for example. The 'faute' in French law consists of every failure to observe the general precept of prudence and diligence, every behaviour deviating from the conduct a 'reasonable man' would have shown in such circumstances. The very general wording of Article 1382 *Code civil* may be surprising to a foreign lawyer: '[e]very act whatever of man which causes damage to another obliges him by whose fault the damage occurred to repair it'.[65]

As far as personal attributes are concerned, the question is whether the marketing of such attributes without the consent of their owner can always be considered a fault. In spite of the very broad conception of fault in French law, the answer must be negative. Personality attributes are only protected by means of the traditional personality rights, which are extrapatrimonial. Thus, only the non-economic interests are automatically protected. But if the harm suffered by the person is only an

[64] Moreover, the term 'right' has in this context the force of 'claim' under US law, whereas the use of this term refers to a real exclusive right under French law.

[65] Van Gerven, Lever, Larouche, *Tort Law, Common Law of Europe Casebooks*, Oxford and Portland, Hart Publishing, 2000, p. 71: 'German and English law view the interests and relationships to be protected by tort rules differently from French law, with the former systems taking a restrictive (and coincidentally similar) approach. ... French law proceeds differently. In establishing liability the first question is not whether an interest or special relationship protected by the law is affected, as all interests and relationships warrant protection unless clearly illicit, but rather the inquiry proceeds immediately to the substance of the case, i.e. questions of fault, causation and damage. This question is also raised under German and English law, but only after the existence of an interference with a specific protected interest (under German law), or a specific relationship between tortfeasor and victim (under English law), has been proved. Accordingly, the introduction of tort law with a discussion of protected interests or relationships will be considered unusual, to say the least, by French jurists.'

economic one, that is, if the person does not object to the marketing of his attributes as such and only claims compensation for the lost profit, the personality rights do not enable him to recover the money (which would have been) charged if his consent had been obtained prior to the commercial use of such attributes. Since these attributes are not the subject of a real monopoly, that is, of an exclusive right to control their commercial exploitation, their mere marketing without the consent of their holder does not, as such, give rise to liability in tort law. Liability is assumed only in cases where the behaviour of the unauthorised user is considered at fault, because, for example, of unfairness. Most commentators infer from this situation that a French 'right of publicity' needs to be recognised in order to protect economic interests adequately. It seems, however, that the alternative is neither the recognition of an exclusive right to attributes of personality nor assumption of liability under tort law provided fault is proven.

A new doctrine has developed in the last two decades in France, the so-called parasitism doctrine or doctrine of parasitic behaviour. Its initial goal was to achieve protection against unlawful use of the fame or the notoriety of competitors, and it has since been extended to other economic values besides celebrity and today offers protection against every usurpation of economic investments. Like the tort of unfair competition, the parasitism doctrine is an application of Article 1382 *Code civil*, that is, of civil liability. Unlike unfair competition, however, it does not apply only to relations between competitors, but also to every field of business or, more generally, to any aspect of social life.

The parasitism doctrine as applied by the courts and approved by prevailing opinion results in the protection of every kind of investment, and ultimately every economic value, whatever its origin may be. The danger lies in undermining the advantages of the existing intellectual property rights and dangerously threatening the fundamental principle of free trade and industry. However, the underlying idea of the parasitism doctrine, that is, strongly to protect some interests which are not the subject of an exclusive right, seems to be a good means of adapting the law to the latest economic evolution of society. It is a flexible solution which does not face the same obstacles as the recognition of new exclusive rights. However, French law seems in its latest developments to have gone too far in protecting too many different interests through the parasitism doctrine. A specific criterion must, therefore, be found to determine which interests are worthy of stronger protection than the mere application of the general principles of tort law.

The criterion of economic value as used today in French law is not satisfactory. The mere fact that an interest has an economic value should not suffice to justify automatic legal intervention to protect such an

interest. The interests protected by parasitism, that is, through a variation of tort law where the required fault is more or less presumed, can only be exceptions to the principle of free trade and enterprise, which implies the free use of values which are not directly protected through an exclusive right.

One criterion to be applied could be that of a 'prior indirect reservation', that is, an obstacle which can be material or legal and which prevents a third party from freely using the value concerned. This is the case with know-how, for example, the secret nature of which enables such indirect reservation for its owner. In the case of know-how, there is indeed a material obstacle to its free use by a third party, and one may therefore consider that every usurpation as such is a 'faute'.

This seems to be the case for personality attributes as well, since there is an obstacle, not a factual but a legal one, to their free use by a third party. This legal obstacle is the existence of traditional personality rights, which may not enable a direct sanction of an unauthorised commercial exploitation of personal attributes, but can achieve an indirect 'reservation' to their holders' benefit. Thus, the economic interests of the owner of the exploited attributes can be satisfactorily protected by civil liability provided that fault is presumed. The point is here – using common law terminology which is not familiar to the French lawyer – to acknowledge not a new property *right*, but a new *tort* of appropriation of personality. Considering the very general provision of Article 1382 *Code civil*, it should be more precisely recognised, not so much a real new independent tort, but rather a subcategory inside this general provision, concerning the interests which are the subject of a prior indirect reservation, that is, the know-how and confidential information on the one hand, attributes of personality on the other hand. For these two kinds of economic interests, mere usurpation or appropriation is sanctionable.

The acknowledgement of this intermediate category of interests in French law which are not the subject of an exclusive right, but may not freely be used by any third person, would have the advantage of taking into account the increasing movement in this direction of both the courts and legal theory. Using the criterion of indirect reservation to decide which interests are worthy of inclusion in this category would curb the debatable expansion of the parasitism doctrine. This solution differs from the recognition of a new exclusive right in two ways. First, this system only leads to the assumption that an unauthorised exploitation of the personal attributes is at fault, which does not automatically result in sanctioning the defendant's behaviour. Rather, the plaintiff has to prove that he suffered harm, i.e., it must be shown that the alleged loss of profits indeed occurred, and evidence must be produced to establish the causal

link between the fault and the harm. Second, it is only a presumption of fault, and the defendant can thus always argue that he acted in good faith, an argument that would not be relevant in the case of an infringement of an exclusive right.

Unjust enrichment Another solution may be considered for protecting the commercial value of personal attributes without acknowledging a new tort of appropriation. However, it has the disadvantage, in comparison with the previous solution, in that it only allows damages to be awarded for the economic harm suffered, and cannot be used to prevent an unauthorised exploitation.

This solution is based on the notion that a third party who exploits the attributes of an individual's personality without paying him the usual fees profits unjustly at the individual's expense. He takes advantage of the economic value of these attributes which, even if it is not necessarily the result of physical or intellectual investments, is reserved to the owner of such attributes because of the existence of personality rights. According to this view, the commercial exploitation of personal attributes cannot be prohibited if the dignitary interests of their holder are not affected, but the exploiter has to compensate the owner for this enrichment. It is in a certain sense the institution of a 'paying public domain' such as that of some copyright legislation.

The use of the unjust enrichment doctrine appears finally to be useful for securing the compensation of the profit lost by the person whose attributes are exploited without his consent. The aim of this doctrine, which has purely jurisprudential origins,[66] is to restore a balance between two patrimonies, to redress the injustice arising from the enrichment of a person to the detriment of another.

There are four conditions for a successful so-called 'action *de in rem verso*' in French law: first, there must be enrichment of the defendant (here, the one who markets attributes of personality and who saved the fees that he should have paid for the authorisation); and second, a corresponding impoverishment of the plaintiff (here, the loss of profit of the person whose attributes are marketed and who would have required the payment of a fee for this marketing). The third condition is that the enrichment be unjust, that is has no 'cause légitime'. It has been argued that creations which are not the subject of an exclusive right are in the public domain, and can therefore be freely used so that the enrichment of

[66] Zweigert & Kötz, *An Introduction to Comparative Law*, (2nd edn) (Oxford: Oxford University Press, 1987) p. 584: 'The Civil Code in France, unlike those of Germany and Switzerland, has no general provision regarding the restitution of unjustified enrichment'.

the person exploiting them has a 'cause légitime'. But this can be discussed for those interests which are 'indirectly reserved' for their owner, such as know-how or attributes of the personality. In this case, since no legal monopoly exists, the values may be used without authorisation, which does not, however, mean free of charge. The fourth and final requirement of an unjust enrichment claim in French law is that the plaintiff may have no other action, contractual or delictual, at his disposal for the recovery of his loss. This requirement also seems to be satisfied in the field of the unauthorised commercialisation of attributes of the personality. Since the mere use of an attribute of personality without the consent of the person concerned does not constitute fault as such if that person's dignitary interests are not affected,[67] the plaintiff has no claim against the defendant to recover his loss of profit.[68]

The unjust enrichment doctrine could be a good means of solving the problems arising from the unauthorised exploitation of attributes of the personality. As has been noted above, this solution rules out the previous one, the parasitism doctrine, where fault is presumed. No matter which solution is preferred (parasitism or unjust enrichment), there is no need to acknowledge a new intellectual property right to protect the economic interests involved in the exploitation of attributes of the personality under French law.

Trade mark law The question whether trade mark law can serve as supplementary means of protection of the economic interests in personality has not received much discussion in French law. Trade mark law is only referred to in the context of commercial exploitation of personality to estimate the legal effect of the consent and more precisely its binding power. The question arises when a name is used as a trade mark or trade name with the consent of its holder and this use gives rise to a new intellectual property right. The consent cannot then be as easily revoked as in other cases of commercial exploitation of personality, and the

[67] So the current French law, since the previously made proposition to presume fault in such cases has not (yet) become positive law.

[68] The requirement that the defendant may have no other action, i.e., the so-called 'subsidiarité' of unjust enrichment, makes its application very rare in French law, which has been criticised in recent years. See Van Gerven, Lever, Larouche, *Tort Law*, *Common Law of Europe Casebooks*, (Oxford & Portland, Hart Publishing, 2000) p. 816: 'The French rules on the restitution of unjust enrichment, giving rise to a claim called *actio de in rem verso*, play only a subsidiary role, as the action is available only in the absence of any other remedy. Consequently, when the defendant incurs tortious liability, the *actio de in rem verso* is not available. Thus it has recently been suggested that (...) the scope of application of the *actio de in rem verso* should be enlarged by legislative intervention'.

majority opinion in French law sees this as an exception to the rule that personality rights are inalienable.[69]

Protection of non-economic interests

Non-economic interests are protected very extensively in French law. The personality rights give their owner the power to oppose every use of his attributes which would injure his dignitary interests. These are: (i) the right to privacy *stricto sensu*, which French law calls the right to respect of private life ('droit au respect de la vie privée') which is legally recognised in Article 9 *Code civil*; (ii) the right to one's name and (iii) the right to one's image. The latter two are acknowledged by the courts rather than by the legislature, although their existence is well established in French law. These three rights are real subjective rights, meaning that their encroachment gives rise to an action to have the infringement stopped, which is independent of tort law. As for legal redress, the action is theoretically governed by the rules of tort law, that is of Article 1382 *Code civil*, which requires the proof of a fault, a damage and a causal link. But the fact that personality rights are subjective rights on the one hand[70] and that the interests affected are of a non-economic nature on the other hand[71] makes it easier for the plaintiff to obtain damages: 'the application of Article 1382 C. civ. is considerably simplified, to the point of becoming purely formalistic, as both fault and non-material prejudice are held to be made out by the fact that the "right" to privacy has been infringed. . . . the link with the tortious liability rules of Article 1382 C. civ. (is) loosened'.[72]

[69] See 199 below.

[70] As a result of the fact that personality rights are subjective rights, every infringement is presumed to be a fault. See, e.g., TGI Paris 24.11.1965, *Bardot*, JCP 1966, II, 14521: 'the mere fact to publish, without his permission, the photographic portrait of someone else constitutes a fault which must be redressed by its author'. – TGI Paris 27.2.1974, 83 RIDA (1975) 114: 'the publication of a person's image without his consent constitutes a fault likely to render his author liable under tort law'. – TGI Paris 23.10.1985, Gaz. Pal. 1987, 1, somm., 128: 'the fault results from the objective fact of the infringement of the right to one's image'.

[71] The non-material damage resulting from the infringement of personality rights is presumed: one only has to characterise the infringement to prove it. See e.g. CA Paris 10.9.1996, 171 RIDA (1997) 353: 'the infringement of the right to one's image is likely to cause an immaterial harm to his owner'. – TGI Paris 14.5.2001, Légipresse 2001, No.184, I, 108: 'the non-material damage resulting from the encroachment of personality rights is constituted by the mere fact of their infringement'. – TGI Paris 7.7.2003, *Arielle Dombasle*, Légipresse 2003, No. 207, II, 196: 'La transgression du droit à l'image génère un prejudice dont le principe est acquis du seul fait de l'atteinte'. Cass. civ. 30.6.2004 Légipresse 2004, No. 216, I, 155.

[72] Van Gerven, Lever, Larouche, *Tort Law, Common Law of Europe Casebooks* (Oxford and Portland: Hart Publishing, 2000) 153.

Personality rights should not, however, be viewed as a real power to dispose of the name, the image or the facts from one's private life. They are means to defend one's personality by preventing others from violating one attribute of it. Personality rights have indeed a purely negative status in French law; they are 'defence rights'.[73]

In addition to private life, image and name, other attributes of personality are protected in French law, despite some confusion as to whether or not they are the subject of an independent right. The voice is one such attribute. In France, everyone agrees that the voice as such should be protected, independently of the words pronounced, since it is a way of expressing an individual's personality. It remains uncertain, however, whether French law acknowledges a real 'right to one's voice' as some authors claim.[74] It has also been argued that French law recognises a 'right to one's honour' which should be classified among the personality rights.[75] It seems that while one's honour is protected in French criminal law through the prohibition of defamation and in civil law through the general rules of tort law, it is not the subject of an autonomous right.[76]

Two points need to be discussed in the context of the enforcement of personality rights: first, the characterisation of the infringement; second, the restrictions likely to justify such an infringement.

Assessment of the infringement of the personality rights

The right to one's image A court dealing with an action for violation of a personality right has to verify that the alleged violation, that is the use of the attribute of the personality without the consent of the holder, really infringes the personality right concerned. As to the right to one's

[73] See, e.g., Stoufflet, Le droit de la personne sur son image (Quelques remarques sur la protection de la personnalité), JCP 1957, I, 1374, No. 19. – Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 427. – Goubeaux, Les personnes, in Ghestin (ed.), Traité de droit civil, LGDJ 1989, p. 252. – Marino, Responsabilité civile, activité d'information et média, PUAM-Economica 1997, p. 202. For a judicial example, see CA Aix-en-Provence 30.11.2001, CCE 2003, Comm. No. 11, p. 40 : 'the right to one's name is a personality right which enables everyone to oppose the use of his image without his consent'.

[74] Huet-Weiller, La protection juridique de la voix humaine, RTD civ. 1982, 511: 'the voice (. . .) is worth protecting through a real subjective right as an element of the personality'. See, for a recent decision in this sense, CA Pau 22.1.2001, D. 2002, 2375: 'the voice constitutes one of the attributes of the personality and can enjoy the protection provided by Art. 9 C. civ., insofar as a characteristic voice may be linked to an identifiable person'.

[75] Teyssié, Droit civil. Les personnes, 3rd edn, Litec, 1998, 30. – Cornu, Droit civil. Introduction, les personnes, les biens, 9th edn, Montchrestien, 1999, p. 225.

[76] Beignier, L'honneur et le droit, LGDJ 1995, p. 91: 'there is no subjective right to one's honour'. – Lucas-Schloetter, Droit moral et droits de la personnalité. Etude de droit comparé français et allemand, PUAM 2002, p. 202.

image, a court will examine whether the person concerned is recognisable. The way the person is represented may be irrelevant,[77] but the right to one's image only protects a person's features if the person can be recognised. In a case concerning a famous photograph named 'The Kiss of the Hôtel de Ville' by the French photographer Robert Doisneau, the court dismissed the suit brought by a couple claiming to have been photographed without their knowledge, as well as the suit of an actress asserting she had posed for the photograph in question, since none of them could establish who was really represented: 'the protection of this personality right can only be enforced if the photographed person is recognisable'.[78]

This requirement of identification raises the problem of the use of a look-alike (or sound-alike) for advertising purposes. The French courts seem to be rather undecided on this point, as the action of an unknown person was dismissed,[79] whereas the advertising use of a look-alike of the actor Gérard Depardieu[80] or of a sound-alike of another actor, Claude Piéplu[81] was prohibited. The requirement of identification further raises the question whether the right to one's image covers only the reproduction of a person's features, i.e. his face, or other parts of the body as well. This question has not yet been addressed by the courts or by any author, and it is thus uncertain whether the requirement can be met if only the stature, the figure, the haircut or any other characteristic feature is represented. In Belgium, however, it seems to be admitted that the right to one's image can be infringed through the mere imitation of the figure of a celebrity.[82]

The last point concerning the infringement of the right to one's image turns on the question of how to determine whether or not an individual is recognisable. It is not, of course, sufficient that the person concerned recognises himself, but the 'appreciation *in abstracto*', such as that usual in

[77] The representation may be two- (painting, photo, film . . .) or three-dimensional (sculpture . . .). See e. g. CA Versailles 30.6.1994, D. 1995, jur., 645: 'the infringement of the right to one's image is likely to be achieved in various ways and can be realised, as in this case, by the manufacture of nativity figures, provided the person whose image is represented can sufficiently be identified'.

[78] TGI Paris 2.6.1993, Gaz. Pal. 1994, 1, 133. See also Logeais, The French Right to One's Image: A Legal Lure? (1994), 5 Ent LR 163 and see 69 above.

[79] CA Paris 6.6.1984, D. 1985, inf. rap., 18: 'even if the resemblance between the actor playing a lawyer in a movie and a practising lawyer was perfect, . . . the person concerned is not entitled to claim his right to his image, since he does not appear in person in the movie, which does not at any time use his image'.

[80] TGI Paris 17.10.1984, D. 1985, somm., 324.

[81] TGI Paris 3.12.1975, D. 1977, jur., 211. Cf. 69–70 above.

[82] Leroy & Mouffe, Le droit de la publicité, Bruxelles 1996, Bruylant, p. 350. – Isgour & Vinçotte, Le droit à l'image, Bruxelles 1998, Larcier, p. 70.

tort law, seems on the other hand too restrictive. The courts therefore require that everyone who knows the person concerned can recognise him before he can claim a violation of the right to his image.[83]

The right to one's private life As to the right of privacy *stricto sensu*, that is the right to one's private life, the courts have to consider whether or not the disclosed information is of a confidential nature.[84] Article 9 *Code civil*, which states that 'everyone is entitled to privacy', prohibits the disclosure of details about an individual's address and home,[85] state of health,[86] family, friendship or love relations,[87] religious beliefs[88] and hobbies.[89] Family events such as birth, marriage or divorce were until recently always considered as belonging to the private sphere.[90] One can,

[83] TGI Paris 27.2.1974, D. 1974, jur., 530. – TGI Paris (réf.) 20.6.1974, D. 1974, jur., 751.

[84] The question whether the subject matter of the disclosure is true is not relevant under French law. The point is only whether it is of a private nature. If so, liability follows without inquiry into truth.

[85] CA Paris 15.5.1970, Ferrat, D. 1970, jur., 466. – TGI Paris 8.1.1986, D. 1987, somm., 138. – CA Bordeaux 9.1.2001, D. 2002, jur., 2372.

[86] TGI Paris 4.7.1984, D. 1985, somm., 16: 'sphere of health, eminently personal, is more than any other worth being left secret. The disclosure of the fact that a famous actor underwent a surgical operation ... infringes his right of privacy'. – CA Paris 26.6.1986, D. 1987, somm., 136: 'every information about the health of a person belongs to his private life, provided he does not decide differently'. – CA Paris 5.12.1997, D. 1998, inf. rap., 32, about the internment of a politician in a psychiatric hospital. – TGI Nanterre 8.2.2000, Légipresse 2001, No. 182, I, 78. – TGI Paris 14.5.2001, Légipresse 2001, No. 184, I, 108. – CA Versailles 16.1.2003, Légipresse 2003, No. 203, I, 106.

[87] CA Paris 13.11.1986, D. 1987, somm., 139: 'the allegations contained in the newspaper article about the married and family life of the Count of Paris are a matter of his private life'. – CA Paris 26.2.1986, D. 1986, somm., 447, about the allegation of homosexuality. – Cass. civ. 6.10.1998, D. 1999, somm., 376: 'a letter whose purpose is to disclose a cohabitation status ... infringes the right established by Article 9 Civil Code'. – CA Paris 18.6.1998, D. 1998, inf. rap., 204: 'the revelation of a person's feelings towards another one is an intolerable interference in the sentimental life of the person concerned, which constitutes the core of private life'. – TGI Nanterre 12.12.2000, Légipresse 2001, No.180, I, 45, about the evocation of an adulterous affair with the President of the French Republic. – CA Paris 7.11.2001, D. 2002, jur., 2373, about the disclosure of the pregnancy of a famous model. – TGI Paris 10.3.2003, Légipresse 2003, No. 201, I, 68: 'l'orientation sexuelle d'une personne relève de sa vie privée et bénéficie à ce titre de la protection de l'art. 9 du C. civ. Dans ces conditions, l'homosexualité d'une personne ne peut être révélée publiquement sans son autorisation'.

[88] See as early as 1874, Cass. crim. 28.2.1874, S. 1874, 1, 233, about the condemnation of a journalist who had published a list of persons having participated in a pilgrimage.

[89] See for a comparable enumeration, d'Antin & Brossollet, Le domaine de la vie privée et sa délimitation jurisprudentielle, 20/4 Légicom (1999) 10. See also CA Paris 30.3.1995, D. 1995, inf. rap., 140: 'a weekly [newspaper] infringes the right of privacy of a celebrity by drawing up an inventory of her garbage can in the days following Christmas and the New Year and showing its readers the tights she wore, the medicine she took, the drawings her children made for her and her friends, and the dishes she cooked'.

[90] See e.g. CA Paris 5.12.1997, D. 1998, inf. rap., 32.

however, observe a new trend towards a more restrictive approach.[91] The same happened with regard to financial details, that is information about a person's fortune. The lower courts and the prevailing opinion considered that 'everything which refers to the patrimony and the financial resources of a person or his family belongs to his private sphere'.[92] The *Cour de cassation*, however decided that 'the respect of the private sphere is not violated by the publication of information of a purely financial nature which does not refer to the life and the personality of the person concerned'.[93] The European Court of Human Rights has confirmed this finding in a decision of 1999, which nevertheless only refers to public persons,[94] and the French lower courts seem to be coming round to this opinion.[95]

The right to one's name The right to one's name protects its owner from every use of this means of identification made without his consent. This usually concerns the surname, but it can also be the first name,[96] a pseudonym[97] or even the initials, provided there is no doubt about the person alluded to. The way the name is used does not matter. It can be of a professional nature, such as the use of the name as a trade mark, trade name or pseudonym, or for advertising or electoral purposes, or for the designation of a character in a novel, a film or a play.

The enforcement of the right to one's name requires, however, that a risk of confusion can be shown,[98] which may be easier for a rare or famous name. When the bearer of a name which is neither famous nor original wishes to prevent the use of that name in a literary work, the confusion argument is generally only admitted if the situation in the work is identical, or at least similar, to the life of the name holder.[99] The courts often require, moreover, that the imaginary character for which the name is

[91] TGI Paris 24.3.1997, Légipresse 1997, No. 144, I, 99: 'a person's filiation and civil status do not belong to the private sphere protected under Art. 9 C. civ.'.
[92] TGI Marseille 29.9.1982, D. 1984, jur., 64. See also the same solution in CA Paris 13.10.1981, D. 1981, jur., 420. – CA Paris 12.1.1987, D. 1987, somm., 386.
[93] Cass. civ. 28.5.1991, D. 1992, jur., 213. See also the same solution in Cass. civ. 20.10.1993, D. 1994, jur., 594.
[94] ECHR 21.1.1999, D. 1999, inf. rap., 46.
[95] TGI Nanterre 27.3.2001, Légipresse 2001, No. 184, I, 108.
[96] See e.g. TGI Seine 9.10.1963, Gaz. Pal. 1964, 1, 173, about Princess Soraya.
[97] See e.g. CA Paris 15.9.1999, D. 2000, jur., 801.
[98] See e.g. Cass. civ. 19.12.1967, D. 1968, jur., 277. – Cass. civ. 26.5.1970, D. 1970, jur., 520.
[99] See for examples of cases where the confusion has been denied, and the claim therefore rejected, for lack of analogy of situations: TGI Paris 19.5.1971, 75 RIDA (1973) 143. – CA Paris 24.5.1975, D. 1975, jur., 488. – CA Paris 7.2.1989, D. 1990, jur., 124. – CA Paris 30.10.1998, D. 1998, inf. rap., 259.

used be portrayed as ridiculous or unpleasant. The enforcement of the right to one's name is thus made more difficult when the name is used for literary purposes (rather than in the case of a use for commercial purposes), which can be explained by the fact that the fame of a character normally lasts for only a short period, or at least not as long as the life of a person (use of the name as pseudonym) or the life span of a product (use of the name as trade mark). One can therefore presume that the moral harm is, in the case of a literary use, not very significant. Protection is afforded only if the consequences of this use for the personality of the holder are particularly serious. A limitation of protection is also justified by the freedom of creation recognised to the benefit of every author, which constitutes a restriction of the protection of personality rights.

Restrictions to Personality rights: defences

If 'everyone is entitled to privacy'[100] the respect of this privacy cannot be unconditional and absolute without threatening other fundamental rights protected by law. The first interest to conflict with privacy is, of course, freedom of opinion and expression. But the enforcement of personality rights can also be hindered for other reasons which are not directly covered by freedom of speech and these have to be examined first.

Limitation on grounds other than free speech The first exceptions which are unanimously accepted lie within the area of public safety and justice, such as a publication of the image of a delinquent wanted by the police, a house-search of a person suspected to have committed a crime, or phone-tapping enabling private conversations to be recorded. In the *Touvier* case, the Cour de Cassation stated that 'the infringement of personality rights alleged by Paul Touvier, resulting from the reproduction or the diffusion of the recordings of the hearings, is justified by the *Law of 11 July 1985* concerning the constitution of audiovisual archives of the justice; therefore, the plaintiff cannot reproach the competent authority having decided without taking his right to his image into consideration'.[101]

The most important defences concern photographs taken in a public place representing either a landscape or a demonstration, a procession or

[100] Art. 9 al.1 C. civ.

[101] Cass. crim. 16.3.1994, JCP 1995, II, 22547. See also Cass. civ. 18.12.2003, D. 2004, inf. rap., 254: la prise de photographies anthropométriques et le relevé d'empreintes digitales à l'occasion d'une enquête judiciaire ne constituent pas des atteintes au droit au respect de la vie privée.

any other public event. The taking and publishing of such photographs is allowed without special consent, provided that any person depicted in the photograph is only incidentally represented.[102] This limitation to the personality rights is justified by the constraints of life in society. However, the person represented should not be recognisable,[103] and can otherwise require that his features be made unidentifiable.[104] So, the courts in different cases have sanctioned the publication of photographs taken in a public place, such as those of a prostitute on a public highway whose face was recognisable,[105] those of tourists taken in front of the Tower of Pisa used to illustrate a campaign against the sloppiness of holiday dress, because they did not appear incidentally,[106] that of a praying man taken in a synagogue to illustrate an article about the situation of the Tunisian Jews in France, because of the centring of the image on him,[107] or that of a child taking part in a folkloric feast, because 'the photo was isolated from the event during which it had been taken'.[108]

The free speech defence Freedom of expression is internationally acknowledged as a fundamental principle of democratic societies.[109] It is a universal value and may justify some encroachments on personality rights in different areas. It can be relevant in cases where historians or authors of literary and artistic works are blamed for having infringed a person's right to his own name, to his own image, but above all, the right to privacy of living or deceased persons who are the subjects of these works. As to literary and artistic works, French courts are because of 'freedom of art' very reluctant to sanction infringements of personality rights: 'if everybody is entitled to claim that the image he wants to give of himself not be seriously distorted, freedom of expression and the integrity of an artistic work must,

[102] Cass. civ. 25.1.2000, JCP 2000, II, 10257; D. 2000, somm., 270 and 409.
[103] CA Versailles 31.1.2002, Légipresse 2002, No. 192, I, 68: 'the reproduction by a newspaper with a wide circulation of a photograph taken on the occasion of the Gay Pride parade, without authorisation of the persons concerned who are centred in close-up and perfectly identifiable . . . infringes their right of privacy'.
[104] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 143. – Kayser, Le secret de la vie privée et la jurisprudence civile, Mélanges Savatier, Dalloz 1965, p. 419. – Stoufflet, Le droit de la personne sur son image (Quelques remarques sur la protection de la personnalité), JCP 1957, I, 1374, No. 15.
[105] TGI Paris 27.2.1974, D. 1974, jur., 530.
[106] Trib. com. Seine 26.2.1963, JCP 1963, II, 13364, confirmed on this point by CA Paris 24.3.1965, JCP 1965, II, 14305.
[107] CA Paris 11.2.1987, D. 1987, somm., 385.
[108] Cass. civ. 12.12.2000, JCP 2001, II, 10572; D. 2001, jur., 2064.
[109] Art. 19 of the Universal Declaration on Human Rights of 10 December 1948, Art. 19 of the International Covenant on Civil and Political Rights of 16 December 1966; Art. 10 of the European Convention on Human Rights of 4 November 1950 on which see 217 below.

however, be safeguarded'.[110] In the case of a work of fiction that is, for example, inspired by a news item, the courts generally consider that 'the conflict between personality rights and freedom of expression must be resolved to the benefit of the latter'.[111] Only in particular circumstances, such as a nude scene in a film,[112] could personality rights entitle their owner to oppose the use of his attributes in an artistic work without his consent. French courts seem, moreover, particularly tolerant of satire and caricature. They have stated, for example, that 'the caricature, as a manifestation of the freedom of critique, allows an author to exaggerate the features and to distort the personality of the person represented'.[113]

Freedom of expression is not only relevant to authors of literary works but also to historians. The question here is how many and which details about the private life of famous historic persons a historian may reveal to illustrate his argument. French courts consider that they have 'neither the duty nor the competence to judge history and that they have not been charged with deciding how a special episode of the national or world history should be represented or characterised'.[114] A historian may be found liable only when rendering inaccurate facts or presenting a distorted interpretation of such facts. When the historic person concerned is still alive, or belongs to recent history, it also seems to be a requirement that the fact disclosed is undoubtedly of historic interest.

Most of the cases of limitation of personality rights concern neither the author of an artistic work nor a historian, but a journalist asserting that his right to free speech and the public right of freedom of information are to prevail over the interests of individuals to have their privacy, and more generally their personality, respected. French courts usually state in such cases that 'the principle of freedom of the press as well as the right to

[110] TGI Paris (réf.) 17.9.1984, D. 1985, somm., 16.

[111] TGI Paris 8.7.1970, JCP 1970, II, 16550. See also the same solution in Cass. civ. 3.12.1980, D. 1981, jur., 221. But see on the contrary Cass. civ. 9.7.2003, Chandernagor, Légipresse 2003, No. 205, I, 142.

[112] TGI Seine 4.10.1965, JCP 1965, II, 14482. – Cass. civ. 13.2.1985, D. 1986, somm., 51, about the mistress of the famous criminal *Mesrine*.

[113] TGI Paris (réf.) 17.9.1984, D. 1985, somm., 16. See also about a French politician from the extreme Right, the *Le Pen* case: TGI Paris (réf.) 17.6.1987, JCP 1988, II, 20957: 'satire, like caricature, manifestation of the freedom of critique, allows exaggerations, distortions and seriously ironical presentations'. – CA Versailles 31.1.1991, Gaz. Pal. 1992, 2, 534, about the French actor Belmondo. See however other decisions which have rejected the defence of satire: TGI Paris (réf.) 24.2.1975, D. 1975, jur., 438 (case *Leprince-Ringuet*). – CA Paris 28.1.1982, D. 1985, inf. rap., 165 (case *Chantal Goya*). – CA Paris 22.11.1984, D. 1985, inf. rap., 165 and CA Paris 19.6.1987, JCP 1988, II, 20957 (both *Le Pen* cases).

[114] TGI Paris 6.5.1983, D. 1984, jur., 14 (*Papon* case). See also another decision in the same sense TGI Paris 8.7.1981, D. 1982, jur., 59 (*Faurisson* case).

information have their limits in the provisions of Article 9 *Code civil* concerning the respect of every person's privacy'.[115] More recent decisions often quote the wording of Article 10 of the European Convention on Human Rights, stating that 'the exercise of the freedom of expression ... involves duties and responsibilities. It can be bound by some formalities, conditions, restrictions or sanctions provided by law, which constitute necessary measures in a democratic society for the protection of one's reputation or the rights of others to prevent the disclosure of confidential information'.[116] On the other hand, it is well accepted in French law that use of attributes of personality without the consent of their holder may be justified by a need for information when the person concerned is in one way or another newsworthy. It is usual in France to state that 'the protection of personality rights has a variable geometry depending on the social function of the person seeking protection'.[117]

Contrary to the (still) prevailing opinion,[118] it seems that the legitimacy of disclosures and publications concerning public figures does not rely on

[115] CA Paris 22.10.1987, D. 1988, somm., 198 (*Adjani* case). See also TGI Paris 19.3.1986, D. 1986, somm., 446.

[116] CA Paris 27.5.1997, D. 1998, somm., 86 (*Mitterand* case). See also TGI Paris 13.10.1997, D. 1998, jur., 154 (*Yann Piat* case): 'the rule of freedom of expression and that of the respect due to the reputation are of equal worth; the judge has therefore to take the appropriate measures in order to maintain a balance between these two rights'. – TGI Nanterre 5.11.2001, Légipresse 2002, No. 188, I, 13: 'the freedom of expression proclaimed in Article 10 of the European Convention on Human Rights shall be exercised with respect to the right to privacy and family life of Article 8'.

[117] Bigot, Protection des droits de la personnalité et liberté d'information, D. 1999, chr., 238. See the same opinion by Lindon, La presse et la vie privée, JCP 1965, I, 1887, No. 3: 'depending on the nature of the participation of the person concerned in the political, economical or social life of the country, the limitations to his privacy are variable and may be fixed by the courts in each case'. See for an example of a judicial decision, about the French tennis-player *Yannick Noah*: CA Paris 13.3.1986, D. 1986, somm., 445: 'The protection of privacy and the right to one's image are differently appreciated when they concern a person without any public notoriety, or a person whose name, photograph and details of the professional life are often related in the press'. – CA Versailles 22.11.2001, *Depardieu* c. *Paris-Match*, Légipresse 2002, No. 189, I, 29: 'Les limites dues au respect de la vie privée s'apprécient moins strictement lorsqu'il s'agit de personnes dont le métier les expose à la curiosité légitime du public'. – CA Versailles 27.6.2002, *Epoux de Hanovre* c. *Hachette Filipacchi*, Légipresse 2002, No. 194, I, 110: 'si toute personne, quel que soit son rang, sa naissance, sa fortune ou ses fonctions, a droit au respect de sa vie privée, le statut de deux époux princiers repousse les limites de la protection légale de l'art. 9 du C. civ., ces limites ne pouvant être appliquées avec la même rigueur que pour un citoyen anonyme'.

[118] Badinter, Le droit au respect de la vie privée, JCP 1968, I, 2136, n° 25. – Stoufflet, Le droit de la personne sur son image (Quelques remarques sur la protection de la personnalité), JCP 1957, I, 1374, no. 12. – Edelman, Esquisse d'une théorie du sujet: l'homme et son image, D. 1970, chr., 120, n° 8. – Lindon, Les droits de la personnalité, Dalloz 1983, coll. Dictionnaire juridique, p. 281. – Marino, Responsabilité civile, activité d'information et médias, PUAM-Economica 1997, n° 395 p. 239.

the presumption that the person concerned waived the legal protection by acting publicly: 'arguing that the person concerned implicitly authorises the reproduction of his features within the boundaries of his public life means that he has *e contrario* the power to oppose the making and publishing of this image; but he does not have this power'.[119] The use of attributes of a celebrity's personality without his consent is therefore allowed only if it is justified by the information interest of the public, that is, by the legitimate and useful nature of the information.[120]

Thus, it is the right of the public to information which legitimises the different limitations to the protection of the personality of public figures, without it being necessary to make a distinction between politicians on the one hand and celebrities of show business on the other hand. In French law, public figures, whatever the reason may be why they became famous, enjoy theoretically the same personality rights as unknown persons, but their interests in having their privacy protected and not having their attributes used without their consent give way more often to the right to information than in the case of unknown persons. 'The "wall of privacy" lowers itself for some persons since the public has a legitimate interest to know them better than others'.[121] French law requires that the information be both (i) legitimate (ii) and useful to justify an exception to the rule of protection of the personality.

(i) Legitimate information The legitimacy of the information depends on the degree and the source of fame of the person concerned. Those who hold a public office or who are candidates for such a function (principally politicians) must tolerate, more than others, incursions into the personal sphere that personality rights theoretically protect: 'their voters must be able to know what, in their private life, may be detrimental to the exercise of their duties'.[122]

Show business celebrities (actors, singers, sportsmen, and others), on the other hand, may not have to account for their opinions to any

[119] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 169. See the same opinion by Kayser, Le droit dit à l'image, Mélanges Roubier, Dalloz 1961, t. 2, p. 77.

[120] Goubeaux, Les personnes, in Ghestin (ed.), Traité de droit civil, LGDJ 1989, p. 300. – Agostinelli, Le droit à l'information face à la protection civile de la vie privée, Aix-en-Provence thesis, 1993, p. 216.

[121] Kayser, La protection de la vie privée par le droit, 3rd edn PUAM-Economica, 1995, p. 286.

[122] *Ibid.*, p. 290. See also Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 160. See for an example of a judicial decision, CA Paris 20.9.2001, D. 2002, jur., 2300.

voter, but nevertheless have to tolerate the legitimate inquisitiveness of the public whose favours they are seeking.[123] It is the price of fame. A limitation of their personality rights appears all the more justified since they make significant profits from their celebrity. Further, sovereigns and members of royal families also need to be mentioned here, not because they seek the votes or the favour of the public, but because their birth made them the subject of the legitimate interest of the public.

Apart from these so-called public figures, the right to information also justifies limits to the personality rights of some other persons who were *a priori* unknown but have become the subject of a public event, who fall into two broad categories. First, persons who entered, for whatever reason, the field of current events such as wars, natural disasters, accidents, hostage taking, bomb attacks, but also political, artistic or sporting events. Second, persons involved in a legal trial whose personality rights are limited for reason both that trials are public events,[124] and because of the rule that proceedings should be heard in open court.

(ii) Useful information The information must, furthermore, be useful, which in this context means necessary. The disclosure of private facts or the publication of the image must be directly linked to the related event and has to occur for the purpose of informing the public.[125] It follows from this that an infringement of personality rights may not be justified by the right to information when the publication is made for purely commercial purposes. This question primarily concerns the marketing of public figures. French courts have, for example,

[123] See e.g. TGI Paris 14.5.2001, Légipresse 2001, No. 184, I, 104: 'the rule of freedom of information leads to the limitation of the right to one's image in some circumstances concerning current events or the public or professional life of those whose fame exhibits them to the legitimate inquisitiveness of the public'. – TGI Nanterre 29.10.2001, Légipresse 2002, No. 188, I, 13. – CA Versailles 22.11.2001, Légipresse 2002, No. 189, III, 37. – TGI Nanterre 3.6.2002, Légipresse 2002, No. 197, I, 158. – TGI Nanterre 1.7.2002, Légipresse 2002, No. 197, I, 158. See however, much more in favour of celebrities, CA Paris 7.11.2001, Légipresse 2001, No. 187, I, 158: 'neither the fame of the person concerned, nor the existence of previous publications on the same topic, nor even the public interest for information about current happy events, allow a newspaper to violate the right everyone has to freely set the limits and conditions of what can be published about his intimate life'.

[124] Cass. civ. 12.7.2001, D. 2002, jur., 1380; JCP 2002, II, 10152.

[125] See e.g. TGI Paris 3.7.1974, JCP 1974, II, 17873. – TGI Nanterre 15.7.1999, D. 2000, somm., 272. – Cass. civ. 20.2.2001, D. 2001, jur., 1199; JCP 2001, II, 10553: 'the publication concerned ... was legitimate as it was in direct relation with the event'. – TGI Paris 14.3.2001, CCE 2001, comm., No. 43, p. 23: 'as far as information by image is concerned, the legitimacy of an illustration depends on its connection with and appropriateness for a new event'. – Cass. civ. 11.12.2003, Légipresse 2004, No. 209, III, 28 Cass. civ. 30.6.2004, Légipresse 2004, No. 216, I, 155.

sanctioned the use of the image of a French President in an advertisement for an outboard motor[126] or the commercial exploitation of photographs of famous sportsmen taken in the course of their professional activities.[127] It is acknowledged under French law that a legitimate exercise of the right to information excludes every advertising or commercial purpose.

As far as persons who unintentionally become the subject of a public event are concerned, the requirement that the information be useful prohibits first the disclosure of the current life of a person who was involved in a news item in the past. The Paris Court of Appeals decided, for instance, that an article disclosing the present situation of a person involved in a tragedy that had been reported some fifteen years previously constituted 'an infringement of the right to privacy which could not be justified by the necessities of information'.[128] It is thus admitted that, 'when someone involved in a lawsuit has become famous because of a press report of the hearings, he can, as soon as the necessities of information no longer justify the report, argue that he has a "right to be forgotten". He can, especially, argue an infringement of his right to privacy if the press reveals the circumstances of his current way of living'.[129]

The question arises whether the approach is the same when the infringement of personality rights follows from the reminder given a few years later of the event itself, and not from the disclosure of the current life of a protagonist. The first and second instance judges were inclined to admit this, assessing that 'every person who has been party to a public event, even if he has been the protagonist, may assert a right to be forgotten and oppose the reminder of an episode of his life which could harm his rehabilitation and have a pernicious influence on his private life'.[130]

[126] TGI Paris 4.4.1970, JCP 1970, II, 16328 (*Pompidou* case). See also the *Giscard d'Estaing* case, about the publishing of playing cards representing the French President in the role of the famous personages of French history, TGI Nancy (réf.) 15.10.1976, JCP 1977, II, 18526.

[127] TGI Paris 21.12.1983, Gaz. Pal. 1984, 2, somm., 360 (*Noah* case). – TGI Paris 4.7.1984, D. 1985, somm., 14. – TGI Paris 30.4.1986, D. 1987, somm., 137 (*Platini* case). – CA Paris 3.4.1987, D. 1987, somm., 384 (*Fignon* case). – TGI Nanterre 6.4.1995, Gaz. Pal. 1995, 1, 285 (*Cantona* case).

[128] CA Paris 13.10.1981, D. 1983, jur., 421.

[129] *Costaz*, Le droit à l'oubli, Gaz. Pal. 1995, 2, doct., 962. See also *Lindon*, D. 1983, jur., 422. *Contra Bertrand*, Droit à la vie privée et droit à l'image, Litec 1999, p. 72.

[130] TGI Paris 25.3.1987, D. 1988, somm., 198. See also TGI Paris 20.4.1983, JCP 1985, II, 20434. – CA Paris 24.2.1984, Gaz. Pal. 1984, 2, somm., 370. – TGI Paris 4.11.1987, D. 1988, somm., 199. – CA Versailles 14.9.1989, Gaz. Pal. 1990, 1, somm., 123: 'a public event, after the passing of a sufficiently long time, can become, for the person who was its protagonist, a fact of private life again, which may remain secret and forgotten'.

The *Cour de cassation* however in 1990 departed from this approach and clearly denied the existence of a 'right to be forgotten': the facts had been lawfully disclosed by the reports of the hearings in the local press and therefore no longer belonged to the private sphere.[131] The question still remains whether this solution should also be applied when the person concerned is the victim of the crime or the offence. One may hope that the courts will be stricter in this case.

The requirement that the information be useful further prohibits the publication of images of tragic events such as accidents, fires, or bomb attacks, which have not occurred in the recent past. It has been held, for instance, that, with regard to the broadcast of a television report showing a person jumping from the window of a building on fire, the television channel 'could not take shelter under the needs of the legitimate information of the public to justify the broadcast carried out without the consent of the person concerned, since the broadcast occurred four months after the event and nothing topical made the reminding of these tragic events necessary as part of an entertainment programme'.[132] It seems, however, that the solution is different when the related event is not a tragic one but, for example, a political demonstration[133] or a religious meeting in a public place.[134]

Even if the publication occurs immediately after the event, the right to information does not automatically prevail over the personality rights. French courts further require that the publication does not harm the dignity of the person concerned or the feelings of his family when he is deceased. The *Erignac* case illustrates this new tendency in French jurisprudence to refer to the notion of dignity.[135] Erignac was chief administrator of Corsica and was murdered on the street in Ajaccio by Corsican militants demanding independence. Images of his

[131] Cass. civ. 20.11.1990, JCP 1992, II, 21908.

[132] TGI Nanterre 18.1.1995, Gaz. Pal. 1995, 1, 279. See also in the same sense, TGI Nanterre 24.4.2001, Légipresse 2001, No. 183, I, 94: 'a photograph, taken 15 years after a news event, does not have a sufficient link, in terms of relevance and adequacy, to the facts related in the article which the photograph illustrates'.

[133] CA Versailles 7.12.2000, Légipresse 2001, No. 179, III, 35, about the publication of a photograph taken forty years before during the May 1968 events.

[134] TGI Paris 25.2.2002, Légipresse 2002, No. 192, III, 109; D. 2002, jur., 2764: 'As far as the publication of a photograph to directly illustrate a public event is concerned, one must admit such a publication, not only at the time the event occured, but also at the time of its reminder, provided it is necessary for the right to information.'

[135] See on this notion, *Mathieu*, La dignité de la personne humaine: quel droit? quel titulaire, D. 1996, chr., 282 s. – *Edelman*, La dignité de la personne humaine, un concept nouveau, D. 1997, chr., 185 s. – *Saint-James*, Réflexions sur la dignité de l'être humain en tant que concept juridique du droit français, D. 1997, chr., 61 s. – *Dreyer*, Dignité de la personne, JurisClasseur Communication, Fasc. 3740, 2003.

body had been published in a magazine and his widow claimed that such a publication offended her feelings of grief. Despite the fact that Erignac was a public figure and the fact that the drama had occurred in a public place, French judges acceded to the widow's request.[136] The decision of the Court of Cassation is very interesting in that it seems to acknowledge a real 'right to dignity': 'The Court of Appeals, which noted that the published photograph clearly represented the body and the face of the murdered civil servant, was right to decide that such a publication was unlawful, since the image harmed the dignity of the person, and its decision is justified with regard to the requirements of both Article 10 of the European Convention on Human Rights and Article 16[137] of the civil Code'.[138]

Since the *Erignac* case, the notion of dignity has been used on several occasions as a criterion, not to limit the right to information, but to judge the lawfulness of a publication. In a case concerning a photograph representing a victim of a bomb attack in the Saint-Michel subway station in Paris in July 1995, the Court of Appeals had granted an injunction concerning the publication of the photograph by the famous magazine *Paris-Match* in spite of the fact that it illustrated a very important news event which had taken place publicly. The Court of Appeals was overruled by the *Cour de cassation*, which stated that 'the photograph was devoid of any sensationalism and of any indecency, and therefore did not hurt the dignity of the person represented'.[139] Thus, French judges resort to the criterion of the harm to dignity, not to prohibit a publication, as in the *Erignac* case, but on the contrary to allow such a publication since it does not harm the dignity of the human individual. Thus, the balance now seems to be more in favour of freedom of expression and the right to information. This constitutes a noticeable evolution of French law, which was previously more in favour of the protection of the individual personality against the power of the press. The reasons adduced in the decision of the *Cour de cassation* are in this respect very interesting, as they reflect this evolution: 'the freedom of communication of information allows the publication of images of those who are involved in an event, provided that

[136] CA Paris 24.2.1998, D. 1988, jur., 225, confirmed by Cass. civ. 20.12.2000, JCP 2001, II, 10488.

[137] Article 16 C. civ. has been added in by the Law of July 29, 1994 on the respect of the human body. It states the respect of the dignity of the human person and was never used previously in personality rights cases.

[138] Cass. civ. 20.12.2000, JCP 2001, II, 10488. See the commentary of this decision by *Gridel*, Retour sur l'image du préfet assassiné: dignité de la personne humaine et liberté de l'information d'actualité, D. 2001, chr., 872.

[139] Cass. civ. 20.2.2001, D. 2001, jur., 1199; JCP 2001, II, 10533.

this publication does not harm human dignity'.[140] These grounds have been used again more or less literally in other subsequent decisions.[141]

Remedies providing for prevention or cessation of the infringement: injunctions

The question of the remedies granted in the case of infringement of personality rights is divided in French law into two parts: first, the remedies which provide for the cessation or the prevention of the infringement (discussed in this section); second, the remedies providing for legal redress (discussed in this section). This distinction, which is not always made by authors, follows from the very nature of personality rights: since they are real subjective rights,[142] a special right of action, independent of tort law, is attached to them as to every other kind of subjective right.

Every encroachment of a personality right gives rise to an action to prevent or stop it. Such an action is independent of tort law in that it does not require proof of fault, damage and causal link. The mere fact that a personality right has been infringed and that no opposing interest justifies this infringement entitles the court to order the measures necessary to stop or prevent it. This power of the court is legally recognised only in respect of the right to one's private sphere, which is the only personality right which is officially acknowledged by the French legislature. Thus, Article 9 para. 2 *Code civil* provides that 'the judges can, without regard to the later reparation of any damage suffered, prescribe all measures such as sequester, seizure and others capable of preventing or terminating a violation of the intimacy of private life; these measures can, if there is urgency, be ordered by one judge sitting in chambers (*juge des référés*)'.

Claims arising in the field of personality rights are in France very often brought before the *juge des référés*, that is, a summary jurisdiction in matters of special urgency.[143] The efficiency of the protection depends here, more than in other fields, on rapid judicial intervention, especially when the alleged violation of the right to one's image or the right to one's private life occurs in

[140] Cass. civ. 20.2.2001, D. 2001, jur., 1199; JCP 2001, II, 10533.

[141] Cass. civ. 12.7.2001, JCP 2002, II, 10152; D. 2002, jur., 1380. – CA Paris 27.9.2001, D. 2002, somm., 2764; CCE 2002, comm. No. 15, 39. – TGI Nanterre 5.11.2001, Légipresse 2002, No. 188, I, 3. – TGI Paris 25.2.2002, Légipresse 2002, No. 192, III, 109. – TGI Toulouse (réf.) 8.3.2002, Légipresse 2002, No. 191, I, 53. – TGI Paris 3.4.2002, Légipresse 2002, No. 197, I, 150. – TGI Nanterre 3.6.2002, Légipresse 2002, No. 194, I, 101. – TGI Nanterre 28.10.2002, Légipresse 2003, No. 199, I, 23. – TGI Nanterre 26.2.2003, Légipresse 2003, No. 200, I, 42. – Cass. civ. 13.11.2003, Légipresse 2004, No. 208, I, 5. Cass. civ. 4.11.2004 Légipresse 2004, No. 217, I, 174.

[142] See above 167.

[143] Lindon, Le juge des référés et la presse, D. 1985, chr., 61: 'the *juge des référés* has become the ordinary jurisdiction in matters of privacy'.

a transitory publication such as a newspaper or magazine. After a few days, the violation is complete and measures aiming at preventing the publication would no longer make any sense if granted by the court a few weeks or months later. Injunctive relief is all the more desirable since 'the later award of damages can not adequately redress this kind of harm'.[144]

The power of the *juge des référés* to grant preliminary injunctions preventing the violation of personality rights rests either on Article 9 para. 2 *Code civil* or Article 809 of the *Nouveau Code de procédure civile* (New Code of Civil Procedure), which provides that 'the President [of the Tribunal de grande instance] may always, even if there is a serious dispute, prescribe the necessary protective or repairing measures either to prevent imminent harm or to stop a clearly illegal situation'. Such measures may, however, seriously threaten the freedom of the press and, even if they are admitted in principle,[145] their implementation still raises questions.

This is especially the case as regards the preliminary injunction to prevent, in advance, the publication or dissemination of newspapers or magazines, or the broadcasting of television programmes which infringe the right to one's image or the right to privacy. Even though the very principle of an *a priori* intervention of the *juge des référés* is recognised by the law,[146] both academic writing[147] and the courts[148] still hesitate to call for it. A relatively recent

[144] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 459. See also the same opinion by Derieux, Référé et liberté d'expression, JCP 1997, I, 4053, No. 6.

[145] Used as early as the middle of 19th century to stop the exhibition of pictures in photography shopwindows (see, e.g., in addition to the famous *Rachel* case already mentioned, Trib. civ. Seine (réf.) 11.4.1855, *Soeur Rosalie*, *Ann. prop. ind.* 1860, 167), the interlocutory injunction was requested for the first time against the press in the 1960s (see the first injunction in chambers in this field, Cass. civ. 27.11.1963, *Rotschild*, JCP 1965, II, 14443), especially in the famous *Gérard Philippe* case (CA Paris 13.3.1965, JCP 1965, II, 14223, confirmed by Cass. civ. 12.7.1966, D. 1967, jur., 181). The law of July 17, 1970 confirmed this jurisprudence in Art. 9 al.2 C. civ.

[146] Both in Art. 9 par. 2 C. civ. and Art. 809 NCPC.

[147] See, e.g., supporting the preliminary injunctions, Lindon, JCP 1976, II, 18385. – Kayser, Les pouvoirs du juge des référés à l'égard de la liberté de communication et d'expression, D. 1989, chr., 13, No.6. See however against such preliminary injunctions, *Dupeux*, Les interdictions préventives de publications de clichés portant atteinte au droit à l'image, D. 1998, somm., 80. – Bertrand, Droit à la vie privée et droit à l'image, Litec 1999, No. 413 p. 193. – Bigot, Regards sur l'interdiction préventive de publier, 20/4 Légicom (1999) 40.

[148] For examples of decisions which have rejected a request of seizure before the book has been published, see TGI Paris (réf.) 26.12.1975, JCP 1976, II, 18385. – TGI Paris (réf.) 13.9.1996, D. 1998, somm., 79. For examples of decisions which have however granted preliminary injunctions to prevent the publication of photographies in magazines, see TGI Nanterre (réf.) 2.8.1996, D. 1998, somm., 79: 'the judge has the power to take all measures likely to prevent this harm, without waiting for it to happen'. – TGI Nanterre (réf.) 24.8.1996, D. 1998, somm., 79. – CA Caen 21.7.2000, Légipresse 2000, No. 175, III, 168.

decision of the Court of Appeal of Versailles has, for the first time, delineated the notion of 'imminent harm' likely to justify a preliminary injunction to prevent a publication: 'Article 809 *NCPC* requires an imminent harm, the proof of which lies with the plaintiff and which implies not a mere misgiving, a hypothesis even if reasonable, or an eventuality, but a certainty or a serious risk of occurrence and an immediacy or a proximity of achievement'.[149] This reluctance to admit such measures which aim at preventing a violation of personality rights before it occurs may be criticised with reference to the wording of the French law, which theoretically allows them.

French courts are totally free to apply whichever measure seems most appropriate to the particular infringement. They only have to ensure that the measure is proportionate to the seriousness of the violation and to the circumstances of the case. Thus, French courts prescribe a wide variety of specific remedies to prevent or alleviate infringements of personality rights. These remedies include the destruction of the photograph[150] or the documents by which the violation of privacy could be continued or repeated,[151] the suppression of particular passages of a book,[152] broadcast programme,[153] scenes of a film[154] or documents on an internet website.[155] French courts may also request that the defendant take appropriate actions to render the features of the plaintiff unrecognisable,[156] or require that the plaintiff's face be covered to prevent his identification.[157] Beyond these suppressive measures,

[149] CA Versailles 2.10.1996, D. 1998, somm., 79.

[150] Especially the destruction of the negative. See, e.g., the famous *Rachel* case, Trib. civ. Seine 16.6.1858, D. 1858, 3, 62, and more recently, TGI Paris 25.5.1983, D. 1984, somm., 332.

[151] See, e.g., decisions that order the destruction of copies of a book still in possession of the publisher, TGI Paris 8.7.1970, JCP 1970, II, 16550 (*Les écrous de la haine*). – CA Paris 24.6.1980, D. 1980, jur., 583 (*Citroën*).

[152] See e.g. TGI Paris 28.2.1973, JCP 1973, II, 17401. – CA Paris 14.5.1975, D. 1975, jur., 687. – TGI Paris (réf.) 14.5.1985, D. 1986, somm., 52 (*Giscard d'Estaing*). See also for a weekly, TGI Paris 4.4.1970, JCP 1970, II, 16328 (*Pompidou c. L'Express*). – CA Paris 28.12.1987, D. 1989, somm., 91. – CA Paris 31.10.2001, CCE 2002, comm. No. 50, p. 36.

[153] See e.g. CA Paris 17.12.1991, D. 1992, jur., 245 which confirms the suppression ordered by the *juge des référés*.

[154] See e.g. TGI Paris (réf.) 22.12.1975, JCP 1976, II, 18410. – CA Paris 9.11.1979, D. 1981, jur., 109 (*Le pull-over rouge*). – CA Paris 7.3.1984, D. 1984, somm., 333.

[155] TGI Nanterre 12.7.2000, CCE 2001, comm., No. 69, p. 36 (*Princesse Caroline de Monaco et Prince Ernst-August de Hanovre* c. *Sté Hachette Filipachi Presse*), about the publication, on the website of Paris-Match, of photos and details of the private sphere of the plaintiffs. – TGI Paris (réf.) 13.12.2001, CCE 2002, comm. No. 50, p. 36.

[156] See, e.g., the famous *Whistler* case, Cass. civ. 14.3.1900, S. 1900, 1, 489.

[157] See e.g. TGI Paris 12.11.1976, JCP 1977, II, 18695 (passages of a book must be occulted by some 'masks'. – TGI Paris (réf.) 31.1.1983, D. 1984, jur., 48 (injunction to affix a 3 mm wide 'headband' at eye level on each photo that represents the plaintiff full-face and with uncovered face). – CA Paris 19.11.1986, Gaz. Pal. 1987, 1, 18.

courts can also order that a rectification be made restoring the truth and refuting the passage concerned,[158] or that a comment[159] or a warning be added at the beginning of the film to avoid a confusion in the public's mind between the story of the film and reality.[160] Finally, the courts may prescribe that the dissemination of the book or the film be stopped while the suppressive measures or insertions remain to be carried out.[161]

The suppression of some passages is not always feasible, however, especially when the part of the book or the film which infringes a person's right to his image or right to privacy cannot be separated from the whole. Furthermore, 'all these measures of forced insertion and suppression are not appropriate when newspapers and magazines are concerned which are only read just after publication and for which the moral repercussions of an infringement of the right to privacy would not be sufficiently corrected and redressed afterwards'.[162] French courts may therefore, normally in 'référé', i.e. in preliminary injunction proceedings, order the seizure of the book, the magazine or the film concerned, if necessary with a temporal[163] or a geographic limit.[164] The seizure is, 'however, effective only if all the copies of the publication, or most of them, are still in the stores of the publisher or the printer. When some of them have already been forwarded to the subscribers of a periodical or put up for sale in bookshops and newsstands, they can no longer be seized'.[165] Most of

[158] See e.g. TGI Paris 22.11.1973, D. 1975, jur., 168. – TGI Paris 14.11.1980, D. 1981, jur., 163. – TGI Paris (réf.) 27.3.1981, D. 1981, jur., 324. – TGI Paris 21.10.1981, JCP 1982, II, 19794.

[159] See e.g. CA Paris 22.11.1966, Gaz. Pal. 1966, 2, 341.

[160] See e.g. CA Paris 5.1.1972, D. 1972, jur., 445. – TGI Paris (réf.) 3.9.1980, 107 RIDA (1981) 174.

[161] See e.g. TGI Paris (réf.) 4.4.1970, JCP 1970, II, 16328 (*Pompidou* case). – TGI Marseille (réf.) 18.1.1974, Gaz. Pal. 1974, 1, 282. – TGI Paris (réf.) 11.7.1977, D. 1977, jur., 700 (*Léon Zitrone* case). – TGI Paris (réf.) 14.5.1985, Gaz. Pal. 1985, 2, 608 (*Giscard d'Estaing* case).

[162] Ravanas, Jouissance des droits civils. Protection de la vie privée. Mise en oeuvre de la protection, Juris-Classeur Civil, Art. 9, Fasc. 20, 1996, No. 65.

[163] When a film is concerned, the seizure is usually only temporary until the cuts are carried out. See for ex. TGI Paris (réf.) 25.1.1977, Gaz. Pal. 1977, 2, somm., 276.

[164] See e.g. TGI Paris (réf.) 20.6.1974, D. 1974, jur., 751: the seizure is prescribed 'in the limits of the district where the young boy (the son of the plaintiff) is living'. – TGI Paris (réf.) 28.6.1974, D. 1974, jur., 751: the seizure is 'limited to the districts of Paris and to the localities where the plaintiffs are the most well known'. – Cass. civ. 31.1.1989, D. 1989, inf. rap., 48: reversal of the judgment of the Court of Appeal which had 'extended to the whole national territory a temporary seizure aiming to protect some persons living in a particular district, without justifying that this measure be adequate to the purpose intended and therefore be necessary'.

[165] Kayser, Les pouvoirs du juge des référés à l'égard de la liberté de communication et d'expression, D. 1989, chr., 15, No. 9. See e.g. CA Paris 19.6.1987, JCP 1988, II, 20957 (*Le Pen* case).

the decisions ordering a seizure further state that such a measure is exceptional, depending on the condition that the infringement of the personality rights be serious and can not be compensated by damages awarded later.[166] They usually refer to the 'intolerable nature' of the harm, which is ruled out by previous tolerance on the part of the victim.[167]

The effectiveness of most of these measures depends on the willingness of the defendant to comply. French courts have, however, incentives to ensure compliance with their decisions. They can first impose a coercive enforcement penalty (*astreinte*), i.e. a daily fine for non-compliance with a court order.[168] They can also award a so-called *provision*, that is, an amount provisionally allocated before the final judgment has been made (possibly as an advance on damages) or order the judicial *sequestration* of the author's royalties when the infringing publication enjoys copyright protection.[169]

Remedies providing for legal redress

Beyond the measures which aim to prevent or stop the infringement of personality rights, other remedies are available to compensate the plaintiff for harm resulting from this infringement. A distinction can be drawn under French law between moral damage and economic damage.

Moral damage

Among the means of reparation of the moral harm resulting from an infringement of personality rights, special mention should be made of the right to reply (*droit de réponse*),[170] which is not strictly speaking a remedy (a). The remedies as such are the publication of the judicial decision (b), the award of symbolic damages (c) and the award of solatium (d).

[166] See e.g. TGI Paris (réf.) 27.2.1970, JCP 1970, II, 16293 (*Papillon* case). – CA Paris 21.12.1970, JCP 1971, II, 16653 (*Antoine* case). – TGI Paris (réf.) 23.1.1971, JCP 1971, II, 16758, confirmed by CA Paris 15.1.1972, Gaz. Pal. 1972, 1, 302. – Cass. civ. 18.5.1972, JCP 1972, II, 17209 (*Les écrous de la haine* case). – TGI Paris (réf.) 4.2.1986, D. 1987, somm., 140.

[167] See e.g. CA Paris 6.7.1965, Gaz. Pal. 1966, 1, 37 (*Picasso* case). – CA Paris 14.5.1975, D. 1975, jur., 685.

[168] See e.g. TGI Paris (réf.) 30.11.1983: D. 1984, jur., 111: defendant has to withdraw the issues already published from the sale, otherwise he must pay a comminatory penalty of 10 francs per issue which is not returned.

[169] See e.g. CA Paris 11.6.1986, D. 1987, jur., 107 (*Villemin* case).

[170] That is, the right to reply in the public press to a statement which appeared in the paper concerned.

The right to reply The right to reply is provided by Article 13 of the *Act on the Freedom of the Press of 29 July 1881*.[171] It is the right to request the editor of a newspaper or a magazine to publish the comments of all those mentioned in the publication. This right, the purpose of which is to restore some balance between individuals and the press, is strictly speaking not a measure ordered by a judge in case of infringement of personality rights,[172] since its enforcement does not depend on a judicial intervention.[173] Even if it can certainly be said to provide some satisfaction to the victim, it is not a means of either terminating the infringement or compensating for damage. Indeed, the right to reply is independent of tort law and does not sanction a fault that would have been committed by the editor of the publication or the author of the article concerned. Consequently, the enforcement of the right to reply does not depend on proof of either malicious intent on the part of the article's author,[174] or of harm suffered by the person concerned.[175]

The publication of the judicial decision French courts often order the publication of their decision in matters of personality rights.[176] This may contribute to effective redress, especially in cases of defamation or misrepresentation. Such a measure might be an 'adequate reparation of the non-material damage since it restores the authenticity of the personality in the public's eye',[177] but this appears doubtful in cases of invasion of privacy and disclosure of private facts, since 'the publication of the judgment may actually give further publicity to the revelations.[178] But even in these cases, such an order may contribute indirectly to redress

[171] See also Art. 6 of the *Law of July 27, 1982* for the regulation of the right to reply in the audiovisual field.

[172] But more generally a means of protecting the personality. See CA Paris 17.4.1996, D. 1997, somm., 75: 'the right to reply . . . is a right intended to ensure the protection of the personality'.

[173] Judicial intervention is required only if the editor refuses to insert the reply.

[174] Cass. crim. 27.5.1972, D. 1972, somm., 179.

[175] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 333.

[176] The publication of the judicial decision has been ordered in 32% of the decided cases in 1998 (Gras, L'indemnisation des atteintes à la vie privée, 20/4 Légicom (1999) 23). See e.g. CA Paris 13.2.1971, JCP 1971, II, 16774. – CA Paris 16.2.1974, JCP 1976, II, 18341. – TGI Paris 2.6.1976, D. 1977, jur., 364. – CA Paris 5.6.1979, JCP 1980, II, 19343. – CA Paris 24.6.1980, D. 1980, jur., 583. – TGI Paris 14.11.1980, D. 1981, jur., 163. – CA Paris 27.3.1981, D. 1981, jur., 324. – TGI Paris 25.5.1983, D. 1984, somm., 332.

[177] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 480.

[178] See e.g. CA Paris 14.5.1975, D. 1976, jur., 291 (*Deneuve* case). – TGI Paris 27.4.1983, Revue critique de droit international privé 1983, 670.

because it informs the public of the plaintiff's lack of consent'.[179] Thus French courts now consider that the plaintiff alone is entitled to decide whether the publication of the judgment is a satisfactory means of reparation.[180]

The publication of the court decision has been criticised on the basis of Article 10 of the European Convention on Human Rights. It has been argued that such a measure would not comply with the requirements of Article 10 for restraining freedom of expression. However, this argument has recently been rejected by the *Cour de cassation* in a case concerning a famous singer and his wife whose disputes were reported in two magazines, illustrated by photographs of them. According to the French Supreme Court, 'the publication of the court decision ... constitutes an appropriate measure, and such a restriction of freedom of expression complies with the requirements of Article 10 (2) as for its legal basis, its necessity for the protection of the rights of others and for its proportionality to the violations'.[181]

The symbolic award The award for non-material damage is often limited to a symbolic 1 franc in personality rights cases in France.[182] It corresponds to an award of *nominal damages* in English law.[183] It is granted, in particular, when the court finds the defendant liable but without identifying any real or appreciable harm to the plaintiff: '[i]t can be the case, for example, of an unauthorised publication of details from the private life of a celebrity who usually discloses such details himself'.[184] Such a measure has an obvious disapproving function, especially when it is required from the plaintiff himself, and not automatically

[179] Van Gerven, Lever, Larouche, *Tort Law, Common Law of Europe Casebooks* (Oxford: Hart Publishing, 2000) 768.

[180] See e.g. CA Paris 26.4.1983, D. 1983, jur., 376. – CA Paris 28.11.1988, D. 1989, jur., 410: 'The court need not have verified whether the publicity given to its decision was appropriate to the nature of the detrimental act and did not create the risk of aggravating the damage, since the measure claimed and ordered was proportionate to the harm sustained; ... in the case at hand, the plaintiff, who alone is entitled to decide whether this form of reparation is satisfactory for her, has an interest in making known ... that the dissemination of the contested photograph was made against her will and in contravention of her rights and that she intends to vindicate the respect of her private life by legal means'.

[181] Cass. civ. 12.12.2000, *Consorts Smet* c. *Prisma Presse*, D. 2001, somm., 1987.

[182] See e.g. TGI Bordeaux 19.4.1988, D. 1989, jur., 93. – CA Paris 5.12.1988, D. 1990, somm., 239. – TGI Paris 13.1.1997, D. 1997, jur., 255, about the publication of a photograph of the mortal remains of the French President Mitterand. – TGI Nanterre 13.2.2001, Légipresse 2001, No. 182, I, 68.

[183] Van Gerven, Lever, Larouche, *Tort Law, Common Law of Europe Casebooks* (Oxford: Hart Publishing, 2000) 768.

[184] Carval, La responsabilité civile dans sa fonction de peine privée, LGDJ 1995, p. 30.

ordered by the court.[185] 'Frequently, a plaintiff claims the *franc symbolique* when he attaches more importance to the recognition of his or her right than to effective compensation for harm and is satisfied by the condemnation of the defendant's wrongful conduct. Such a claim may be inspired by the plaintiff's concern that he or she should not be suspected of money-making motives'.[186] Yet 'the symbolic effect of such a remedy seems to be quite weak and even ambiguous. As far as the victim is concerned, it is as if the harm suffered was only a penny worth ... One could almost believe that a doubt exists concerning the legitimacy of the claim of the plaintiff. As far as the defendant is concerned, the price of such "shame" is ridiculous in that it is imposed by a court decision occurring too late and being mostly unknown to the public, and it cannot be compared with the profits generated by some sensational journalism'.[187]

Solatium Despite the preference of French courts for specific relief rather than monetary damages in privacy cases, a plaintiff may also seek monetary relief in the form of compensatory damages for the non-material harm resulting from the infringement of his personality rights. The reparation of this so-called 'moral damage' is admitted without any difficulties in French law since 'all kinds of damage call for compensation when the responsibility of a person is engaged ... The amount of damages depends on the Court, which has a very wide discretionary power in this respect'.[188]

Since the 1970s French courts have increased the amount of damages awarded to compensate the non-material harm resulting from an infringement of personality rights,[189] 'albeit the level of French awards remains

[185] 'A judgment of this kind does not aim at compensation, but is merely the judicial declaration of the infringed right, from which the plaintiff may draw satisfaction, and which may also have a preventive effect, especially when publication of the judgment is ordered' (Van Gerven, Lever, Larouche, *ibid.*, p. 768).

[186] *Ibid.*, p. 769.

[187] Montero, 'La responsabilité civile des médias', in Strowel & Tulkens (eds), Prévention et réparation des préjudices causés par les médias, Bruxelles 1998, ed. Larcier, p. 125. See also in the same sense, Carval, *ibid.*, p. 29.

[188] David, English law and French law. A comparison in substance, London & Calcutta, 1980, p. 161 and 167.

[189] See e.g. CA Paris 17.12.1973, D. 1975, jur., 120: 45,000 FRF to *Charlie Chaplin*. – CA Paris 16.2.1974, JCP 1976, II, 18341: 50,000 FRF to *Johnny Halliday* and *Sylvie Vartan*. – TGI Paris 20.4.1977, D. 1977, jur., 610: 100,000 FRF to each plaintiff. – CA Paris 26.4.1983, D. 1983, jur., 376: 100,000 FRF. – TGI Paris 17.12.1986, Gaz. Pal. 1987, 1, 283: 200,000 FRF. – CA Paris 4.1.1988, D. 1989, somm., 92: 250,000 FRF to *Brigitte Bardot*. – TGI Paris 23.10.1996, JCP 1997, II, 22844: 100,000 FRF for the widow and 80,000 FRF to each three children of the former President *François Mitterand*, that is altogether 340,000 FRF for the publication of the book *Le grand secret*.

lower than comparable sums awarded in Germany or England'.[190] Thus, French courts, with the approval of a majority of legal authors, deviate from the rule of tort law according to which the degree of blameworthiness should not be taken into account in the assessment of damages. This judicial trend towards greater severity in the treatment of the gutter press remains, however, unofficial since it is hardly reconcilable with the real dogma of French law according to which tort law is only of a compensatory nature.[191] Thus, 'the judge's sovereign power (*pouvoir souverain*) to assess damage results in an almost unrestricted liberty to evaluate the level of award, so that the judge may take into account circumstances which are foreign to the compensatory approach, such as the degree of culpability, without any risk of interference by the *Cour de cassation* if the judge does not articulate such considerations in his judgment'.[192] Some authors, however, criticise this 'hypocritical' solution, arguing instead that the notion of punitive damages should be recognised in French law.[193]

As far as the assessment of damages is concerned, some authors propose, in the field of infringement of personality rights through the press, to take into consideration the number of readers, so that the level of damages would be set on the basis of the circulation of the newspaper or magazine concerned.[194] This suggestion has a deterrent aim, since the award would be proportionate to the publisher's profit. French courts, however, seem quite reluctant to take such a factor explicitly into account.[195]

Economic damage

The existence of an economic damage arising from the use of attributes of personality without an individual's consent implies that the individual

[190] Van Gerven, Lever, Larouche, *Tort Law, Common Law of Europe Casebooks* (Oxford: Hart Publishing, 2000) 768.

[191] See for a judicial example of this dogma, CA Paris 26.4.1983, D. 1983, jur., 376: 'Damages are intended to make good the harm sustained, and should not vary according to the gravity of the wrong committed.'

[192] Van Gerven, Lever, Larouche, *Tort Law, Common Law of Europe Casebooks* (Oxford: Hart Publishing, 2000) 766.

[193] See e.g. Carval, La responsabilité civile dans sa fonction de peine privée, LGDJ 1995, p. 156. – Beignier, Réflexions sur la protection de la vie privée, Droit de la famille Nov. 1997, chr., No. 11, p. 6.

[194] See e.g. Carval, La responsabilité civile dans sa fonction de peine privée, LGDJ 1995, p. 35. – Lindon, note on CA Paris 26.4.1983, D. 1983, jur., 376, and TGI Paris (réf.) 31.1.1984, D. 1984, jur., 283.

[195] See e.g. Cass. civ. 17.11.1987, Bull. civ. 1987, I, No. 301, p. 216. – TGI Paris 5.5.1999, D. 2000, somm., 269. – TGI Nanterre 27.2.2001, Légipresse 2001, No. 182, I, 78. – TGI Nanterre (réf.) 12.11.2001, Légipresse 2002, No. 188, I, 4.

concerned would have consented if he had been asked.[196] Thus, in such cases the plaintiff does not object to the very principle of the marketing of his name or his image, but only claims a financial reward. Contrary to the cases previously discussed, the claim does not concern an infringement of personality rights as such, since these rights only give the power to prevent an unauthorised use of name, image or voice or disclosure of private facts. Since French law does not (yet) recognise a real property right in attributes of personality but only acknowledges that the economic interests of their holder are worth protecting, the material damage suffered in a case of non-authorised exploitation is compensated on the basis of tort law[197] or the unjust enrichment doctrine.[198]

French courts and doctrine unfortunately do not distinguish clearly enough between the material damage following from an unauthorised marketing and the moral damage arising from an infringement of the personality rights *stricto sensu*. French courts have for a long time[199] (although often implicitly),[200] awarded quite substantial damages to compensate the victim for loss of profit. However, more recent court decisions, which seem to acknowledge the existence of an exclusive right over attributes of personality as noted above,[201] mention explicitly

[196] CA Paris 20.6.2001, CCE 2002, comm., No. 49, p. 35: 'the person concerned cannot, without contradiction, assert, on the one hand that the contentious photographs give a false image of him, so that he would never have consented to their disclosure, and, on the other hand, that he has suffered an economic damage, since such damage could only result from his consent to their publication'. – TGI Paris 13.3.2002, *Barthez* case, Légipresse 2002, No. 193, I, 86, which rejected the alleged economic damage of a famous sportsman and awarded damages to compensate only the non-material harm resulting from an infringement of his personality rights, stating that the non-economic damage is exclusive of any loss of profit.

[197] 'If the damage for which remedy is sought is of a commercial nature, the rules of the common law of civil liability are applicable and the court must evaluate – if necessary by appraisal through experts on a case-by-case basis – the costs and losses suffered. It should be borne in mind that French judges as a general rule are not very generous in such matters.' (de Haas, France, in Henry (ed.), International Privacy, Publicity and Personality Laws, Butterworths, 2001, p. 152). See for a judicial example CA Versailles 21.3.2002, Légipresse 2002, No. 193, III, 138: en publiant sans son autorisation la photo d'un mannequin, l'éditeur a commis une faute, 'source pour la demanderesse d'un préjudice patrimonial car elle n'a pas été rémunérée pour cette publication'.

[198] See above 161.

[199] See already Trib. civ. Nantes 18.12.1902, Gaz. Pal. 1903, 1, 432: implicit establishment of a loss of profit and award of damages to compensate the material harm suffered by the plaintiff because of the reproduction of her image on a calendar. – Trib. civ. Seine 10.2.1955, JCP 1955, II, 8678: the defendant 'deprived the plaintiff of his right to a fair payment for his figuration commercially exploited'.

[200] See e.g. CA Paris 1.12.1965, JCP 1966, II, 14711 (*Petula Clark* case). – CA Paris 13.2.1971, JCP 1971, II, 16771 (*Belmondo* case).

[201] See above 156.

the economic damage resulting from an unauthorised exploitation. Courts generally grant compensation in the amount which would have been paid if the person concerned had been asked for permission.[202] Such an assessment of damages occurred only implicitly until recently. However, it was expressly admitted in a recent decision:[203]

> [so] far as concerns the amount awarded in damages, decisions vary widely and in the end appear rather arbitrary ... When concerned with the publication or distribution of the likeness of public figures, the judge may refer to the going rate (established by expert witness if necessary) in order to award on the basis of lost earnings, at most the sum equivalent to what could have been paid contractually, in accordance with the principles of the allocation of damages by virtue of Article 1382 of the *Code civil*.[204]

Transfer

Are personality rights really inalienable under French law?

It is traditionally asserted in France that personality rights are inalienable, that is, can neither be waived nor assigned. At first sight they are merely the means by which individuals can protect their personality. The interests protected are purely private ones, so that the individual should be allowed to waive his personality rights. But the underlying values of the personality rights, such as human dignity or individuality, are actually so important, almost sacred, that human beings are to be protected, so to speak, against their will and can never give up their personality rights completely.[205] Thus, a person's commitment definitively to surrender the protection offered by the law against violations of his personality by way

[202] See e.g. TGI Paris 3.12.1975, D. 1977, jur., 211 (*Piéplu* case). – TGI Lyon 17.12.1980, D. 1981, jur., 202. – CA Paris 9.11.1982, D. 1984, jur., 30. – CA Paris 14.6.1983, D. 1984, jur., 75 (*Johnny Halliday* case). – TGI Paris 21.12.1983, D. 1984, inf. rap., 331 (*Noah* case). – TGI Paris 30.4.1986, D. 1987, somm., 137 (*Platini* case). – CA Paris 3.4.1987, D. 1988, somm., 390 (*Fignon* case). – CA Nîmes 7.1.1988, JCP 1988, II, 21059.

[203] TGI Paris 12.9.2000, Légipresse 2001, No. 180, I, 36. See also CA Versailles 2.5.2002, Légipresse 2002, No. 192, I, 69.

[204] De Haas, France, in Henry (ed.), International privacy, publicity and personality laws, Butterworths, 2001, p. 154.

[205] Badinter, Le droit au respect de la vie privée, JCP 1968, I, 2136, No. 16. – Kayser, Les droits de la personnalité. Aspects théoriques et pratiques, RTD civ. 1971, 493, No. 37. – Rubellin-Devichi, L'influence de l'avènement des droits de la personnalité sur le droit moral, Mélanges Lambert, Cujas 1975, p. 561. – Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 265. – Tallon, Droits de la personnalité, Répertoire Civil Dalloz, 1996, No. 157. – Cornu, Droit civil. Introduction, les personnes, les biens, 9th ed., Montchrestien, 1999, p. 34.

of disclosing his privacy or using his name, his voice or his image would not have any legal effect. Thus, personality rights are a matter of public policy (*d'ordre public*), which, however, does not mean that the will of their owner has no effect on them.

Tolerance Personality rights enable their owner to oppose every use of his attributes considered to be inappropriate. But an individual can also decide not to assert any claims, and in doing so, he does not waive his right to his name, or his image or his right to privacy. He only tolerates the encroachment and can change his mind whenever he likes. Court decisions frequently state, more often than not about famous people, that 'a mere tolerance, even for a longer period, does not mean a renunciation of the right to one's image, nor an assimilation of the private sphere to the public life'.[206]

Yet one may wonder whether the solution should be the same when the celebrity not only tolerates but rather encourages the intrusion of the media into his privacy. Until recently, French courts have always refused to confer legal effect on celebrities' indulgence towards the media and, on the contrary, always stressed that the tolerance, even for a long time, of violations of the right to one's image or one's right to privacy does not result in the owner of the right losing the right to privacy.

French law does not however recognise a real 'right of caprice'[207] of celebrities. On the one hand, the attitude of the celebrity towards the media may reduce the damages awarded and even sometimes exclude a preliminary measure such as a seizure.[208] On the other hand, lower courts recently decided that a previous disclosure by a person of details of his

[206] TGI Seine 24.11.1965, JCP 1966, II, 14521 (*Brigitte Bardot*). See also in the same sense Cass. civ. 6.1.1971, JCP 1971, II, 16723 (*Gunther Sachs*). – CA Paris 15.5.1970, D. 1970, jur., 471 (*Jean Ferrat*). – CA Paris 21.12.1970, JCP 1971, II, 16653 (*Antoine*). – CA Paris 16.2.1974, JCP 1976, II, 18341 (*Sylvie Vartan & Johnny Hallyday*). – TGI Paris 19.12.1984, Gaz. Pal. 1985, 2, somm., 398 (*Jane Birkin*). – TGI Paris 16.1.1985, Gaz. Pal. 1985, 2, somm., 399 (*Isabelle Adjani*). – CA Paris 19.2.1985, D. 1985, somm., 321 (*Alain Delon*). – CA Paris 3.10.1988, D. 1988, inf. rap., 260 (*Johnny Hallyday*). – TGI Paris 8.3.1989, Gaz. Pal. 1992, 1, somm., 225 (*Christophe Lambert*). – CA Paris 23.1.1990, D. 1990, inf. rap., 62 (*Brigitte Bardot*).

[207] See *Brossollet*, Droit au caprice ou droit à l'information? La reprise d'informations précédemment divulguées par l'intéressé au regard de l'article 9 du Code civil, Légipresse 1999, No. 165, II, 126.

[208] See e.g. TGI Paris (réf.) 28.6.1974, D. 1974, jur., 751 (*Alain Delon & Mireille Darc*). – TGI Paris 8.5.1974, 83 RIDA (1975) 116 (*Serge Gainsbourg & Jane Birkin*). – CA Paris 3.10.1988, D. 1988, inf. rap., 260 and CA Paris 28.2.1989, JCP 1989, II, 21325 (*Johnny Halliday*). – TGI Nanterre 12.11.2001, Légipresse 2002, No. 188, I, 14. – TGI Nanterre 6.5.2002, Légipresse 2002, No. 193, I, 94 (the attitude of the plaintiff towards the medias is qualified as 'exhibitionism' by the court). – TGI Paris 15.1.2003, Légipresse 2003, No. 200, I, 45.

own private sphere prevents him from prohibiting the further disclosure of these details. In litigation between Prince Ernst August of Hanover and the magazine *Point de vue*, French judges stated that 'no damage can be claimed in relation to the right to privacy since all the statements made in the impugned article concern a public figure who has already officially disclosed these facts, which necessarily implies that such facts have left the private sphere'.[209] This jurisprudence, which had been overruled by the *Cour de cassation* in a case concerning the famous French popstar Johnny Hallyday,[210] was recently approved by the same Court in a case concerning Stéphanie Grimaldi.[211]

Consent If tolerating the disclosure of private facts does not constitute a waiver of the right to privacy, what about the real consent given to such a disclosure? Consent is usually considered a defence in personality rights cases, that is, a legal justification of encroachments on these rights. French or French-speaking authors unanimously assume that the consent of the owner renders the encroachment lawful,[212] but there is disagreement concerning the legal nature of this consent. The question here is whether consent must be seen as a waiver of rights, and if so, whether it is compatible with the principle of inalienability of personality rights. Before answering the question of the legal nature of the consent, we will first examine the conditions of its validity and the problem of its revocation.

Conditions of the validity of consent The validity of the consent given to an encroachment of personality rights depends on the conditions under which uses of the attributes are authorised and who is entitled to use them. Under French law, one may not consent to every disclosure of private facts or every publication of one's image in advance, but one can, in each individual case, consent to a precise encroachment of the right to

[209] TGI Paris 8.9.1999, D. 2000, somm., 271 (*Prince of Hanover*). See also in the same sense TGI Nanterre 3.3.1999, Légipresse 1999, No. 162, I, 75. – TGI Nanterre 20.12.2000, Légipresse 2001, No. 179, I, 30 (*Claire Chazal*). – TGI Nanterre 12.11.2001, Légipresse 2002, No. 188, I, 14 (*Odispo c. Prisma Presse)*. – CA Toulouse 10.12.2002, Légipresse 2003, No. 202, III, 103 (*Fabien Barthez*). – TGI Paris 11.12.2002, Légipresse 2003, No. 200, I, 50 (*Petrucciani et Flory* c. *Prisma Presse*).

[210] Cass. civ. 30.5.2000, JCP 2001, II, 10524 (*Johnny Hallyday*). See along the same lines TGI Nanterre 12.12.2001, Légipresse 2002, No. 189, I, 30 (*Alain Delon*) Cass. civ. 23.9.2004, Légipresse 2004, No. 217, I, 180.

[211] Cass. civ. 3.4.2002, Légipresse 2002, No. 195, III, 170 (*Stéphanie Grimaldi*).

[212] *Ravanas*, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 246. – *Rigaux* (belgian), La protection de la vie privée et des autres biens de la personnalité, Bruxelles & Paris 1990, p. 334. – *Tercier* (swiss), Le nouveau droit de la personnalité, Zurich 1984, p. 88. – *Tallon*, Droits de la personnalité, Répertoire Civil Dalloz, 1996, No. 78–83 and 127–35.

privacy or the right to one's image.[213] The consent must relate to a particular use of the attribute concerned and must be interpreted restrictively. The consent given to the taking of a photograph does not, for example, provide an authorisation to publish the photograph,[214] and, more generally, 'an authorisation which has been given only for a definite purpose can not be used for other aims'.[215] Not only must the intended use, but also the beneficiary of the consent be determined precisely: the authorisation given to someone to use the name, the voice or the image applies only to a particular person and nobody else is entitled to make such a use. The consent given, for example, by celebrities to some magazines to publish their image or details of their private sphere does not allow other newspapers or magazines to make such publications.[216] Apart from being precise, the consent must also be unequivocal and convey the owner's wish not to oppose the use of his name, his voice, his image or details of his private life.[217] Further, French courts seem to require an express consent[218] and thus reject the possibility of implied consent.

Revocation of consent The prevailing opinion in French law is that consent to the use of personal attributes can be revoked at any time, and

[213] Luciani, Les droits de la personnalité: du droit interne au droit international privé, Paris I thesis, 1997, p. 93. – Nitard, La vie privée des personnes célèbres, Paris X thesis, 1987, p. 223. – Loiseau, Le nom objet d'un contrat, LGDJ 1997, p. 313. – Isgour & Vinçotte, Le droit à l'image, Bruxelles 1998, p. 83. – Kayser, La protection de la vie privée par le droit, 3rd. ed. 1995, p. 238.

[214] See e.g. TGI Paris 26.2.1976, JCP 1977, IV, 257. – TGI Paris 18.11.1987, D. 1988, somm., 200. – CA Paris 5.7.1988, D. 1990, somm., 239. – CA Paris 8.11.1993, *Ann. prop. ind.* 1994, 206. – TGI Marseille 11.10.2002, Légipresse 2003, No. 198, I, 6.

[215] TGI Paris 3.5.1984, D. 1985, somm., 14. See also in the same sense TGI Paris 16.2.1973, D. 1973, inf. rap., 212, about a model participating to a fashion show who had consented to be filmed during the make-up and undress sitting and whose images had been included in a pornographic movie. – CA Paris 9.11.1982, D. 1984, jur., 30. – CA Paris 20.3.1985, D. 1985, somm., 324: 'the authorisation given by actors to be filmed during the shooting of a TV film to illustrate a TV magazine does not enable that their image be used, without their express consent, for a different purpose as the one initially agreed'. – TGI Nanterre 15.2.1995, Gaz. Pal. 1995, 1, 284. – Cass. civ. 30.5.2000, D. 2001, somm., 1989. – CA Versailles 11.10.2001, Légipresse 2002, No. 189, I, 21. – CA Paris 4.4.2002, CCE 2003, comm., No. 11, p. 40 Cass. civ. 23.9.2004, Légipresse 2004, No. 217, I, 173.

[216] CA Versailles 21.3.2002, D. 2002, jur., 2374. – CA Paris 27.2.2002, CCE 2003, comm., No. 11, p. 40.

[217] See e.g. TGI Paris 11.7.1973, JCP 1974, II, 17600: 'failing an authorisation devoid of ambiguity, the contentious poster constitutes an infringement of the right of every person to his image'.

[218] See e.g. CA Paris 17.3.1966, D. 1966, jur., 749 (*Trintignant*). – CA Paris 15.5.1970, D. 1970, jur., 466 (*Jean Ferrat*). – CA Paris 19.2.1985, D. 1985, somm., 321 (*Alain Delon*). – CA Paris 22.3.1999, CCE 1999, comm., No. 35, p. 25: 'the publication of a person's image, attribute of his personality, requires his previous authorisation, express and special'. – TGI Paris 16.10.2002, Légipresse 2002, No. 197, I , 151. – TGI Paris 4.12.2002, Légipresse 2003, No. 204, I, 115.

that this revocation becomes effective only prospectively and depends on the previous indemnification of the beneficiary. This exception to the principle of binding power of conventions is justified by the specific nature of the personality rights, and some French authors compare it to the right of withdrawal in copyright.[219] A few, however, have recently criticised this dogma of the revocability of consent given to the use of attributes of personality.[220]

The rule of the revocable character of consent given to the disclosure of private details or the publication of one's image under French law is old. Clearly affirmed by the Paris Court of Appeal in the famous *Alexandre Dumas* case in 1867,[221] it has since always been reaffirmed by both courts[222] and doctrine,[223] and is still considered to be unanimously accepted today. Even if a real contract has been concluded, the consent can, according to prevailing opinion, be withdrawn at any time, provided that the contracting party is indemnified. This obligation of compensation exists even if the revocation is not abusive, since it does not rest on the idea of fault or the notion of bad faith, but on that of guarantee: 'the model who revokes his consent deprives the contracting party of the advantages the latter could have gained from the contract'.[224]

[219] See e.g. Stoufflet, Le droit de la personne sur son image. Quelques remarques sur la protection de la personnalité, JCP 1957, I, 1374, No. 33. – Badinter, Le droit au respect de la vie privée, JCP 1968, I, 2136, No. 40. – Acquarone, L'ambiguïté du droit à l'image, D. 1985, chr., 135, No. 32. – Goubeaux, Les personnes, in Ghestin (ed.), Traité de droit civil, LGDJ 1989, p. 302. – Tallon, Droits de la personnalité, Répertoire civil Dalloz, 1996, No. 162. – Nitard, La vie privée des personnes célèbres, Paris X thesis, 1987, p. 229. – Isgour & Vinçotte, Le droit à l'image, Bruxelles 1998, p. 111. – Rigaux, La protection de la vie privée et des autres biens de la personnalité, Bruxelles & Paris 1990, p. 733.

[220] See already Ancel, L'indisponibilité des droits de la personnalité. Une approche critique de la théorie des droits de la personnalité, Dijon thesis, 1978, p. 227. See more recently Loiseau, Le nom objet d'un contrat, LGDJ 1997, p. 310. – Bichon-Lefeuvre, Les conventions relatives aux droits de la personnalité, Paris XI thesis, 1998, p. 217.

[221] CA Paris 25.5.1867, S.1867, 2, 41.

[222] See e.g. CA Paris 8.7.1887, Ann. prop. ind. 1888, 287. – TGI Seine (réf.) 2.11.1966, JCP 1966, II, 14875. – CA Paris 7.6.1988, D. 1988, inf. rap., 224.

[223] See e.g. Pouillet, Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation, Paris 1879, p. 182. – Fougerol, La figure humaine et le droit, Paris 1913, p. 87. – Nerson, Les droits extrapatrimoniaux, Lyon 1939, p. 424. See also more recently, Stoufflet, Le droit de la personne sur son image. Quelques remarques sur la protection de la personnalité, JCP 1957, I, 1374, No. 33. – Badinter, Le droit au respect de la vie privée, JCP 1968, I, 2136, No. 40. – Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LGDJ 1978, p. 294 s. – Tallon, Droits de la personnalité, Répertoire Civil Dalloz, 1996, No. 135 & 152. – Luciani, Les droits de la personnalité: du droit interne au droit international privé, Paris I thesis, 1997, p. 75.

[224] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, LJDJ 1978, No. 282, p. 297.

On closer examination, however, the doctrine of free revocation of consent is not convincing. The special nature of personality rights could perhaps justify some derogations from the rules of civil law, especially that of the binding power of contracts.[225] But this can only be the case if the personality is really threatened by the exploitation made by the beneficiary of the consent. But if one admits that a valid consent has to aim at a precisely delineated use of the attribute concerned, and must therefore necessarily be limited in time,[226] one may wonder how such a use is likely to violate the personality of the person having consented to it, or at least where such a violation could legitimate the revocation *ad nutum*.

The cases where it seems fair to allow the person concerned to oppose a previously permitted use of his attributes are those cases where in fact the beneficiary of the consent goes beyond the scope of the consent. There is thus no need to acknowledge a unilateral right of revocation for the holder of the attributes exploited since the user, although the subject of a consent, acts unlawfully insofar as his use of the attributes is not encompassed by the consent.[227]

The requirement that the use of attributes of personality consented to by the holder must be precisely defined renders discussion of the revocation of the consent unnecessary. If the person who gave a general authorisation to use his name or his image may certainly go back on his word, it is not because such a consent is naturally revocable, but because the consent given is, in such a case, not valid, insofar as its scope and subject are not sufficiently specified. When a celebrity allows a newspaper to publish his image or to disclose details about his private life without specifying the way it should occur, one may consider that such an authorisation covers only one publication but no further disclosures in other issues. In the same way, when a famous singer or sportsman gives his consent to the use of his name or image as part of an advertising campaign, his attributes cannot be used to advertise another product. In all these cases, this limitation is not the result of a unilateral power of revocation enjoyed by the holder of the attributes exploited, but rather the consequence of a mere restrictive interpretation of the consent whose scope is not

[225] One may, however, wonder how such an exception to the rule of the binding power of contracts may be admitted without being legally laid down, as the one recommended by the proponents of a true right of revocation for the holder of the attributes exploited (See, e.g., Ancel (note 220 above), No. 229 p. 227). In copyright law, the author's right of revocation is not only defined but also strictly delimited by the legislator.

[226] Either because the use of the attribute is naturally one-of-a-kind, or because a time limit has been expressly fixed when the contract is a continuous one.

[227] See Ancel (fn 220), No. 229 p. 228. – Loiseau (note 220 above), No. 320 p. 310. – Bichon-Lefeuvre (note 220 above), No. 243 p. 217.

sufficiently specified. The *raison d'être* of the personality rights is to enable, not the exploitation, but rather the protection of attributes of personality. The consent to an act of exploitation has, therefore, to be not only precisely defined but also interpreted restrictively.

In contrast to mere tolerance, which the holder of the attributes exploited can always revoke, validly given consent to such exploitation binds its author, and cannot be revoked according to his wishes. It is, theoretically, not necessary to make a distinction between unilateral and contractual authorisation since revocation *ad nutum* is in both cases impossible. However, a revocation can exceptionally be admitted as the result of a balancing test when the use of the attributes consented to by their holder would seriously damage his personality. In such a case, the fact that consent has been given contractually may be a criterion for the balancing test. The interest of the beneficiary of the consent to exploit attributes of personality weighs much more when the consent is of a contractual nature, and even more so when it has been given in exchange for remuneration.

The legal nature of consent: does it constitute a waiver? The consent given by the holder of the attributes exploited is nothing more than the obligation he enters into not to exercise his power of defence towards a particular person.[228] Since the personality rights only have a defensive nature, such an obligation forecloses every action of the owner against the recipient of the consent. One may, therefore, consider that consent constitutes a waiver, not of the personality right itself, which still belongs to the owner and can be enforced against other persons, but a waiver of the exercise of this right towards a particular person. Contrary to the waiver of a right, which must be understood as a definitive surrender and has an absolute (*in rem*) effect, the waiver of the exercise of a right has only a relative (*in personam*) effect, that is, only towards a certain person. Such a waiver does not infringe the principle that personality rights are inalienable, since the owner retains the right to sue all other persons than the beneficiary of the consent.

Assignment The rule according to which personality rights are inalienable prohibits not only their waiver but also their assignment. Does this mean that all agreements made daily for the commercial exploitation of personal attributes are not valid? Do such agreements constitute a transfer of the corresponding personality right? In this respect it is

[228] See in the same sense *Marino*, Les contrats portent sur l'image des personnes, CCE mars 2003, Chr. No. 7, p. 11.

necessary to distinguish between the use of attributes of the personality as trade marks or trade names and the commercial exploitation of the attributes outside the field of distinctive signs. The latter shall be discussed first.

Contracts concerning the commercial exploitation of attributes of personality are numerous and cover cases as varied as the use of a name, image or voice to advertise products or services (possibly as part of a sponsorship contract), the reproduction of a name or image on various items such as posters or T-shirts (merchandising), the account of details from the private sphere as part of an interview or a biography, or the contract between a model and an agency for the marketing of his image. These contracts are almost always for remuneration, i.e., the holder of the attributes exploited receives financial compensation in exchange for his consent. As seen above, such consent constitutes a waiver of the exercise of the corresponding personality right. Does it further constitute a transfer of this right?

As noted above, personality rights are non-economic rights under French law and only have a defensive nature. The economic interests attached to the commercial exploitation of the image, name, voice, or details from the private life of a person are recognised and protected, without it being clear whether this occurs on the basis of the general principles of tort law or of a new intellectual property right. The question whether such a new intellectual property right should be recognised under French law continues to be discussed but, even for its proponents, such a property right would be independent of the traditional personality rights. The discussion is indeed influenced by the conception of copyright which prevails in France, according to which dignitary and economic interests are protected by two kinds of rights. Contrary to practice in other jurisdictions, French law does not acknowledge any exclusive right of a dual nature protecting both economic and dignitary interests. Even if officially recognised, a French 'right of publicity' would nevertheless be distinct and quite independent from the traditional personality rights.

The question of whether the consent given to the commercial exploitation of personality is to be regarded as assignment depends on whether such a property right is acknowledged in France. If all the person has is a non-assignable personality right, consent to use the attributes of his personality is to be qualified as a release from liability for invasion of privacy or infringement of another personality right, i.e. an enforceable promise not to sue. On the other hand, if there is a property right in the attributes of one's personality, such consent is to be understood as a transfer of this right, which is enforceable against third parties. Unfortunately, case-law does not provide any solution to this problem, since court decisions only

refer to the 'economic damage' suffered by the person whose attributes have been used without consent. There is, as far as we know, no decision concerning the enforceability of contracts aimed at the commercial exploitation of personality attributes against third parties.

A special case of commercial exploitation of attributes of personality concerns the use of a person's name as a trade mark or business name. It is well-acknowledged that an individual can use his name to refer to his own business or his own products. He can register it as a trade mark to identify his products or services, or use it as the trading name of his business or as the trading name of a partnership. But he can also use, instead of his own name, the name of another person. The holder then has to consent to such a use,[229] except where the name is neither rare nor famous and if there is no risk of confusion.[230] Such consent is to be qualified as a waiver of the exercise of the right to one's name, i.e. as release from liability for infringement of this personality right, like every other commercial use of attributes of the personality. Thus, at this first step, the use of a name as trade mark or trade name does not have any specificity.

But, contrary to other means of using attributes of the personality for commercial purposes, the use of a name as a trade mark then gives rise to a new intellectual property right enforceable against third parties. How can this be reconciled with the requirement stated above, according to which the consent given to the commercial exploitation of an attribute of one's personality has to be limited in time? If the consent is not valid when its duration is not precisely determined, it means that the owner of the intellectual property right in the trade mark is at the mercy of the holder of the name incorporated in the trade mark. Such a result is not satisfactory. But how does one explain why the beneficiary of the consent who at the beginning owned only a right *in personam* then becomes the owner of a right *in rem*?

This transformation is due to the detachment of the name from the person of its holder, such a detachment being involved in every use of a name as a trade mark. Contrary to other forms of commercial use of attributes of personality, such as use for advertising purposes, the use of a name as a trade mark or trade name no longer aims at designating the person of the holder, but rather a product or an enterprise. Such use cannot hurt the interests protected through the personality right and therefore cannot be prohibited by the subject concerned on the basis of his personality right. The intellectual property right which arises when the name is registered as a

[229] Art. L. 711–4 *Code of Intellectual Property*.
[230] Chavanne & Burst, Droit de la propriété industrielle, 5th ed. Dalloz 1998, No. 915 p. 512.

trade mark or first used as a trade name is thus enforceable against the holder of the name incorporated in the trade mark or the trade name.

But what if a partner has consented to the use of his name as a business name for the company? Can he prohibit such a use after he has left the company? French courts have long considered such inclusion of the partner's name in the business name of the company as something that is merely tolerated and that can be revoked when the partner leaves the company.[231] In the famous *Bordas* case, the *Cour de cassation* changed French case law, stating that 'the name, because of its inclusion in the statutes of the company, has become a distinctive sign which has detached itself from the natural person who carries it to apply to the legal person which it identifies and then becomes the subject of an incorporeal property right'.[232] This solution is now well established in French law[233] and can be considered as a limitation of the legal effects usually attributed to consent in matters of commercial exploitation of attributes of the personality.

The question of possible assignment is answered differently in cases where the name is used as a trade mark or trade name than in other cases of commercial exploitation of attributes of the personality, since the incorporeal property right in the trade mark or the trade name can be licensed or assigned like any other right of this kind. Indeed, the fact that the trade mark or trade name consists of a person's name has only an influence on the requirements for its validity, but once it is legally attributed its origin no longer plays a role. Thus, the licence or assignment of the right in a trade mark or trade name cannot be denied because of the inalienable nature of the personality rights. The right to one's name as a personality right is not the subject of the assignment; rather it is the incorporeal property right in the trade mark or the trade name.

Transmission by succession

The personal nature of the personality rights raises the question of whether or not they are descendible. Opinion on this point is strongly divided in French legal doctrine. It seems that the majority of authors

[231] See e.g. CA Aix-en-Provence 20.12.1949, D. 1950, jur., 220 (*Bouchara*). – CA Paris 26.6.1961, *Ann. prop. ind.* 1962, 82 (*Aiton*). – CA Paris 8.11.1984, *Ann. prop. ind.* 1985, 14 (*Bordas*).

[232] Cass. com. 12.3.1985, JCP 1985, II, 20400; D. 1985, jur., 471.

[233] See e.g. TGI Paris 1.6.1988, D. 1993, somm., 117. – CA Paris 14.9.1988, Revue du Droit de la Propriété Intellectuelle (RDPI) 1988, No. 20, 89. – CA Paris 2.5.1990, *Ann. prop. ind.* 1992, 32. – Cass. com. 27.2.1990, JCP 1990, II, 21545. – CA Versailles (aud. sol.) 6.3.1991, *Ann. prop. ind.* 1991, 153.

consider that heirs are entitled to sue in cases of infringement of the personality rights of the deceased. The theoretical basis of such a claim remains uncertain. Some authors argue that personality rights are descendible, specifying, however, that such a devolution does not follow the usual rules of the law of succession.[234] According to this view, the personality right concerned is actually transmitted to the relatives of the deceased, even if it is sometimes explained that the right then becomes subject to some transformation.[235] Other authors argue that the entitlement of heirs to bring an action in cases of infringement of the personality rights of the deceased does not rest on a real transmission by succession, but rather on the legal technique of representation.[236] One of the most famous authorities on personality rights in France, Professor Ravanas, seems to be also in favour of this idea of representation of the deceased by his relatives, stating, even so, that 'the interest of the heir is not easily separable from the interest that the deceased would have had to claim'[237] and 'it is therefore mostly impossible to make up one's mind in this debate, which is of more theoretical and not so much practical interest'.[238]

The opposite thesis, according to which personality rights expire at the death of their owner, has long been defended principally by Kayser, another famous authority on personality rights in France. Kayser argues that 'relatives of the deceased sue for themselves, i.e. as victims of the damage that the disclosure of the privacy of the deceased caused them'.[239] This view seems to be becoming stronger at present, since it

[234] Ponsard & Laroche-Gisserot, Nom-Prénom, in Répertoire Civil Dalloz, 1997, No. 410. – Stoufflet, Le droit de la personne sur son image. Quelques remarques sur la protection de la personnalité, JCP 1957, I, 1374, No. 16. – Badinter, Le droit au respect de la vie privée, JCP 1968, I, 2136, No. 21. – Edelman, Esquisse d'une théorie du sujet: l'homme et son image, D. 1970, chr., 119, No. 4.

[235] Tallon, Droits de la personnalité, in Répertoire Civil Dalloz, 1996, No. 169–170. Lamoureux & Pochon, comment to CA Paris 7.6.1983, *Claude François* case, Gaz. Pal. 1984, 2, 531.

[236] Nerson, Les droits extrapatrimoniaux, Lyon 1939, No. 204 p. 456. – Dijon, Le sujet de droit en son corps. Une mise à l'épreuve du droit subjectif, Namur 1982, ed. Larcier, No. 307 p. 214. – Collet, La notion de droit extrapatrimonial, Paris II thesis, 1992, No. 247 p. 250.

[237] Comment to TGI Paris 5.7.1995, *Yves Montand* case, D. 1996, jur., 176.

[238] Ravanas, La protection des personnes contre la réalisation et la publication de leur image, Paris 1978, LGDJ, No. 402 p. 451. See along the same lines Goubeaux, Les personnes, in Ghestin (ed.), Traité de droit civil, Paris 1989, LGDJ, No. 288 p. 260: 'if some personality rights can be exercised, after the death of their initial owner, by his heirs, it is difficult to know whether there is a real transmission by succession or whether they are new rights which arise with the heirs. In any case, this devolution, if it takes place, is not identical with the transmission of the deceased estate: it is a "moral heritage" to which most of the common rules of succession do not apply'.

[239] Kayser, La protection de la vie privée par le droit, 3rd ed. Paris 1995, Economica, No. 165 p. 313.

is defended in most of the new monographs dealing with personality rights.[240]

Case law, on the other hand, evolved in the opposite direction. From the *Rachel* case to the *Gabin* case, courts insisted as a first step on the necessity to protect the personality *post mortem* and admitted a real transmission by succession of the personality rights of the famous actor portrayed on his deathbed.[241] A few years later, in a case concerning Maria Callas, French courts accepted the claim of the daughter and the sister of the famous opera singer, stating that 'members of the family suffer, because of the invasion of the privacy of the deceased, at least a moral damage'.[242] Case law was thus evolving towards an action by the heirs based, not on a transmission by succession of personality rights, but rather on the reparation of their own damage suffered because of the infringement of the right of privacy or the right to own image of their predecessor.

This evolution has since been confirmed. Starting in the 1980s, French courts have explicitly acknowledged the expiration of the personality rights at the death of their owner. In *Matisse* v. *Aragon*, the Paris Court of Appeal dismissed the claim of the heirs of the famous painter stating that 'if Article 9 Code Civil entitles every person to prohibit every kind of disclosure of his privacy, this power belongs only to living humans and the heirs of a deceased person are only entitled to defend his memory against the injury which would result from the report of erroneous or distorted facts published in bad faith or with excessive thoughtlessness'.[243] This solution has subsequently been confirmed on several occasions,[244] and was held to be certain in French law. Yet, the problem has been discussed once again in the very famous case *Le grand secret*, which takes its name from the book written by former French President François Mitterand's private doctor about the statesman's health, giving details about his illness which his widow and children were not willing to have published. In deciding whether to issue a preliminary injunction against the publisher,

[240] Beignier, L'honneur et le droit, Paris 1995, LGDJ, p. 238. – Loiseau, Le nom, objet d'un contrat, Paris 1997, LGDJ, No. 146 p. 163. – Luciani, Les droits de la personnalité: du droit interne au droit international privé, Paris I thesis, 1997, No. 194 p. 195. – Bichon-Lefeuvre, Les conventions relatives aux droits de la personnalité, Paris XI thesis, 1998, No. 128 p. 122.

[241] TGI Paris (réf.) 11.1.1977, JCP 1977, II, 18711.

[242] TGI Paris 19.5.1982, D. 1983, jur., 147; JCP 1983, II, 19955.

[243] CA Paris 3.11.1982, D. 1983, jur., 248.

[244] See e.g. TGI Strasbourg (réf.) 31.5.1989, D. 1989, somm., 357. – CA Paris 19.5.1992, JCP 1992, IV, 2345. – CA Paris 23.11.1993, Légipresse 1994, No. 114, II, 132. – TGI Paris (réf.) 4.8.1995, 167 RIDA (1996) 291 RIDA 1996, No. 167, 291. – CA Paris 6.5.1997, D. 1997, jur., 597.

the summary judge stated that the distribution of the book would constitute an intrusion into 'familial privacy',[245] which can be interpreted as meaning that the protection afforded by the personality rights does not cease with the death of the owner. In the substantive proceedings, the Court of Appeal expressly recognised that the right of privacy is not descendible[246] and the solution was confirmed by the *Cour de cassation*.[247] The problem is not totally resolved since the criminal courts do not share the same opinion and seem to admit the descendibility of personality rights, that is to say, their survival after the death of their owner.[248]

Thus, French law is very unclear as regards the question of the descendibility of personality rights. If case law (at least the civil jurisdiction) seems to be in favour of expiration of personality rights at the death of the owner, a large part of academic writing still supports the idea that heirs are entitled to claim for invasion of privacy or violation of other personality rights of the deceased, whether on account of a transmission by succession or as representatives of the deceased.

The idea of a representation of the deceased by his heirs is not convincing: the mechanism of representation requires the existence of the person represented. But a dead person no longer exists. He can no longer take part in social life and no longer needs protection against third parties violating his personality. It is nonsense to talk about the private life of a dead man since he does not have any life at all. What the proponents of *post mortem* personality rights actually want to protect is the memory of the person after his death. But this memory is not a matter of the personality rights of the deceased, which would have survived the death. The claim of the heirs is not founded on these personality rights, but rather arises after the death, having never been possessed by the deceased. The power to oppose the publication of the image of a dead body does not constitute the exercise of the deceased person's right to his image, since it arises, by definition, only after his death. It is a right that the heirs acquire at the death of their predecessor but which never belonged to him.

[245] TGI Paris (réf.) 18.1.1996, JCP 1996, II, 22589.
[246] CA Paris 27.5.1997, JCP 1997, II, 22894; D. 1998, somm., 85.
[247] Cass. civ. 14.12.1999, JCP 2000, II, 10241. See along the same lines Cass. civ. 20.11.2003, Légipresse 2004, No. 209, I, 32: les héritiers ne bénéficient pas du droit d'agir en justice sur le fondement de la violation de la vie privée au nom d'une personne décédée.
[248] Cass. crim. 21.10.1980, D. 1981. jur., 72. – TGI Paris (ch. corr.) 13.1.1997, D. 1997, jur., 255; JCP 1997, II, 22845. – CA Paris 2.7.1997, D. 1997, jur., 596. – Cass. crim. 20.10.1998, D. 1999, jur., 106; JCP 1999, II, 10044.

Personality rights finally appear to be indescendible by nature, since their enforcement requires the physical existence of their owner, which is not given any more after death. The right to sue recognised in favour of the family of the deceased aims actually at the defence either of the memory (and not the personality) of the latter or of the family members' own feelings. But it is in all cases an action founded on the general principles of tort law, independent of the doctrine of personality rights. Conversely, if the use of attributes of personality of the deceased does not harm his memory or invade the privacy of the members of his family or hurt their feelings, such a use is then free, since there is no longer a personality to protect. The right of veto granted to the owner during his lifetime expires at his death and his name, image and the details of his private life come into the public domain.

The question arises, however, what happens with the economic value of these attributes. A trend is emerging in French case law according to which the non-economic element of personality rights is indescendible, but the economic element devolves on the heirs in accordance with the ordinary rules of the law of succession. In this sense, the first instance court of Aix-en-Provence stated, for example, in a case concerning the French actor Raimu, that 'the right to one's image has a moral and patrimonial nature; the economic right which enables one to make money from the commercial exploitation of the image is not purely personal and passes on to the heirs'.[249] But, even among the authors who favour the recognition of an economic right of exploitation of attributes of personality, which does not yet exist in French law, opinion is divided on the question of the descendibility of such a right. Gaillard, the first author expressly to support the acknowledgement of an intellectual property right to one's image denied its descendibility, considering that 'the monopoly granted to every individual on the commercial exploitation of his image expires at the death of the person concerned'.[250]

Even though French law does not yet recognise a property right in the commercial exploitation of the personality, the use of the attributes is subject to the consent of the person concerned. The latter can thus not

[249] TGI Aix-en-Provence 24.11.1988, JCP 1991, II, 21329, confirmed by CA Aix-en-Provence 21.5.1991, Images Juridiques 1991, No. 91 p. 3: 'the economic value of this right can be devolved to the heirs like any other right of this nature and the latter may consequently ... authorise or not the exploitation of the image of the deceased for commercial purposes'. See along the same lines, TGI Paris (réf.) 4.8.1995, 167 RIDA (1996) 291. – CA Paris 16.9.1996, 171 RIDA (1997) 45. – CA Grenoble 24.6.2002, Légipresse 2002, No. 195, I, 118.

[250] Gaillard, La double nature du droit à l'image et ses conséquences en droit positif français, D. 1984, chr., 163.

only enter into a contract to this effect but also and, conversely, can claim for compensation in cases of non-authorised exploitation. Is such a claim also granted to the heirs? Theoretically, the transmission by succession of patrimonial claims does not raise any difficulty, but when the person whose attributes are exploited is deceased, one may no longer assume that this exploitation constitutes a fault or that the enrichment of the defendant is unjust, since the attributes have come into the public domain with the expiration of the personality rights. The claim of the heirs to receive reparation for the economic damage arising from the non-authorised exploitation of the attributes of their predecessor is therefore not admissible, since such an exploitation does not depend on their consent. It would be different only in a case where the deceased brought such a claim before he died, his heirs then being entitled to pursue that case.

The personality rights are indescendible, which means that the exploitation of the attributes of a deceased person, even for commercial purposes, is free. This solution is justified inasmuch as the use of the name, the image or the private life of a deceased person in practice nearly always concerns a celebrity. The 'rights' of history then have to prevail over the susceptibility of the heirs or their lure of profit. This solution does not, however, flout the respect due to the dead since it does not prevent the relatives of the deceased from claiming in their own name, either for infringement of their own personality rights, or on the basis of general principles of tort law, to have the fault condemned which consists of a violation of their feelings for the deceased or harm to his memory.

6 Conclusions

Introduction

Commercial appropriation of personality has generally been approached from two basic perspectives in the major common law and civil law jurisdictions analysed in the preceding chapters: (i) the unfair competition or intellectual property perspective aligning the problem most closely with the common forms of intellectual property rights such as patents, copyright and trade marks and (ii) the privacy and personality perspective, focusing on the damage to human dignity.[1] The differences in substantive legal protection examined in the preceding chapters remain quite significant and a number of legal concepts have been employed to address the same basic problem. Despite these differences, a surprising number of common trends may be identified from the discussions of the individual systems. This chapter draws together some of the common features and patterns of development that emerge from the individual systems. While the developments have at times been systematic, they have more often been rather more haphazard, although they may be distilled into three basic models. These basic models inevitably attempt to reconcile the economic and non-economic aspects of personality, which often conflict in the development of intellectual property rights in aspects of personality. This is a problem that pervades the analysis in the preceding chapters and is summarised in a subsequent section. Finally, we examine the effects of European human rights law both in raising the threshold of protection for privacy interests and in marking the boundaries, which are often difficult to identify, between privacy and freedom of expression. As noted at the outset, while there is no prospect of a common European way forward, there are tentative signs, at least at an analytical level, of an emerging European consensus.

[1] See 4–6 above.

Common features and contrasts

Protection for interests in personality usually comes relatively late in any legal system's evolution following on from the protection given to interests in the physical person and property.[2] In the common law systems, interests in personality traditionally occupied a subsidiary position in any hierarchy of interests and protection was often parasitic and dependent on establishing damage to a primary interest in property or reputation. The process of development has seen a gradual stretching of the traditional common law causes of action protecting interests of a primarily proprietary nature, such as trespass, breach of confidence, various causes of action for unfair competition and the tort of defamation. England and Wales, Australia, New Zealand and Canada are at different stages of the same basic process of gradual piecemeal development, although the differences between the systems should not be underestimated. The courts in the United States, on the other hand, transcended this piecemeal incrementalism early in the twentieth century, developing a general right of privacy, although this is a right that remains somewhat conceptually uncertain and poorly defined. Similarly, the continental codifications of the nineteenth century reflect the primacy of property rights while giving little weight to the protection of interests in personality. The French civil code (the *Code Napoléon*) of 1804 did not contain any explicit protection of the personality.[3] While in Germany in the nineteenth century some academic writers had argued in favour of a broad personality right, the drafters of the civil code (*Bürgerliches Gesetzbuch*) of 1900 rejected this concept as too vague and found it difficult to reconcile with the system of subjective rights underlying the code's law of torts. Whereas property could be regarded as an archetypal subjective right, the notion of a personality right was frowned upon as a 'right in oneself', which lacked an external object and proved to be difficult to accept.[4] Thus protection initially depended on casuistic applications of existing actions such as trespass and criminal libel[5] and on piecemeal provisions such as § 12 *BGB* protecting a personal name and the right to one's image provided by § 22 of the *Kunsturhebergesetz*.[6] On the one hand this approach is reminiscent of the common law development in that it reflects some reluctance to acknowledge a general right of personality, while on the other hand showing acceptance of the notion of specific, well-defined, and restricted personality rights. Only in the 1950s did a more principled approach emerge in the form of a judicially created 'general personality

[2] See 8–10 above. [3] See 147 above.
[4] See 96 above. [5] See 96–7 above. [6] See 105 above.

right'.[7] In France, on the other hand, the general principle set out in Article 1382 *Code civil* allowed a remedy, provided that a claimant could establish damage attributable to a 'faute', regardless of the precise nature of the legal interests that were affected, which extended to non-economic or moral harm.[8] French law, however, continues to reject the notion of a general personality right and the vague and diffuse nature of such a right remains difficult to reconcile with the notion of a subjective right which requires a precisely determined subject.[9]

It is quite striking that the development of enhanced protection for interests in personality has largely been the result of judicial initiatives rather than legislation.[10] This has particular relevance for common law countries where judges are reluctant to develop new remedies through case law development.[11] Although in France the right of privacy has a statutory basis in Article 9 of the *Code civil*, this was effectively a codification of a body of law developed by the courts, while the right to one's name and the right to one's image, though firmly established in French law, are purely the result of judicial and jurisprudential development.[12] The absence of a general personality right in Germany was long regarded as a policy matter more appropriate for legislation, but attempts at legislative reform were hampered by the concerns of the press about the harmful effect that such a sweeping right might have on free speech.[13] After the coming into force of the constitution of 1949 (*Grundgesetz*), however, the lack of a general provision protecting all aspects of the personality came to be seen as a gap in the law which could only be remedied by judicial initiative,[14] an approach which the English courts continue to reject.[15] Significantly, the judicial development of a general personality right relied on constitutional rights. While, according to the German doctrine of 'indirect horizontal effect' ('mittelbare Drittwirkung'), such rights cannot be enforced directly between private individuals, they can apply indirectly by influencing, rather than governing or overriding, the interpretation of private law norms and they can entitle the courts to fill gaps left by the code.[16] A similar process can be seen at work through the indirect influence of the values of the European Convention on Human rights on the development of the

[7] See 100 above. [8] See 149 above.
[9] See 154 above. [10] See 147 above.
[11] See 47 above. [12] See 153 above.
[13] These concerns were mirrored in the UK debate concerning the introduction of a statutory right of privacy which has continued from the 1960s until the present day: see 76–7 above.
[14] See 100 above. [15] See 93 above.
[16] See BVerfGE 34, 269 – *Soraya*.

English common law.[17] In the United States the right of privacy has largely been the work of the courts in most states. The early decisions relied, to some extent, on the provisions of written constitutions guaranteeing civil rights: the right of privacy was regarded as a corollary of the right to personal liberty guaranteed by the Federal and State Constitutions[18] which partly reflected the natural law idea of pre-existing moral rights such as the right to life and liberty. Such constitutional provisions provided useful bases for the development of new causes of action, although their vagueness could justify a number of legal innovations.[19] The English courts have been reluctant to develop a common law of privacy on the basis that legislative law reform is more appropriate, although the legislature shows no inclination to confront such a delicate issue.[20]

Perhaps the most striking difference is that, with the notable exception of the United States, common law jurisdictions have not followed an inductive course of reasoning from the particular to a general cause of action for invasion of privacy (although such a cause of action has proved to be conceptually problematic in the United States).[21] That said, German law relies on a number of different rights and provisions to protect various aspects of an individual's personality, such as name, voice and likeness. In Germany, most instances of unauthorised commercial exploitation of aspects of personality are dealt with on the statutory basis of the right to one's image (§ 22 *Kunsturhebergesetz*) and the right to one's name (§ 12 *BGB*). The general personality right, which is regularly invoked in cases concerning press intrusions into the private sphere of individuals or the publication of articles displaying a person in a false light, is only of restricted relevance in cases concerning the use of a person's indicia for commercial purposes. Nevertheless, even in disputes of this kind the general personality right serves as a doctrinal basis in exceptional cases, such as the unauthorised commercial exploitation of a well-known comedian's voice and style,[22] which are not covered by the rights to one's image or name. French law, on the other hand, differs from both German and English law in that tort liability is based on one general provision (Article 1382 *Code civil*), which provides that anyone who causes damage to another person by his fault has to compensate the damage caused by him. Thus the French courts were free to grant protection

[17] See 77 above and see 225 below.
[18] See, e.g., *Pavesich* v. *New England Life Assurance Co*, 50 SE 68 (1905) and see 51 above.
[19] L. Brittan, 'The Right of Privacy in England and the United States' (1963) 37 *Tul. L. Rev*. 235, 242–3.
[20] See 75–8 above. [21] See 53–64 above.
[22] OLG Hamburg GRUR 1989, 666 = [1990] IIC 881 – Heinz Erhardt.

against the misappropriation of a person's name or image without having to develop a general cause of action by inductive reasoning.

The more fluid approach to legal development allowed by systems lacking a doctrine of binding precedent in continental legal systems, which at first sight seems to account for these differences, probably has had little ultimate effect.[23] Codified systems depend on flexible and open-textured provisions, although their vagueness makes them impossible to apply in isolation. Rather, they provide a framework for case-by-case development which resembles the common law methodology. While the approach to precedent in France and Germany may not be as strict as in most common law jurisdictions, judgments of the higher courts have a high persuasive authority and are generally followed.[24] In Germany, the starting point in a personality rights case will be a statute such as § 823 *BGB*, but the broad statutory framework will be filled by reference to decisions handed down by the Federal Supreme Court. Thus the account of German law given in chapter 4 consists in large parts of an analysis of the case-law development rather than of statutory provisions. Within the common law systems, the stark differences between the United States and the other major systems which have yet to develop systematic protection for non-economic privacy interests may be explained by, amongst other factors, a looser approach to precedent.[25] Although, in many cases, a relatively small number of state authorities will be binding, in other cases there will be a choice from an array of case law which can provide support for almost any legal proposition. The courts have considerable leeway in applying a mass of precedents generated by the multiple jurisdictions and may choose between conflicting precedents on substantive policy or value grounds, rather than adhering to formal precedential authority. Moreover, American courts are rather more inclined to rely on substantive reasoning, involving moral, economic, political or institutional considerations, than on formal rules, while English courts adhere to formal reasoning, which is more rigidly rule based, and which excludes, overrides, or at least diminishes the weight of, countervailing substantive reasons.[26]

[23] See generally, K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, 1998), 259–65; Ohly, AcP 201 (2001), 1 et seq.

[24] See ch. 4 above.

[25] See generally, P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (Oxford, 1987), ch. 5; R. Cross and J. W. Harris, *Precedent in English Law*, 4th edn (Oxford, 1991), 19–20; Beverley-Smith, *The Commercial Appropriation of Personality*, 189–98.

[26] Atiyah and Summers, *Form and Substance*, ch. 1 and see, e.g., *Pavesich* v. *New England Life Assurance Co*, 50 SE 68 (1905), discussed at 51 above.

The influence of academic writing has been profound in this area, although this feature has been most remarkable in the development of US law. The famous Warren and Brandeis article[27] remains one of the few outstanding examples of the direct influence of scholarly opinion on the development of the common law. Prosser's reshaping of the privacy tort, which remains the basic modern conceptual source, was equally significant and is seen as at least partly responsible for the growth of the tort's status from a residual category to an expansive quadripartite cause of action.[28] In English law, on the other hand, there is a more rigid divide between academics and practitioners[29] and a traditional lack of willingness to cite academic writings,[30] with an over-reliance on narrow conceptual arguments at the expense of some of the wider implications.[31] In stark contrast to English judges, members of the German judiciary regularly refer to academic writing in their judgments. The development of personality rights in Germany owes much to the theoretical foundations laid by Gierke, Gareis and Kohler in the nineteenth century. However, the breakthrough for the general personality right in 1954 is not attributable, directly at least, to academic influences. In its *Schacht* judgment, in which the general personality right was accepted for the first time, the Federal Supreme Court acknowledged the importance of the theories of Gierke and Kohler, but made surprisingly little reference to contemporary academic writing. While the creation of the general personality right must thus be considered to be the result of judicial activism rather than academic thought, commentators have done much to structure the extensive mass of cases decided by the Supreme Courts and the lower courts since the 1950s. In its *Marlene Dietrich* judgment,[32] which has become the leading case for the modern copyright-oriented approach, the Federal Supreme Court extensively analysed the academic dispute between writers who are in favour of a property-like protection of the economic aspects of personality and those who argue for restricting the personality right to its non-economic aspects. Citations of academic writing abound.

[27] S. Warren and L. Brandeis 'The Right to Privacy' (1890) 4 *HarvLRev* 193.

[28] See D. W. Leebron, 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) *Case West Res L Rev* 769, 808 and T. E. White, *Tort Law in America – An Intellectual History* (Oxford, 1980) 177–8.

[29] See P. Birks, 'The Academic and the Practitioner' (1998) 18 *LS* 397, 401 and see Atiyah and Summers, *Form and Substance*, ch. 14 esp. 398 et seq.

[30] See, e.g., the comments of Lord Steyn in *White* v. *Jones* [1995] 2 AC 207, 235 and see B. S. Markesinis and N. Nolte 'Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places' in P. Birks (ed.) *Privacy and Loyalty* (Oxford, 1997), 113, 114.

[31] J. Steyn, 'Does Legal Formalism Hold Sway in England?' [1996] *CLP* 43, 54.

[32] BGHZ 143, 214 – *Marlene Dietrich*: on this judgment, see 104 above.

The three basic models of protection

The origin of personality protection in all legal systems analysed in the preceding chapters was the protection of a person's non-economic interests. For example, in the late nineteenth century the development of a right to privacy in the United States was premised on the need to protect inviolate personality, going beyond the protection that the pre-existing causes of action gave to interests of a proprietary or economic nature.[33] In both France and Germany a person's interests in the protection of his image, name or private sphere were also long regarded as purely non-commercial. Even in cases with an evident commercial background the courts felt the need to base their judgments on the damage to essentially non-economic or dignitary interests.[34] Since the second half of the twentieth century, however, the courts in all jurisdictions have acknowledged more openly that a celebrity's image has an economic value. While every categorisation tends to over-simplify and generalise, three basic models can be distinguished.

The model that conforms most closely to the traditional 'dignitary' approach is the concept of a purely defensive protection of personality interests, primarily by tort law. This model need not be rights-based. Its most important characteristic is the existence of rules prohibiting certain unauthorised acts such as the invasion of another person's private sphere, the disclosure of confidential information or the use of another person's name or picture. As long as these rules remain restricted to the protection of the private sphere or of confidential information they remain deficient, as the US experience and the emerging English case law illustrate. Many celebrities deliberately seek media attention, thus arguments based on privacy fail in many typical situations of commercial exploitation of personality.[35] When the unauthorised use of another person's picture or name is in itself regarded as tortious, however, the protection provided by tort law may be sufficient, as French law and the German cases before *Nena* and *Marlene Dietrich* show.[36] It may not even be necessary to distinguish between the protection of non-economic and economic interests. Under this model, however, licensing causes conceptual problems, since only positive rights can be licensed whereas a purely negative tort law protection can only be waived. The same applies to descendibility: only rights can be inherited. Nevertheless, post-mortem protection of a person's reputation is possible under this model, since a legal system can

[33] See 48–52 above. [34] For Germany see RGZ 74, 308 at 313 – *Graf Zeppelin*.
[35] See 64 above. [36] See 104 above.

provide rules that prohibit any interference with a deceased person's reputation.

The other extreme is the dualistic model that has developed in US law. Under this model there is a distinction between the protection of non-economic interests by the torts of defamation and invasion of privacy, whereas economic interests are protected by the right of publicity, which has developed into a fully fledged intellectual property right. It is transferable, licensable and, at least in many states, also descendible.[37] This model arguably conforms most closely to commercial practice, where binding contracts permitting the commercial use of a person's picture, name or other indicia are concluded as a matter of course. On the other hand, the jurisprudential and doctrinal justifications of this right are somewhat obscure. Incentive-based theories, which prevail in other areas of intellectual property law, particularly in patent law, hinge on the doubtful proposition that there is a nexus between, on the one hand the property incentive and, on the other hand, the process of developing recognition value and the more fundamental concern that stardom in itself is desirable in a modern society.[38] Justifications based on the protection of human dignity are less convincing where a particular commercial use of an aspect of personality is less harmful. The intellectual property approach may even be said to put human dignity at risk since the acceptance of binding contracts concerning specific features of an individual may neglect the fact that a personality develops over time and that a person thus may resent being bound by a contract concluded under different circumstances. If, for instance, a child's parents enter into a contract permitting the publication of certain photographs showing the child,[39] he or she should arguably have the right to revoke this permission after having reached the age of majority. Similarly, if an individual's image is treated as a property right like any other, detached from the individual's personality, then this might have rather undesirable consequences for the individual in certain circumstances such as divorce or bankruptcy.[40]

A third model attempts to steer a middle course. Under this model, the personality right is regarded as a hybrid right that protects both ideal and economic interests. This model, which has been adopted by the German

[37] See 70–3 above.
[38] See further, Beverley-Smith, *The Commercial Appropriation of Personality*, 299–308.
[39] See *Shields* v. *Gross* 461 NYS 2d 254 (contract permitting the publication of nude photographs of the child who was to become a famous actor was held to be binding and irrevocable).
[40] See, e.g., M. B. Jacoby and D. L. Zimmerman, 'Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity' (2002) 77 NYUL Rev 1322.

courts, is based on an analogy to copyright law which, according to German doctrine, protects the author's *droit moral* and his or her patrimonial rights under one single right. The consequence of this approach is that a complete transfer of a personality right is ruled out. Licensing is possible, but 'personality licenses' may be revocable under certain circumstances. The more limited the permission granted, the shorter the duration of the licence, and the more precise the description of the envisaged use of aspects of personality, the less the licence will be held to be revocable. The advantage of this model is that it tries to reconcile the demands of the markets for licensable and descendible personality rights with the need to protect a person's dignity. The disadvantage is legal uncertainty since in some cases the parties to a licensing agreement will not be sure whether the licence is revocable.

Property, intellectual property and personality

Early in its development the right of privacy in the United States developed distinctly 'proprietary' attributes before evolving into an autonomous right of publicity, with characteristics more akin to intellectual property rights than a right of personality,[41] thereby moving from the first to the second model outlined above. The right of publicity was labelled as a property right on its inception,[42] although this was not inherently significant and merely symbolised the fact that the courts would enforce a claim which had a pecuniary worth.[43] The immediate consequence of the shift in the underlying basis of liability from the right of privacy (protecting predominantly dignitary interests) to the right of publicity was that unlike a right of privacy, which was a purely personal right, a right of publicity could be freely assignable, and thus could give enforceable rights to third party licensees.[44] Later, plaintiffs sought to establish that the right of publicity could be descendible, pressing the 'property' metaphor even further. For the most part, this did not result from the bare fact that the right of publicity was categorised as a property right, although in some cases the courts did indeed base their decisions on the rather dubious reasoning that rights of property were descendible and since the right of publicity was a property right the right of publicity should, therefore, be descendible.[45] The mere fact that a right is labelled

[41] See 52–3 and 71 above.
[42] *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.*, 202 *F* 2d 866 (2nd Cir 1953), 868.
[43] *Ibid.*
[44] See *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc* 202 *F* 2d 866 (2nd Cir 1953).
[45] *Factors Etc. Inc.* v. *Pro Arts Inc.* 579 *F* 2d 215 (2nd Cir 1978), 221.

as a 'property' right does not automatically mean that particular consequences logically follow and that the property right will possess all the standard incidents of full ownership.[46]

The manipulation of a well-established concept such as property, and its gradual stretching, is one of the familiar common law techniques of embracing new rights. Interests are often labelled and protected as property rights even though they do not possess all the incidents of ownership in the full sense. While the courts choose to label a right as a 'property' right, this 'expresses a legal conclusion rather than any independent meaning'.[47] Although an interest labelled as a property right normally possesses certain characteristics in that it may be transferred to others, may be bequeathed, or may be liable to be seized to satisfy a judgment, an interest may qualify as property for certain purposes even though it lacks some attributes that a property right might usually possess.[48] The common forms of intellectual property are only property in a limited and metaphorical sense[49] and the fact that they are labelled as property rights does not, in itself, determine their scope. There is no necessary correlation between economic value and property rights and the idea that property automatically results from the fact that an intangible has exchangeable value is a 'massive exercise in question begging'.[50] Nevertheless, such reasoning has often been used to justify property rights in an individual's personality, seeking to base legal protection on economic value when, in fact, the economic value depends on the extent of the legal protection.[51]

Other systems have been more cautious and the relationship between personality rights and intellectual property rights remains to be resolved.[52] In France, the broad formulation of Article 1382 of the French *Code civil* encompassed most of the problems arising from unauthorised exploitation of name and likeness and it was not necessary to determine the precise juridical basis of the remedy. Gradually,

[46] See *First Victoria National Bank* v. *United States* 620 *F* 2d 1096 (1980), 1102–4.
[47] *First Victoria National Bank* v. *United States*, 620 *F* 2d 1096 (1980) 1103.
[48] *Ibid*., 1103–4. Cf. the full incidents of ownership set out by A. M. Honoré, 'Ownership' in A. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford, 1961), 107.
[49] See M. Lehmann, 'The Theory of Property Rights and the Protection of Intellectual and Industrial Property' (1985) 16 IIC 525, 530 et seq; R. Cotterell, 'The Law of Property and Legal Theory' in W. Twining (ed.), *Legal Theory and Common Law* (Oxford, 1986), 81.
[50] D. Lange, 'Recognizing the Public Domain' (1981) 44 Law and Contemp Probs 147, 157, cited in W. J. Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 *Virg L Rev* 149, 178. See also *WCVB-TV* v. *Boston Athletic Association* 926 *F* 2 d 42, 45 *per* Breyer C. J. (1st Cir. 1991).
[51] F. S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 809, 815.
[52] See 95 above.

however, the idea of an individual's property in himself, which would prevent the unauthorised use of an individual's name or likeness, began to be challenged with a new basis: the right of an individual to have his personality respected.[53] Personality rights have traditionally been conceived in French law as extrapatrimonial rights, which cannot be evaluated financially and only confer a negative right to prevent the unauthorised exploitation of attributes of personality, falling within the first model outlined above. The increasing commercial exploitation and marketing of such attributes is challenging this traditional view and the true focus, in many cases, is on the economic aspects rather than safeguarding an individual's moral integrity. Commentators began to acknowledge that the right to one's image had both economic and non-economic aspects drawing an analogy with copyright. Further, the courts started awarding substantial damages to compensate for the lost profit, rather than the nominal or symbolic awards traditionally made and expressly acknowledged the existence of a patrimonial right to one's image, distinct from the traditional personality right. The question whether French law recognises an economic right in one's image remains unsettled and is a question which is even further from being resolved in respect of other attributes of personality such as an individual's name, voice or aspects of an individual's private life.[54]

In Germany, there has been some reluctance in applying the term 'property' to a right in immaterial subject-matter, since the *Civil Code* (*Bürgerliches Gesetzbuch*) defines property as the absolute right in a chattel or in land (§ 903 *BGB*). Although the term 'intellectual property' (geistiges Eigentum) is used more frequently in German legal language, it is still by no means uncontroversial. Even apart from this terminological problem, German doctrine traditionally distinguished between economic rights ('property rights' from a common law perspective), which were assignable, and personality rights, which were seen as inseparably linked to the person. While trade marks, which were also initially regarded as personality rights,[55] are now seen as intellectual property rights, which may be licensed and assigned, and while copyright is a hybrid between property and a personality right,[56] the nature of personality rights remains somewhat uncertain. The traditionally prevailing view held that personality rights could not be assigned or licensed, although

[53] See 147–9 above. [54] See 153–6 above.

[55] See RGZ 69, 401 at 403; 108, 8 at 9; 113, 413 at 414; and the analysis of the former doctrine in *BGHZ* 143, 214 – *Marlene Dietrich*.

[56] § 11 of the German Copyright Act provides: 'Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilisation of his work.'

an individual could consent to certain uses.[57] The precise nature of such consent remains somewhat controversial and, particularly where the underlying theory is revocable consent, it is difficult to reconcile the commercial imperatives of the merchandising industries with the basic inalienability of personality rights.[58] Some commentators have argued for a separation between a personality right (protecting non-economic interests) and an intellectual property in certain aspects of personality such as name or image (providing a freely assignable intellectual property right). However, the prevailing view amongst proponents of licensing personality rights, who draw on the copyright model, favours a monistic approach, where one single right protects both economic and non-economic interests.[59] While the doctrinal basis remains unsettled, German law does allow a third party licensee a cause of action, and in some circumstances the economic interests protected by the personality right are not as closely linked to the personality as the non-economic interests.[60] While German law has long been prepared to protect a person's reputation even after his death, it was only recently that the Federal Supreme Court accepted the economic aspects of personality rights to be descendible. In this respect, personality rights have been approximated to copyright.

Privacy, freedom of expression and commercial appropriation under the European Convention on Human Rights

The differences between the systems examined in the preceding chapters remain stark, although there as signs of an emerging European consensus which, predictably, is taking place at the most abstract level both in determining the scope and extent of the right to private and family life enshrined in Article 8 of the European Convention on Human Rights and in determining the boundaries between this right and the competing right to freedom of expression in Article 10. The jurisprudence of Article 8 of the European Convention on Human Rights,[61] which protects a somewhat

[57] See 129–37 above. [58] See 132 above.
[59] See 133 above. [60] See 134 above.
[61] Article 8 provides that:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

disparate range of rights,[62] has been mainly concerned with state intrusion into an individual's private and family life (construed disjunctively).[63] While the notion of 'private life' has not been defined exhaustively, it has not been restricted to an 'inner circle' where an individual may live his life as he chooses to the exclusion of the outside world. The notion has been interpreted broadly as embracing an individual's right to establish and develop relationships with others 'for the development and fulfilment of one's own personality',[64] and also as potentially covering activities of a professional or business nature, since they provide a significant opportunity to develop relationships with the outside world.[65] Thus, 'private life' has been held to include an individual's physical and moral integrity,[66] aspects of personal sexuality,[67] and personal or private space.[68] It also embraces an individual's personal identity,[69] such as the right to choose his own name[70] and protection from activities such as surveillance and the holding of personal information by government authorities.[71]

A right to privacy or private life will often be in conflict with the right to freedom of expression. The Strasbourg jurisprudence has traditionally held freedom of expression, guaranteed by Article 10,[72] in

[62] See, generally, Jacobs and White, *European Convention*, ch. 10; C. Warbrick, 'The Structure of Article 8' [1998] *EHRLR* 32; D. Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' [1997] *EHRLR* 265; L. G. Loucaides, 'Personality and Privacy Under the European Convention on Human Rights' (1990) 61 *BYBIL* 175; J. Liddy, 'Article 8: The Pace of Change' (2000) 51 *NILQ* 397.

[63] See J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford, 1987), 211.

[64] *X* v. *Iceland*, 18 May 1976, (1976) 5 *DR* 86 (keeping of a dog not within the sphere of private life).

[65] *Niemietz* v. *Germany* (1993) 16 *EHRR* 97, 111 (search of business premises).

[66] *Costello-Roberts* v. *United Kingdom* (1995) 19 *EHRR* 112, 134.

[67] See, e.g., *Dudgeon* v. *United Kingdom* (1982) 4 *EHRR* 149 (regulation of homosexual relationships).

[68] See, e.g., *Chappell* v. *United Kingdom* (1990) 12 *EHRR* 1 (search order).

[69] See *Von Hannover* v. *Germany*, Application No. 59320, 24 June 2004, para. 50.

[70] See, e.g., *Burghartz* v. *Switzerland* (1994) 18 *EHRR* 101 (assumption of wife's family name by husband).

[71] See, e.g., *Malone* v. *United Kingdom* (1985) 7 *EHRR* 14.

[72] Article 10 provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

high regard as 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[73] The restrictions on freedom of expression which are 'necessary in a democratic society' require the existence of a 'pressing social need'.[74] Freedom of expression extends not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[75] Although some early cases sought to give freedom of expression a preferred status over other competing interests,[76] there is no formal hierarchy of rights. When rights collide, the competing claims must be balanced in the particular circumstances of the case. The greatest importance is attached to political expression. Artistic expression comes within the scope of Article 10, on the basis that it affords an opportunity to participate in, and exchange, cultural, political and social information and ideas, although the principles are applied rather less vigorously and with due regard to the duties and responsibilities imposed by Article 10(2).[77] Commercial expression, on the other hand, is regarded as less worthy of protection.[78] Although information of a commercial nature can be protected by Article 10, states enjoy a wide margin of appreciation (or discretion in determining the balance between Convention rights) in cases involving statements made in the field of commercial competition which have been held to fall outside the 'basic nucleus protected by freedom of expression' and receive a lower level of protection than other ideas or information.[79] Thus, even the publication of truthful information may be prohibited in certain circumstances where, for example, there is an obligation to respect the privacy of others or a duty to respect the confidentiality of certain commercial information.[80] However, when the interests concerned are not purely commercial and

[73] See, e.g., *Nilsen and Johnsen* v. *Norway* (2000) 30 *EHRR* 878, 908.
[74] *Sunday Times* v. *United Kingdom* (1979–80) 2 *EHRR* 245, 275.
[75] *Handyside* v. *United Kingdom* (1979–80) 1 *EHRR* 737, 754; *Zana* v. *Turkey* (1999) 27 *EHRR* 667, 689.
[76] See, e.g., *Handyside* v. *The United Kingdom* (1979–80) 1 *EHRR* 737, 753 and see, generally, Clayton and Tomlinson, *Human Rights*, 1077 and the references cited.
[77] *Muller* v. *Switzerland* (1991) 13 *EHRR* 212, 228 (display of sexually explicit artistic works).
[78] *X and Church of Scientology* v. *Sweden* App. No. 7805/77, 16 *DR* 68 (1979); Clayton and Tomlinson, *Human Rights*, 1067; C. R. Munro, 'The Value of Commercial Speech' (2003) 62 *CLJ* 134, 135.
[79] *Markt Intern and Beermann* v. *Germany* (1990) 12 *EHRR* 161, 173; *Jacubowski* v. *Germany* (1995) 19 *EHRR* 64, 77.
[80] *Markt Intern and Beermann* v. *Germany* (1990) 12 *EHRR* 161, 175 (publication of customer's expressions of dissatisfaction by company not justified by Art. 10).

involve a debate of general interest, such as public health, the extent of the margin of appreciation will be reduced.[81]

The limited ECHR cases involving appropriation of personality have usually concerned the taking and use of photographs by public authorities such as the police, where two factors are relevant: first, the manner in which the photographs were taken and whether they related to a public or private incident and, second, the purpose for which the photographs were taken and subsequently used.[82] Thus, in determining whether a positive obligation exists under Article 8(1), a fair balance must be struck between the general interest of the community and the interests of the individual.[83] Even if an invasion of privacy is established, such an interference may be justified by the exceptions in Article 8, para. 2.[84] For example, photographs taken by the police may readily be justified on the basis of prevention of disorder or crime.[85] Although the primary object of Article 8 is to protect the individual against arbitrary interference by public authorities, it is well-established that, beyond the primarily negative obligation, states have positive obligations under Article 8 to protect private and family life, even in the sphere of private relations between individuals.[86] State bodies are by no means the only infringers of privacy and a significant amount of such infringing action is undertaken by private bodies such as the press.

The balance between privacy and freedom of expression has swung decisively in favour of an individual's right of privacy in the action brought by Princess Caroline in the ECHR, challenging as inadequate the protection given by Germany to her private life and her image.[87] The German Federal Supreme Court had allowed the publication of pictures showing Princess Caroline of Hannover in public places,[88] although the

[81] *Hertel* v. *Switzerland* (1999) 28 EHRR 534, 571 (statements concerning safety of microwave ovens).

[82] See, e.g., *X* v. *United Kingdom*, Application No. 5877/72 (no infringement of privacy where an applicant was photographed against her will while under arrest and during detention following a demonstration, due to the lack of intrusion, the public nature of the events and the fact that the photographs had been taken to allow future identification) and see S. H. Naismith, 'Photographs, Privacy and Freedom of Expression' [1996] *EHRLR* 150, 151.

[83] *Cossey* v. *United Kingdom* (1990) 13 *EHRR* 622, 639 and see generally, R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford, 2000), 821.

[84] See note 61 above.

[85] See, e.g., *Murray* v. *United Kingdom* (1995) 19 *EHRR* 193 (taking and retention of photographs following arrest not a violation of Article 8).

[86] *X and Y* v. *Netherlands* (1985) 8 *EHRR* 235.

[87] *Von Hannover* v. *Germany*, Application No. 59320, 24 June 2004. On this decision, see Grabenwarter, AfP 2004, 309; Heldrich, *NJW* 2004, 2634; Ohly, *GRUR Int.* 2004, 902.

[88] *BGHZ* 131, 332.

court was prepared to protect the Princess's privacy whenever she had withdrawn to places which, while publicly accessible, were secluded from public sight. The Federal Constitutional Court affirmed this judgment, stressing the importance both of privacy protection and the freedom of the press.[89] The ECHR regarded the criterion of spatial isolation used in the German balancing test as too vague, giving excessive scope for the press to intrude into the lives of public figures *par excellence* such as Princess Caroline. Protection for such a person's private life could only be secured where an individual could establish that he or she was in a secluded place out of the public eye.[90] Thus, following the Caroline decision, the scope of private life extends to 'non-official' activities carried on in public.[91] The key test in determining the appropriate balance between Article 8 and Article 10 is the contribution that the photographs and articles would make to a debate of general interest.[92] The Court drew a distinction between reporting (controversial) facts capable of contributing to a debate in a democratic society relating to politicians and the exercise of their public functions, and the reporting of details of the private life of an individual who does not perform any official functions. In the latter case the 'watchdog' function of the press in imparting information and ideas on matters of public interest does not apply.[93] Where the sole purpose of the publication of photographs is to satisfy readers' curiosity regarding an individual's private life it cannot be said that such photographs contribute to any debate of general interest to society.[94] In such circumstances freedom of expression has to be given a narrow interpretation and the ECHR noted that it had, under American influence, to some extent made a fetish of freedom of the press. There was no legitimate public interest in knowing the whereabouts and behaviour of the Princess, even when she appeared in public. The publications in question did not concern the dissemination of 'ideas', but of images containing personal or even 'intimate' information about an individual which are often taken in a climate of continual harassment inducing a strong sense of intrusion or even persecution.[95]

This approach to the balancing exercise between privacy and the freedom of press is inspired by French law. The *Von Hannover* decision thus imposes a very high standard of protection for privacy on states that have so far given more weight to the freedom of the press. The basic level of

[89] *BVerfGE* 101, 361. [90] See 103 above.
[91] Cf *Campbell* v. *MGN Ltd* [2004] UKHL 22 (publication of photographs taken in public places only actionable in exceptional circumstances).
[92] *Von Hannover* v. *Germany*, Application No. 59320, 24 June 2004, paras 74–6.
[93] *Ibid*., para. 64. [94] *Ibid*., para. 65. [95] *Ibid*., para. 59.

privacy protection afforded in Europe is being harmonised upwards quite dramatically. Given that there is no uniform European standard concerning the protection of the private lives of individuals, the national courts should arguably be allowed a wider margin of appreciation. It is somewhat surprising that the judgment neither takes account of the considerable differences between the various European approaches to the protection of privacy nor defers to the decisions of the German courts, despite the fact that Germany has a relatively mature and sophisticated privacy law. The test of contribution to the public debate adopted by the ECHR can be criticised for being inherently vague. While a politician's official function is rather well defined, it is difficult to determine when a celebrity exercises an 'official function'. The public's legitimate interest in being informed arguably extends to public figures other than politicians and the role of the press as a watchdog should not be interpreted narrowly, particularly because the boundary between political commentary and entertainment is becoming increasingly blurred.[96] While the decision is not binding on the English or German courts, it must be taken into account in determining a question concerning a Convention right.[97] Under this approach a clear public interest will need to be shown to justify the publication of photographs, taken in public places, of an individual who does not hold office and is not participating in an 'official' event.

Von Hannover v. *Germany* is a typical case of press intrusion into the private life of an individual. The practical effects of the decision will be felt acutely by some sections of the press which depend on celebrity photo-reportage of limited informational value and by intrusive photographers who often take such photographs in a climate of harassment. Such press intrusion is an age-old problem,[98] although one that is becoming increasingly acute in more recent times, given the popular obsession with celebrity, which exists, to different degrees, in each of the countries surveyed in this study. It is, perhaps, rather more prevalent in the United Kingdom, and reflects the more limited respect traditionally given to privacy rights. In these situations, the balancing of the right of privacy and the freedom of the press is of paramount importance. In typical appropriation cases the case for the protection of privacy is even stronger. The use of a celebrity's picture or name in advertising or merchandising

[96] This has long been recognised by the US courts: see, e.g., *Winters* v. *New York* 333 *US* 507, 510 (1948); *Zacchini* v. *Scripps-Howard Broadcasting Co.* 433 *US* 562, 578 (1977) and see McCarthy, *The Rights of Publicity and Privacy*, 8.4 and see text above at 73.

[97] *Human Rights Act 1998*, s 2.

[98] See Warren and Brandeis, 'The Right to Privacy', 196.

does not provide the public with socially useful information or contribute in any way to a debate of public interest. Following the ECHR's reasoning, Article 8 of the Convention arguably imposes an obligation on the member states to protect individuals against any misappropriation of their personal indicia in advertising or merchandising. A free speech defence will only be available in exceptional cases.

Indeed, the free speech implications in appropriation cases, particularly in advertising and merchandising, tend to be less acute. The fundamental underlying principles of free speech, such as the self-government rationale, the search for truth or autonomy and self-development,[99] are rarely engaged. What is often at stake is a purely commercial conflict between the respective commercial interests of advertisers and the individuals whose images are used. For example, while the German Constitutional Court has decided that commercial speech may also be protected by the freedom of opinion guaranteed in Article 5 of the German Constitution, protection is weaker where the particular statement contains correspondingly less information or opinion of public interest. Advertisements suggesting that a certain product has been endorsed by a celebrity, or merchandise displaying the portrait or the name of a celebrity, do not add much to the public discourse. Thus the courts have regularly held that the unauthorised publication of a celebrity's picture for purposes of advertising or merchandising usually amounts to a violation of the celebrity's justified interests and can thus be enjoined on the basis of § 23 II *Kunsturhebergesetz*. Borderline cases are photographs of sportsmen published on collectors' cards and football calendars or a commemorative coin displaying the portrait of a well-known politician. While press coverage of their lives is the price that celebrities have traditionally had to pay for being famous, they do not have to tolerate the commercial exploitation of their personal indicia. Similarly, in France, the use of the image of a well-known celebrity or politician in an advertisement will not usually be allowed given that such an advertisement is likely to be devoid of any informational content. The usefulness criterion will also prevent the publication of intrusive images to illustrate news items, unless the event has occurred in the recent past and, even then, any publication must not harm the dignity of the individual concerned. Of course, the borderline between advertising and news is often difficult to identify. Celebrity images are often used to sell newspapers or magazines, which are products like any other, and the presence

[99] See E. Barendt, *Freedom of Speech* (Oxford, 1985), 191.

of a celebrity image will often boost circulation figures and advertising revenues. In many cases the news element will be minimal.[100]

Conclusions: a gradual convergence?

The differences between the major common law and civil law systems remain profound and there has been little cross-fertilisation let alone transplantation of legal concepts. Nevertheless, there are signs of a gradual convergence. Most obviously, the English courts are providing a higher basic level of protection in cases of appropriation of personality, overcoming their traditional reluctance by extending the scope of the established causes of action in passing off and breach of confidence. Such pragmatic incremental change is not without its drawbacks[101] but it is typically in keeping with the common law's gradual evolution. It falls some way short, however, of the principled development advocated by an increasing number of commentators.

Of greater interest are the signs of a more fundamental European convergence, at least at the most abstract level, in privacy protection. Unsurprisingly, there is no such convergence of the laws relating to unfair competition, which remain much more disparate and are not subject to a common interpretative structure.[102] The most important features of the emerging European convergence can be seen both in the nuanced and context-specific approach to the distinction between an individual's public and private life and in the spatial scope of privacy. French law has long recognised that public figures enjoy, in principle, the same personality rights as unknown persons and there is no simple presumption that a public figure has waived any legal protection for privacy rights by taking part in public life. What justifies the unconsented use of a celebrity's personality is a context-specific examination of the extent of the public's right to know, which will naturally vary according to the degree and nature of the fame of the individual concerned. Politicians or others who hold public office and show-business celebrities must be ready to tolerate a greater degree of intrusion into their personal sphere than private individuals. The key factor will be the extent to which the courts regard the information as useful in informing the public, which will exclude publications that are made purely to further the commercial interests of the advertisers concerned. Purely commercial uses will usually be prevented.[103] Similarly, German law has rejected the simplistic argument that any unconsented use of the image of a public figure can be justified on the basis that the individual concerned is an absolute person

[100] See 74 above. [101] See 93 above.
[102] See 6–8 above. [103] See 177 above.

of contemporary history. There must be some public interest justification for using the image of such an individual and the commercial interests of the advertiser will be insufficient.[104] A similar approach is developing in English law, although there has been no explicit reference to the French and German jurisprudence. A person's status as a public figure and the fact that certain aspects of that person's life might be newsworthy does not deprive the individual of a right to privacy and only forms part of the general balancing exercise.[105] Moreover, the fact that an individual previously may have courted publicity regarding certain aspects of his life does not amount to a waiver of privacy in respect of every aspect of that individual's life.[106] France has long recognised that spatial considerations are not conclusive and the German courts have more recently acknowledged that the private sphere extends beyond the purely domestic environment.[107] More recently, English law has recognised, falling in line with the Strasbourg jurisprudence,[108] that a person may have a reasonable expectation of privacy in certain circumstances even in public places.[109] While the mere fact that a photograph is taken covertly is not sufficient to make it an actionable breach of confidence,[110] this marks the development of a subtle, context-specific, approach, giving rather more weight to privacy interests than the American jurisprudence, which gives wide latitude to publication of photographs of activities carried out in public places.[111]

The high minimum threshold of protection required by the ECHR, which will apply in cases of purely commercial exploitation, where the countervailing free speech implications are much weaker, will inevitably force English law to confront the issue of how best to develop a remedy for appropriation of personality. The comparative insights gained from the preceding chapters show that a remedy for commercial appropriation is not inextricably linked to the broader question of the desirability, scope and nature of a general right to privacy. European developments have often been rather more piecemeal and pragmatic than would first appear to a common lawyer. Systems that are at a more advanced stage of evolution and offer a higher basic level of protection, such as France and Germany, have rather more intricate problems to confront in determining the nature and scope of the various personality rights. For the

[104] See 106 above.
[105] *Campbell* v. *MGN* [2004] *UKHL* 22, para. 120 and see 91–2 above.
[106] *Campbell* v. *MGN* [2004] UKHL 22. Cf. *Woodward* v. *Hutchins* [1977] WLR 760, 765; *Lennon* v. *News Group Newspapers* [1978] *FSR* 573.
[107] See 116 above. [108] See *Peck* v. *United Kingdom* (2003) *EHRR* 287.
[109] *Campbell* v. *MGN Ltd* [2004] *UKHL* 22. [110] *Ibid.*, para. 154.
[111] See generally McCarthy, *Rights of Publicity and Privacy*, 5.88.

comparative lawyer there is plenty of scope to explore the significant differences in the level of substantive protection and the juridical bases of the panoply of different rights and causes of action that exist in the major European jurisdictions to address the same basic problem. These differences certainly remain, despite the general convergence outlined above. Reconciling the economic and non-economic aspects of personality provides challenges for the individual systems, which can be met rather more readily with a basic awareness and understanding of the intricacies of neighbouring jurisdictions. These are not purely theoretical concerns in a market-place where the commodity of an individual's recognition value is truly global. Fundamental questions concerning the precise nature of personality rights, which often arise in addressing the practical problems of licensing and assignment, are only beginning to be addressed. Analogies to, and assimilation with, the various forms of intellectual property rights, although fascinating, have their natural limits.

Bibliography

Acquarone, D., '*L'ambiguïté du droit à l'image*', *D.* 1985, chr., 129 s.

Adams, J., *Character Merchandising* (2nd edn) (London: Butterworths, 1996).

Ahrens, C., *Die Verwertung persönlichkeitsrechtlicher Positionen* (Würzburg: Ergon-Verlag, 2002).

Amelung, K., 'Die zweite Tagebuchentscheidung des BVerfG', *NJW* 1990, 1753–60.

Anonymous, Note (1930) ALJ 359.

Arnold, M. S., Green, T. A., Scully, S. A., and White, SD (eds), *On the Laws and Customs of England* (Chapel Hill: University of North Carolina Press, 1981).

Arnold, R., '*Circumstances Importing an Obligation of Confidence*' (2003) 119 *LQR* 193.

Atiyah, P. S., and Summers, R. S., *Form and Substance in Anglo-American Law* (Oxford: Oxford University Press, 1987).

Auvret, P., '*Protection civile des droits de la personnalité*', Juris-Classeur Communication, 2002.

Bagshaw, R., 'Obstacles on the Path to Privacy Torts' in P. Birks (ed.) *Privacy and Loyalty* (Oxford: Oxford University Press 1997).

Baird, D. G., 'Common Law Intellectual Property and the Legacy of *International News Service v Associated Press*' (1983) 50 *U Chi L Rev* 411.

Baker, J. H., *An Introduction to English Legal History* (3rd edn) (London: Butterworths, 1990).

Barendt, E., 'Privacy as a Constitutional Right and Value' in P. Birks (ed.) *Privacy and Loyalty* (Oxford: Clarendon Press, 1997).

'*What Is the Point of Libel Law?*' [1999] *CLP* 110.

Barendt, E. M. (ed.), *The Yearbook of Media and Entertainment Law 1995* (Oxford: Clarendon Press, 1995).

'Privacy and the Press' in E. M. Barendt (ed.), *The Yearbook of Media and Entertainment Law 1995* (Oxford: Clarendon Press, 1995).

Freedom of Speech (Oxford: Clarendon Press, 1985).

Barnett, S. R., 'The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy' (1996) 18 *Hastings Comm & Ent LJ* 593.

Barnett, S. R., 'The American Right of Publicity and Visual Art: Solutions for the Growing Conflict' (Paper presented at the Congress of ATRIP, New Delhi, 6–8 October 2002).

Baston-Vogt, M., *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts* (Tübingen: Mohr Siebeck, 1997).

Beckerman, J. S., 'Adding Insult to *Iniuria*: Affronts to Honor and the Origins of Trespass' in M. S. Arnold, T. A. Green, S. A. Scully, and S. D. White, (eds), *On the Laws and Customs of England* (Chapel Hill: University of North Carolina Press, 1981).

Beier, F. K., 'The Law of Unfair Competition in the European Commmunity – Its Development and Present Status' [1985] *EIPR* 284.

Beignier, B., *L'honneur et le droit*, Paris 1995, LGDJ.

Le droit de la personnalité, Paris 1992, PUF, coll. Que sais-je?

Benn, S. I., 'The Protection and Limitation of Privacy' (1978) 52 *ALJ* 601.

Bergmann, S., 'Publicity Rights In the United States and Germany: A Comparative Analysis' (1999) 19 *LoyLA Ent LJ* 479.

Berkman, H. I., 'The Right of Publicity-Protection For Public Figures and Celebrities' (1976) 42 *Brook L Rev* 527.

Bertrand, A., *Droit à la vie privée et droit à l'image* (Paris: Litec, 1999).

Beuthien, V. und Schmölz, A. S., *Persönlichkeitsschutz durch Persönlichkeitsgüterrechte*, München: Beck, 1999.

Beuthien, V., 'Postmortaler Persönlichkeitsschutz auf dem Weg ins Vermögensrecht', *ZUM* 2003, 261–2.

'Was ist Vermögenswert, die Persönlichkeit oder ihr Image?' *NJW* 2003, 1220–2.

Beverley-Smith, H., *The Commercial Appropriation of Personality* (Cambridge: Cambridge University Press, 2002).

Bigot, C., '*La poursuite de la rénovation du régime de l'atteinte à la vie privée*', *D.* 2003, 1854s.

'*Protection des droits de la personnalité et liberté de l'information*', *D.* 1998, chr., 235 s.

Bingham, T., 'Should There Be a Law to Protect Rights of Personal Privacy?' [1996] *EHRLR* 450.

Birks, P., 'The Academic and the Practitioner' (1998) 18 *LS* 397.

Black, H. C. et al., *Black's Law Dictionary* (6th edn) (St Paul, Minn: West Publishing Co., 1990).

Bloustein, E. J., 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *NYULRev* 962.

'Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory' (1978) 12 *GaLRev* 429.

Borchard, W., 'The Common Law Right of Publicity is Going Wrong in the US' [1992] *Ent LR* 208.

Boyd, S., and Jay, R., 'Image Rights and the Effect of the *Data Protection Act 1998*' [2004] *Ent LR* 159.

Brittan, L., 'The Right of Privacy in England and the United States' (1963) *Tulane L Rev* 235.

Burns, P., 'The Law of Privacy: The Canadian Experience' (1976) 54 *CanBarRev* 1.

Buxton, R., 'The Human Rights Act And Private Law' (2000) 116 *LQR* 48.

Calcutt, D., *Report of Press Self-Regulation* Cm 2135 (London: HMSO, 1993).

Report of the Committee on Privacy and Related Matters Cm1102 (London: HMSO 1990).
Canaris, C.-W., 'Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts' in Hans-Jürgen Ahrens et al. (eds), *Festschrift für Erwin Deutsch zum 70. Geburtstag* (Köln: Carl Heymanns, 1999), pp. 85–109.
'Grundrechte und Privatrecht', *AcP* 184 (1984) 201–46.
Cane, P., 'The Basis of Tortious Liability' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991).
Carter-Ruck, P. F., *Carter-Ruck on Libel and Slander* (4th edn) (London: Butterworths, 1992).
Carty, H., 'Character Merchandising and The Limits of Passing Off' 1993 *LS* 289.
'Dilution and Passing Off: Cause for Concern' (1996) 112 *LQR* 633.
'Heads of Damage in Passing Off' [1996] *EIPR* 487.
'Passing Off and the Concept of Goodwill' [1995] *JBL* 139.
Chromecek, M., and McCormack, S. C., *World Intellectual Property Guidebook Canada*, (New York: Mathew Bender, 1991).
Clayton, R., and Tomlinson, H., *The Law of Human Rights* (Oxford: Oxford University Press 2000).
Cohen, F. S., 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colum L Rev* 809.
Cornish, W. R., 'Genevan Bootstraps' [1997] *EIPR* 336.
Cornish, W. R., and Llewelyn, D., *Intellectual Property* (5th edn) (London: Sweet & Maxwell, 2003).
Cotterell, R., 'The Law of Property and Legal Theory' in W. Twining (ed.), *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986).
Craig, J. D. R., 'Invasion of Privacy and Charter Values: The Common Law Tort Awakens' (1997) 42 *McGill LJ* 355.
Cross, R., and Harris, J. W., *Precedent in English Law* (4th edn) (Oxford: Clarendon Press, 1991).
D'Amato, A., 'Comment on Professor Posner's Lecture on Privacy' (1978) 12 *GaLRev* 497.
Dasch, Norbert, *Die Einwilligung zum Eingriff in das Recht am eigenen Bild* (München: Beck, 1990).
David, René, *English Law and French Law: A Comparison in Substance* (London & Culcutta: Stevens & Sons/Eastern Law House, 1980).
de Haas, C., 'France', in Henry, M. (ed.), *International Privacy, Publicity and Personality Laws* (London: Butterworths, 2001) 136.
Decker, M., *Aspects internes et internationaux de la protection de la vie privée en droits français, allemand et anglais*, *PUAM* 2001.
Department of National Heritage, *Privacy and Media Intrusion: The Government's Response* Cm 2918 (London: HMSO, 1995).
Department of Trade and Industry, *Reform of Trade Marks Law* Cm 1203 (London: HMSO 1990).
Derieux, E., 'Référé et liberté d'expression', *JCP* 1997, I, 4053.
Deutsch, E., 'Medizinische Genetik und Genomanalyse', *VersR* 1994, 1–5.
Dietz, A., *Das Droit Moral des Urhebers im neuen französischen und deutschen Urheberrecht* (München: Beck, 1968).

Dreier, T. und S., Gernot, *Urheberrechtsgesetz, Kommentar* (München: Beck, 2004).
Dreyer, E., '*Image des personnes, Juris-Classeur Communication*', Fascicule 3750, 2002.
Drysdale, J., and Silverleaf, M., *Passing Off Law and Practice* (2nd edn) (London: Butterworths, 1994).
Dworkin, G., 'The Common Law Protection of Privacy' (1967) 2 *U Tas LR* 418.
Dworkin, R., *Taking Rights Seriously* (London: Duckworth, 1977).
Eady, D., 'A Statutory Right to Privacy' [1996] *EHRLR* 243.
Epstein, R. A., 'A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic' (1980) *J Legal Studies* 605.
'Privacy, Property Rights, and Misrepresentations' (1978) 12 *GaLRev* 455.
Erman, W. (ed.), *Handkommentar zum Bürgerlichen Gesetzbuch*, vol. 1 (§§ 1–853), 11th edn (Münster: Aschendorff Rechtsverlag, 2004).
Faulks, Sir N., *Report of the Committee on Defamation*, Cmnd 5909 (London: HMSO, 1975).
Fawcett, J. E. S., *The Application of the European Convention on Human Rights* (2nd edn) (Oxford: Clarendon Press, 1987).
Felcher, P. L., and Rubin, E. L., 'Privacy, Publicity, and the Portrayal of Real People by the Media' (1979) 88 *Yale LJ* 1577.
'The Descendibility of the Right of Publicity: Is There Commercial Life After Death?' (1980) 89 *Yale LJ* 1125.
Feldman, D., 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 *CLP* 41.
'Human Dignity as a Legal Value – Part I' [1999] *PL* 682, Part II [2000] *PL* 61.
'Privacy-related Rights and Their Social Value' in P. Birks (ed.), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997).
'The Developing Scope of Article 8 of the European Convention on Human Rights' [1997] *EHRLR* 265.
Fenwick, H., and Phillipson, G., 'Confidence and Privacy: A Re-Examination' (1996) 55 *CLJ* 447.
Flagg, M. A., 'Keeping the Right of Publicity Out of Canadian Law' 13 *IPJ* (1999) 179.
Fleming, J. G., *The American Tort Process* (Oxford: Oxford University Press, 1988).
Forkel, H., 'Lizenzen an Persönlichkeitsrechten durch gebundene Rechtsübertragung', *GRUR* 1988, 491–501.
Gebundene Rechtsübertragungen (Köln et al.: Carl Heymanns, 1977).
Freund, P. A., 'Privacy: One Concept or Many?' in J. R. Pennock and J. W. Chapman (eds), *Privacy* (New York: Atherton Press, 1971).
Fridman, G. H. L., *Fridman on Torts* (London: Waterlow, 1990).
Fried, C., 'Privacy' (1968) 77 *Yale LJ* 475.
Gaillard, E., '*La double nature du droit à l'image et ses conséquences en droit positif français*', *D.* 1984, chr., 161 s.
Gareis, K., 'Das juristische Wesen der Autorenrechte, sowie des Firmen- und des Markenschutzes' *AdHWR* 35 (1877) 185–209.
Gavison, R., 'Privacy and the Limits of Law' (1980) 89 *Yale LJ* 421.

Privacy and Its Legal Protection, DPhil thesis, University of Oxford (1975).
Gerety, T., 'Redefining Privacy' (1977) 12 *Harv CR-CL Law Rev* 233.
Gibson, D., 'Common Law Protection of Privacy: What To Do Until the Legislators Arrive' in L. Klar (ed.), *Studies in Canadian Tort Law* (Toronto: Butterworths, 1977), 343.
Gierke, O. von, *Deutsches Privatrecht, vol. 1, Allgemeiner Teil und Personenrecht* (Leipzig: Duncker & Humblot, 1895).
Goodenough, O. R., 'The Developement of the Right of Publicity in the United States' [1992] *EIPR* 55.
Goodman, E. J., 'National Identity Crisis: The Need For a Federal Right of Publicity Statute' (1999) 9 *DePaul-LCA J Art & Ent L* 227.
Gordon, W. J., 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 *Virg L Rev* 149.
Götting, H.-P., 'Sanktionen bei Verletzung des postmortalen Persönlichkeitsrechts' *GRUR* 2004, 801–8.
'Die Vererblichkeit der vermögenswerten Bestandteile des Persönlichkeitsrechts – ein Meilenstein in der Rechtsprechung des BGH' *NJW* 2001, 585–7.
'Persönlichkeitsmerkmale von verstorbenen Personen der Zeitgeschichte als Marke' *GRUR 2001*, 615–23.
Persönlichkeitsrechte als Vermögensrechte (Tübingen: Mohr Siebeck, 1995).
Gounalakis, G., *Privacy and the Media. A Comparative Perspective* (Munich: Beck, 2000).
Grabenwarter, C., 'Schutz der Privatsphäre versus Pressefreiheit – Europäische Korrektur eines deutschen Sonderweges?' *AfP* 2004, 309–16.
Gregoritza, A., *Die Kommerzialisierung von Persönlichkeitsrechen Verstorbener* (Berlin: Duncker & Humblot, 2003).
Gridel, J.-P., '*Retour sur l'image du préfet assassiné: dignité de la personne humaine et liberté de l'information d'actualité*', *D.* 2001, chr., 872 s.
Gross, H., 'The Concept of Privacy' (1967) 42 *NYULRev* 34.
Grosz, S., Beatson, J. and Duffy, P., *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell, 2000).
Hamilton, M. A., et al., 'Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress' (1998) 16 *Cardozo Arts & Entertainment Law Journal*, 209.
Harper, F. W., and James, F., *The Law of Torts* (Boston: Little, Brown & Co., 1956).
Hart, H. L. A., *The Concept of Law* (2nd edn) (Oxford: Clarendon Press, 1994).
Hauch, 'Protecting Private Facts in France: The Warren and Brandeis Tort is Alive and Well and Flourishing in Paris' 68 *Tul. L. Rev.* (1994) 1219.
Heldrich, A., 'Der Persönlichkeitsschutz Verstorbener', in K. Kuchinke (ed.), *Rechtsbewahrung und Rechtsentwicklung, Festschrift für Heinrich Lange zum 70. Geburtstag* (München: Beck, 1970) pp. 163–78.
'Persönlichkeitsschutz und Pressefreiheit nach der Europäischen Menschenrechtskonvention' *NJW* 2004, 2634–6.
Helle, J., 'Die Einwilligung beim Recht am eigenen Bild' *AfP* 1985, 93–101.
Besondere Persönlichkeitsrechte im Privatrecht (Tübingen: Mohr Siebeck, 1991).
Henkin, L., 'Privacy and Autonomy' (1974) 74 *Colum L Rev* 1410.

Henry, M., (ed.), *International Privacy, Publicity and Personality Laws* (London: Butterworths, 2001).
Heydon, J. D., *Economic Torts* (2nd edn) (London: Sweet & Maxwell, 1978).
Hixson, R. F., *Privacy in a Public Society* (New York: Oxford University Press, 1987).
Hoffman, S. J., 'Limitations on the Right of Publicity' (1980) *Bull Copyright Soc'y* 111.
Holdsworth, W. S., 'Defamation in the Sixteenth and Seventeenth Centuries' (1924) 40 *LQR* 302.
Honoré, A. M., 'Ownership' in A. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961).
Hoppe, T., *Persönlichkeitsschutz durch Haftungsrecht* (Berlin: Duncker & Humblot, 2001).
Howell, R. G., 'Is There an Historical Basis for the Appropriation of Personality Tort?' (1988) 4 *IPJ* 265.
'Personality Rights: A Canadian Perspective: Some Comparisons With Australia' (1990) 1 *IPJ* (Australia) 212.
'The Common Law Appropriation of Personality Tort' (1986) 2 *IPJ* 149.
Huet-Weiller, D., '*La protection juridique de la voix humaine*', *RTD civ.* 1982, 497 s.
Hunt, M., 'The "Horizontal Effect" of the *Human Rights Act*' [1998] *PL* 423.
Irvine, J., 'The Appropriation of Personality' in D. Gibson (ed.), *Aspects of Privacy Law* (Toronto: Butterworths, 1980).
Jacobs, F. G., and White, R. C. A., *The European Convention on Human Rights* (2nd edn) (Oxford: Oxford University Press, 1996).
Jacoby, M. B., and Zimmerman, D. L., 'Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity' (2002) 77 *NYUL Rev* 1322.
Jhering, R. von, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. III (4th edn) (Leipzig: Breitkopf und Härtel, 1888).
Justice (Society), Committee on Privacy, *Privacy and the Law* (London: Stevens & Sons, 1970).
Kalven, H., 'Privacy in Tort Law: Were Warren and Brandeis Wrong?' (1966) 31 *Law & Contemp Prob* 326.
Kamperman Sanders, A., *Unfair Competition Law* (Oxford: Clarendon Press, 1997).
Kayser, P., 'Les droits de la personnalité. Aspects théoriques et pratiques' *RTD civ.* 1971, 445s.
'Les pouvoirs du juge des référés civil à l'égard de la liberté de communication et d'expression', *D.* 1989, chr., 11 s.
La protection de la vie privée par le droit, 3rd edn 1995, Economica & PUAM.
Keeton, W. P., *Prosser and Keeton on the Law of Torts* (5th edn) (St Paul: West Publishing Co., 1984).
Klar, L., (ed.), *Studies in Canadian Tort Law* (Toronto: Butterworths, 1977).
Klar, L. N., *Tort Law* (Toronto: Carswell, 1991).
Klippel, D., *Der zivilrechtliche Schutz des Namens* (Paderborn et al.: Schöningh, 1985).
Knaak, R., *Das Recht der Gleichnamigen* (Köln et al.: Carl Heymanns, 1979).
Köhler, H., and Piper, H., *Gesetz gegen den unlauteren Wettbewerb, Kommentar* (3rd edn) (München: Beck, 2002).

Kohler, J., '*Die Idee des geistigen Eigenthums*', *AcP* 82 (1894) 141.
Lehrbuch des Bürgerlichen Rechts, *vol. 2, part 1* (Berlin: Carl Heymanns, 1906).
Kötz, H. und Wagner, G., *Deliktsrecht* (9. Aufl.) (Neuwied et al., Luchterhand: 2001).
Kwok, R., '*Cardtoons v. Major League Baseball Players Association:* Fair use or Foul Play?' (1998) *UCLA Ent L Rev* 315.
Lange, D., 'Recognizing the Public Domain' (1981) 44 *Law and Contemp Prob* 147.
Langenbucher, K., 'Argument by Analogy in European Law' [1998] *C.L.J.* 481–521.
Larenz, K. und Canaris, C.-W., *Lehrbuch des Schuldrechts*, vol. II/2 (13th edn) (München: Beck, 1994).
Leebron, D. W., 'The Right to Privacy's Place in the Intellectual History of Tort Law' (1991) 41 *Case West Res L Rev* 769.
Lehmann, M., 'The Theory of Property Rights and the Protection of Intellectual and Industrial Property' (1985) 16 *IIC* 525.
Leigh, I., 'Horizontal Rights, The Human Rights Act and Privacy: Lessons From the Commonwealth' (1999) 48 *ICLQ* 57.
Lepage, A., '*L'ampleur de la protection de la vie privée (de la célébrité et du temps quipasse)*' *CCE* 1999, chr., p. 13 s.
'*L'indemnisation du préjudice résultant d'atteintes aux droits au respect de la vie privée et à l'image dans la jurisprudence récente*' *CCE juillet-août* 2001, chr., p. 17 s.
Libertés et droits fondamentaux à l'épreuve de l'internet (Paris: LGDJ, 2002).
Lester, A. and Oliver, D. (eds), *Constitutional Law and Human Rights* (London: Butterworths, 1997).
Liddy, J., 'Article 8: The Pace of Change' (2000) 51 *NILQ* 397.
Linden, L. M., *Canadian Tort Law* (4th edn) (Toronto: Butterworths, 1988).
Lindon, R., '*Le juge des référés et la presse*' *D.* 1985, chr., 61 s.
Les droits de la personnalité (Paris: Dalloz, coll. Dictionnaire juridique, 1983).
Logeais, I., 'The French Right to One's Image: A Legal Lure?', [1994] *Ent. Law Rev* 163.
Logeais, I., Schroeder J-B., '*The French Right of Image: An Ambiguous Concept Protecting The Human Persona*', 18 *Loyola of Los Angeles Entertainment Law Journal* (1998) 511.
Loiseau, G., 'Des droits patrimoniaux de la personnalité en droit français' 42 *Rev. Droit McGill* (1997) 319.
Le nom, objet d'un contrat (Paris: LGDJ, 1997).
Loucaides, L. G., '*Personality and Privacy Under the European Convention on Human Rights*' (1990) 61 *BYBIL* 175.
Lucas-Schloetter, A., *Droit moral et droits de la personnalité*, *PUAM* 2002.
Lucas-Schlötter, A., 'Die Rechtsnatur des Droit Moral' *GRUR Int.* 2002, 809–15.
MacCormick, N., 'A Note Upon Privacy' (1973) 89 *LQR* 23.
'Privacy: A Problem of Definition?' (1974) 1 *JLS* 75.
Madow, M., 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *Calif L Rev* 125.
Magold, H. A., *Personenmerchandising* (Frankfurt et al.: 1994).
Marino, L., '*Les contrats portant sur l'image des personnes*', *CCE mars* 2003, Chr. No. 7, pp. 10–12.

Responsabilité civile, activité d'information et médias, *PUAM-Economica* 1997.
Markesinis, B. S., (ed.), *Protecting Privacy* (Oxford: Oxford University Press, 1999).
'Our Patchy Law of Privacy – Time to Do Something About It' (1990) 53 *MLR* 802.
'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons From Germany' (1999) 115 *LQR* 47.
The German Law of Obligations, Vol II, The Law of Torts: A Comparative Introduction (Oxford: Clarendon Press, 1997).
Markesinis, B. S., and Enchelmaier, S., 'The Applicability of Human Rights as Between Individuals Under German Constitutional Law' in B. S. Markesinis, (ed.), *Protecting Privacy* (Oxford: Oxford University Press, 1999).
Markesinis, B. S., and Nolte, N., 'Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places' in P. Birks (ed.) *Privacy and Loyalty* (Oxford: Clarendon Press, 1997).
Marsh, N. S., 'Hohfeld and Privacy' (1973) 89 *LQR* 183.
Martino, T., *Trademark Dilution* (Oxford: Oxford University Press, 1996).
Massis, T., '*Le secret du président et le juge des référés*', *D.* 1997, chr., 291 s.
McMullan, J., 'Personality Rights in Australia' (1997) 8 *AIPJ* 86.
McCarthy, J. T., *The Rights of Publicity and Privacy* (2nd edn) (New York: Clark Boardman Callaghan, 2001).
McCarthy on Trade Marks and Unfair Competition (4th edn) (St Paul, Minn: West Publishing, 1999).
The Rights of Publicity and Privacy (New York: Clark Boardman Callaghan, 1997).
McLean, D., 'False Light Privacy' (1997) 19 *Comm & L* 63.
Medicus, D., *Bürgerliches Recht* (18th edn) (Köln, et al.: Carl Heymanns, 1999).
Metzger, A., *Rechtsgeschäfte über das Droit moral im deutschen und französischen Urheberrecht* (München: Beck, 2002).
Milmo, P., and Rogers, W. V. H., *Gatley on Libel and Slander* (10th edn) (London: Sweet & Maxwell, 2004).
Montero, E., 'La responsabilité civile des médias', in A. Strowel & F. Tulkens (eds), *Prévention et réparation des préjudices causés par les médias* (Bruxelles: edn Larcier, 1998).
Morcom, C., Roughton, A., Graham, J., *The Modern Law of Trade Marks* (London: Butterworths, 1999).
Morgan, J., 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 *CLJ* 444.
Morison, W. L., 'Unfair Competition and Passing Off – The Flexibility of a Formula' (1956) 2 *Sydney L Rev* 50.
Münchener Kommentar zum BGB, vol. 1 (§§ 1–240) (4th edn) (München: 2001).
Naismith, S. H., 'Photographs, Privacy and Freedom of Expression' [1996] *EHRLR* 150.
National Heritage Select Committee Fourth Report *Privacy and Media Intrusion* (London: HMSO, 1993).
Neill, B., 'Privacy: A Challenge for the Next Century' in B. S. Markesinis (ed.) *Protecting Privacy* (Oxford: Oxford University Press, 1999).

Neill, B., and Rampton, R., *Duncan and Neill on Defamation* (2nd edn) (London: Butterworths, 1983).
Nicholas, B. N., *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962).
Nimmer, M. B., 'The Right of Publicity' (1954) 19 *Law & Contemp Probs* 203.
Note (Anonymous), 'An Actionable Right of Privacy? *Roberson* v. *Rochester Folding Box Co*' (1902) 12 *Yale LJ* 35.
Note (Anonymous), 'Development of the Law of Privacy' (1894) 8 *Harv L Rev* 280.
Note (Anonymous), 'Is This Libel? More About Privacy' (1894) 7 *Harv L Rev* 492.
Note (Anonymous), 'The Right to Privacy' (1891) 5 *Harv L Rev* 148.
Note (Anonymous), 'The Right to Privacy' (1898) 12 *Harv L Rev* 207.
Ohly, A., '*Generalklausel und Richterrecht*', *AcP* 201 (2001) 1–47.
'*Harmonisierung des Persönlichkeitsrechts durch den Europäischen Gerichtshof für Menschenrechte?*' *GRUR Int.* 2004, 902–12.
'*Volenti non fit iniuria*'– *die Einwilligung im Privatrecht* (Tübingen: Mohr Siebeck, 2002).
Richterrecht und Generalklausel im Recht des unlauteren Wettbewerbs – ein Methodenvergleich des englischen und des deutschen Rechts (Köln et al.: Carl Heymanns, 1997).
'Geistiges Eigentum?' *JZ* 2003, 545–54.
Pagenberg, J., 'Protection of Get-Up and Character Merchandising Under German Law'[1987] *IIC* 457–86.
Palandt, O., (ed.), *Bürgerliches Gesetzbuch* (63rd edn) (München: Beck, 2004).
Peifer, K.-N., 'Eigenheit oder Eigentum – Was schützt das Persönlichkeitsrecht?' *GRUR* 2002, 495–500.
Individualität im Zivilrecht (Tübingen: Mohr Siebeck, 2001).
Pennock, J. R., and Chapman, J. W., (eds), *Nomos XXII: Property* (New York: New York University Press, 1980).
Perreau, 'Des droits de la personnalité', *RTD civ.* 1909, 501 s.
Phillipson, G., 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the *Human Rights Act*' (2003) 66 *MLR* 726.
Phillipson, G., and Fenwick, H., 'Breach of Confidence as a Privacy Remedy in the *Human Rights Act* Era' (2000) 63 *MLR* 660.
Pinckaers, J. C. S., *From Privacy Towards a New Intellectual Property Right in Persona* (The Hague: Kluwer, 1996).
Posner, R., 'The Right of Privacy' (1978) 12 *Ga L Rev* 393.
Potvin, L., 'Protection Against the Use of One's Own Likeness' (1997) 11 *IPJ* 203 and 295.
Pringle, H., *Celebrity Sells* (Chichester, West Sussex: J. Wiley, 2004).
Prosser, W., 'Privacy' (1960) 48 *Calif L Rev* 383.
Ravanas, J., '*Jouissance des droits civils. Protection de la vie privée. Mise en ouvre de la protection*', *Juris-Classeur Civil*, Art. 9, Fasc. 20, 1996.
'*Jouissance des droits civils. Protection de la vie privée. Délimitation de la protection*', *Juris-Classeur Civil*, Art. 9, Fasc. 10, 1996.
'*Liberté d'expression et protection des droits de la personnalité*', *D.* 2000, chr., 459 s.
'*Retour sur quelques images*', *D.* 2002, chr., 1502 s.
La protection des personnes contre la réalisation et la publication de leur image, Paris 1978, LGDJ.

Rein, I. J., Kotler, P. and Stoller, M. R., *High Visibility* (London: Heinemann, 1987).
Report of the Committee to Consider the Law on Copyright and Designs (Whitford Committee) Cmnd 6732 (London: HMSO 1977).
Robinson, R. S., 'Preemption, the Right of Publicity, and a New Federal Statute' (1998) 16 *Cardozo Arts & Ent LJ* 183.
Rubenfeld, J., 'The Right of Privacy' (1989) 102 *Harv L Rev* 737.
Ruijsenaars, H. E., *Character Merchandising in Europe* (Gaithersburg: 2003).
Savigny, F. K. von., *System des heutigen römischen Rechts* (Berlin: 1840 et seq).
Schack, H., *Urheber- und Urhebervertragsrecht* (3rd edn) (Tübingen: 2005).
'Case-note on BGH, judgment of 1 December 1999 – "Marlene Dietrich"' *JZ* 2000, 1060–2.
Scheyhing, R., 'Zur Geschichte des Persönlichkeitsrechts im 19. Jahrhundert' *AcP* 158 (1959/60) 503–25.
Schricker, G., (ed.), *Urheberrecht, Kommentar* (2nd edn) (München: Beck, 1999).
Schwerdtner, E., *Das Persönlichkeitsrecht in der deutschen Zivilrechtsordnung* (Berlin: Schweitzer, 1977).
Seifert, F., 'Postmortaler Schutz des Persönlichkeitsrechts und Schadensersatz' *NJW* 1999, 1889–97.
Seipp, D., 'English Judicial Recognition of a Right of Privacy' (1983) 3 *OJLS* 325.
Shanahan, D. R., 'Image Filching in Australia: The Legal Provenance and Aftermath of the Crocodile Dundee Decisions' (1991) 81 *TMR* 351.
Singer, E. M., 'The Development of the Common Law Tort of Appropriation of Personality in Canada' (1998) 15 *CIPR* 65.
Singh, R., and Strachan, J., 'Privacy Postponed' [2003] *EHRLR* Special Issue 12.
'The Right to Privacy in English Law' [2002] *EHRLR* 129.
Steffen, E., 'Schmerzensgeld bei Persönlichkeitsverletzungen durch Medien – Ein Plädoyer gegen formelhafte Berechnungsmethoden bei der Geldentschädigung' *NJW* 1997, 10.
Stewart, S. M., *International Copyright and Neighbouring Rights* (2nd edn) (London: Butterworths, 1989).
Steyn, J., 'Does Legal Formalism Hold Sway in England?' [1996] *CLP* 43.
Strasser, M., 'The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context' (2000) 10 *Fordham IntellProp Media & Ent LJ* 375.
Strömholm, S., *Le droit moral de l'auteur en droit allemand, français et scandinave*, vol. I (Stockholm: 1967).
Terrell, T. P., and Smith, J. S., 'Publicity, Liberty and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue' (1985) 34 *Emory LJ* 1.
Tugendhat, M., and Christie, I., (eds), *The Law of Privacy and the Media* (Oxford: Oxford University Press, 2002).
Twining, W., (ed.), *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986).

Ullmann, E., 'Caroline v., Marlene D., Eheleute M. – ein fast geschlossener Kreis' *WRP* 2000, 1049–54.
'Persönlichkeitsrechte in Lizenz?' *AfP* 1999, 209–14.
Ulmer, E., *Urheber- und Verlagsrecht* (3rd edn) (Berlin: Springer, 1980).
Van Gerven, W. et al., *Tort Law, Common Law of Europe Casebooks*, Oxford and Portland, 2000, Hart Publishing.
Vaver, D., 'What's Mine Is Not Yours: Commercial Appropriation of Personality Under the *Privacy Acts* of British Columbia, Manitoba, and Saskatchewan' (1981) 15 *UBC L Rev* 241.
Volokh, E., 'Freedom of Speech and the Right of Publicity' (2003) 40 *Hous. L. Rev.* 903
Wacks, R., 'The Poverty of Privacy' (1980) 96 *LQR* 73.
Personal Information (Oxford: Clarendon Press, 1989).
Privacy and Press Freedom (London: Blackstone Press, 1995).
Wade, W., 'Horizons of Horizontality' (2000) 116 *LQR* 217.
Wadlow, C., *The Law Of Passing Off* (3rd edn) (London: Sweet & Maxwell, 2004).
Wagner, G., 'Ersatz immaterieller Schäden: Bestandsaufnahme und europäische Perspektiven' *JZ* 2004, 319–31.
'Rudolph v. Jherings Theorie des subjektiven Rechts und der berechtigten Reflexwirkungen' *AcP* 193 (1993) 319–47.
'Case-note on BGH, judgment of 1 December 1999 – *Der blaue Engel*' *GRUR* 2000, 717–20.
Warbrick, C., 'The Structure of Article 8' [1998] *EHRLR* 32.
Warren, S., and Brandeis, L., 'The Right to Privacy' (1890) 4 *Harv L Rev* 193.
Wee Loon, N. L., 'Emergence of a Right to Privacy From Within the Law of Confidence?' [1996] *EIPR* 307.
Welkowitz, D. S., 'Catching Smoke, Nailing Jell-O To a Wall: The Vanna White Case and the Limits of Celebrity Rights' (1995) 3 *J Intell Prop L* 67.
Wernick, W., *Promotional Culture* (London: Sage, 1991).
White, A., 'Data Protection and the Media' [2003] *EHRLR* Special Issue 25.
White, G. E., *Tort Law in America – An Intellectual History* (Oxford: Oxford University Press, 1980).
Wilson, W., 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53 *MLR* 43.
Winfield, P. H., 'Privacy' (1931) 47 *LQR* 23.
Wood, J. P., *The Story of Advertising* (New York: The Ronald Press Company, 1958).
World Intellectual Property Organisation, *Model Provisions on Protection Against Unfair Competition* (Geneva: WIPO, 1996).
World Intellectual Property Organisation, *Protection Against Unfair Competition* (Geneva: WIPO, 1994).
Young, A. L., 'Remedial and Substantive Horizontality: the Common Law and *Douglas* v. *Hello! Ltd*' [2003] *PL* 232.
Younger, K., *Report of the Committee on Privacy*, Cmnd 5012, (London: HMSO, 1972).
Zimmerman, D. L., 'Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!' (2000) 19 *De Paul LCA J Art Ent L* 283.

'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell L Rev* 291.

Zimmermann, Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996).

Zweigert, K., and Kötz, H., *An Introduction to Comparative Law* (3rd edn) (Oxford: Clarendon Press, 1998).

Index

Cambridge Studies in Intellectual Property

Titles in the series

Brad Sherman and Lionel Bently
The Making of Modern Intellectual Property Law
0 521 56363 1

Irini A. Stamatoudi
Copyright and Multimedia Products: A Comparative Analysis
0 521 80819 7

Pascal Kamina
Film Copyright in the European Union
0 521 77053 X

Huw Beverley-Smith
The Commercial Appropriation of Personality
0 521 80014 5

Mark J. Davison
The Legal Protection of Databases
0 521 80257 1

Robert Burrell and Allison Coleman
Copyright Exceptions: The Digital Impact
0 521 84726 5

Huw Beverley-Smith, Ansgar Ohly and Agnès Lucas-Schloetter
Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation
0 521 82080 4