

## • FACE OFF: IMAGE RIGHTS LEGISLATION IN GUERNSEY

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**A picture is worth a thousand words – but for celebrities, it could be worth thousands of pounds. Collas Crill’s managing partner Jason Romer says Guernsey’s new image rights law could be the best way for those in the public eye to protect their assets.**

Celebrity 1: Single white glove, forward tilted fedora hat, black shoes with glittery white socks, signature pose.

Celebrity 2: Blonde hair, red lipstick, white dress blowing in the wind, soft spoken voice.

Celebrity 3: Big hair, white suit with flares and gold sequins, side burns, Las Vegas.

For the vast majority of readers, each of the above should invoke an image of a world renowned celebrity - perhaps after only the first one or two descriptive terms. Such is the power of the status of “celebrity”. Such renowned status is a trait of the “celebrity” and can have significant value.

Society has long been obsessed with celebrities, although the modern concept we are familiar with has evolved over time. From Greek Gods and Roman gladiators, to Saints, martyrs and other religious figures, through to the artists of the Renaissance period. There has always been a fascination of the many to idolise a few. However, it would seem as though our obsession with celebrities has increased with the ease of access to these individuals and information about them. The introduction of printing and publishing allowed stories to be distributed and read around the world, realising a much wider audience. Radio provided instant, and potentially live, access direct to people in their homes. While TV and cinema opened up a whole new world of access and pointed the spotlight on movie stars, sports persons and TV personalities. Now, with the advent of the internet, our celebrity obsessed culture can satisfy its urges 24/7 and from a variety of sources.

### CELEBRITY IMAGE

With obsession comes admiration and loyalty, and businesses have turned this aspect of our society into an extremely profitable industry. Just as a well known trade mark, such as the McDonald’s golden arches, can practically guarantee a loyal following, so too can using a celebrity to endorse your product or service. The celebrity is paid to endorse the product, for example by appearing in advertisements, and the business looks to capitalise on the celebrity’s loyal fan base.

The exploitation of a celebrity’s image may amount to a significant percentage of their overall income. Michael Jordan, the basketball player often recognised as one of the greatest sportsmen of all time, is said to have earned approximately \$90 million in total salary during his active career as a player. However, he earned another \$750 million from sponsors for the use of his image. Tiger Woods, considered the first sportsman to earn more than \$1 billion in his career, is a similar example. Even with the negative PR fallout from his previous personal issues, it is estimated that he receives approximately \$70 million per year from endorsement fees. Nike famously paid Woods US\$200 million for 10 years of endorsement. There is no doubt that the increased sales created by this association no doubt warranted such a significant fee.

### IMAGE RIGHTS

Generally, when it is recognised that an intangible asset is potentially valuable, it is offered some degree of protection. When the printing press made it easier to reproduce written text on a mass scale, jurisdictions introduced copyright laws to protect the rights of the author as creator of the work. The effort involved in creating a new invention was recognised by the introduction of patent law, which provides the inventor with a limited monopoly right over use of the invention. Trade mark law prevents third parties from benefitting from another

party’s goodwill. However, most jurisdictions offer no such protection to the right of an individual to exploit their image, or their ‘image right’.

Certain civil law jurisdictions such as France and the Netherlands have recognised the potential for an image right. Article 21 of the Dutch Copyright Act provides that “if a portrait is made without having been commissioned by or on behalf of the persons portrayed, the copyright owner shall not be allowed to communicate it to the public, in so far as the person portrayed or, after his death, his relatives have a reasonable interest in opposing its communication to the public”. This clearly provides an individual (or, if deceased, his relatives) with some degree of control over the use of their image.

Some common law jurisdictions have also made progress in recognising the right of an individual to control the use and exploitation of their image. In the US, certain States recognise a ‘right of publicity’, which prevents the unauthorised commercial use of an individual’s name, likeness, or other recognisable aspects of their persona. It gives an individual the exclusive right to license the use of their identity for commercial promotion. In the UK, protection of image rights has been attempted through a variety of means, including trade marks, data protection, passing off and trading standards.

Even though image rights do not generally benefit from express statutory recognition, their use in the commercial arena is well accepted. Contracts relating to the exploitation of an individual’s image are common place, as was confirmed in a High Court case relating to Wayne Rooney’s “off field” image. Such rights have also been further recognised in the context of super injunctions. Individuals have successfully managed to use the power of the court to protect their image by creating an absolute ban on public discussion of a certain event.

Although super injunctions are an extreme example, they have led to calls to define the extent to which an individual's image may be protected.

#### **GUERNSEY'S IMAGE RIGHTS**

As discussed, some jurisdictions recognise the concept, or potential for a concept, of an image right. However, few have put this on statutory footing and none have created a register of image rights. Guernsey is about to change this. On 30 September 2011, the States of Guernsey (the island's parliament) approved the drafting and introduction of statutory registrable image rights. This right is primed to have a significant impact on the way individuals protect the use of their image and structure their tax planning.

Celebrities, sports stars and other recognisable figures will be able to obtain a registered Guernsey image right protecting certain definable aspects (such as their name), as well as those less easily defined (like gestures, distinctive expressions, characteristics or attributes). The legislation will balance the protection of such image rights against other important rights, such as freedom of news reporting and the public interest.

Notably, a Guernsey image right may be registered by a person's estate, meaning such protection is offered to both the living and deceased. The potential for exploitation of a deceased individual's image may seem limited at first, but for those celebrities whose status and reputation survive their death, the use of their image can provide a continued income to surviving relatives. CKX Inc., a company which, among other things, owns the rights to Elvis Presley's name, image and likeness, was purchased in 2011 for \$509 million. Whether it's entry fees to Graceland or the purchase of memorabilia, Elvis is clearly still capable of producing a substantial income and the Guernsey image right will help to protect this for years to come.

A Guernsey image right may also be a useful tax planning tool. For example, the UK does not distinguish between a sport's persons winnings and their endorsement fees. Therefore a sports person is taxed a percentage of their world wide income for every day spent in the UK, regardless of the amount actually earned in the UK. This has meant stars such as Rafael Nadal and Usain Bolt have chosen alternative countries to compete, rather than subjecting themselves to the onerous UK tax regime. Although it is difficult to predict how this will develop in time, structuring income through the licensing of a Guernsey image right could help to distinguish between winnings and endorsement fees for tax purposes.

#### **WHY GUERNSEY?**

Guernsey benefits from a modern, state of the art legal regime and is often at the forefront of innovative developments. The area of intellectual property is no exception. In 2004, Guernsey introduced an 'enabling law': primary legislation that allowed for the introduction of separate intellectual property rights (IPRs) by way of secondary legislation. To date, a wide variety of IPRs have been introduced, ranging from the more traditional rights such as trademarks, design rights and copyright, to data base rights and plant breeders rights. The introduction of image rights is a further example of Guernsey's world leading IPR regime.

Guernsey is also home to innovative corporate structures like the protected cell company and incorporated cell company, a beneficial tax regime and world class professional service providers (including accountancy firms, banks, asset managers and administrators). It is a clear choice for the holding of IP, as well as other assets, and holders of such rights would be wise to consider relocating their holding to Guernsey.

#### **WHAT NOW?**

Guernsey's image rights regime is intended to be in place in time for the 2012 Olympics and the 2012/2013 football transfer season. Individuals looking to protect their image should begin to consider adding a Guernsey image right to their portfolio of intellectual property rights.

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