

Hitting back

⚡ To what extent can celebrities protect the exploitation of their image?

Christopher Benson, Michael Gerlinger, Marc Schuler and Valérie Budd, of Taylor Wessing, consider the position in the UK, France and Germany

Picture the scene, July 2006, Wimbledon, London – an unknown British lady tennis player wins Wimbledon at her first attempt. She has captured one of the world's leading sporting trophies. The opportunities that lay in front of her for exploiting her image are immense. She can choose whether to endorse a new range of perfume, sunglasses, clothing – the list is endless. However, she will also find that third parties are willing to exploit her fame and reputation to sell their own goods and services. To what extent can she take steps in Europe

extensive case law relating to protection of images.

In theory, such personality rights are personal and non-transferable. However, and considering the commercial impact of sport events and the financial rewards for sport clubs and famous professional players, there have been some notable exceptions to the non-transferable nature of personality rights and images.

Protection of image rights: As a general rule, consent is required both to take a photograph of a person, whether famous or not, and to circulate this picture.

Infringement of these rights is generally sanctioned by damages as well as publication of the judgment. There has been much case law regarding professional players and protection of their rights.

For example, the Court in Nanterre held that *"any person, even though famous, holds a right to his own image, as part of his personality, which shall enable this person to decide to exploit or not his image as well as the conditions and circumstances of such exploitation. Such person further has the right to oppose the use of his image on any means whatsoever without his/her consent."* (TGI Nanterre, concerning the football player Eric Cantona).

The Court of Appeal of Paris also held that *"the right to privacy enables any person, regardless of reputation and profession, to oppose the circulation, without express consent, of his/her image as part of his/her personality."*

As a consequence, even though a professional player has consented to be photographed; such person holds the right to control circulation and exploitation of the picture concerned.

to prevent this and maintain her rights in her image?

This article will look at the position in France, Germany and the United Kingdom.

Our lady tennis player may face a similar situation to that encountered by the Spanish football team, Real Madrid, and a number of well-known football players who took action against several online bookmakers in relation to use of the images of the world-famous star football players to promote online gambling.

France

The protection of image rights was developed a long time ago under French case law. Image rights fall within the protection of personality rights under article 9 of the French Civil Code, which provides that everyone has a right to privacy.

French judges tend to protect such personality rights widely and there is

In summary

- ⚡ Following Spanish football club, Real Madrid's decision to take action against a number of online bookmakers for using images of its players this article considers image protection
- ⚡ The level and type of protection available to celebrities in the UK, France and Germany are all explained by the authors

Limits: There are two main exceptions to requirement for consent: pictures of any person taken in public places and use for news purposes.

In this respect, and except for harmful use (eg, denigration, ridicule, false statement etc), consent is not required when the photograph has been taken in a public place within the framework of the activity of the portrayed person (eg, player during a match) and when the photograph is used for news purposes.

However, consent of the portrayed person is again required for any commercial use of the picture, image rights being in such a case



“superior” to the right of the public to have this information.

With the development of use of images of famous players in advertisements, there has been a tremendous amount of case law about the protection given to players’ images.

French judges have given specific protection to the name and/ or image of professional players against unauthorised use, where such use aims at profiting from the reputation of the person to promote non-related activities.

For example, the following unauthorised usages of photographs were found to infringe:

- a famous basketball player taken during a match and reproduced on display advertisement for films (Court of Lyon 17/12/1980);
- a golf player in offering subscription services to a magazine (Court of Appeal of Paris, 26/05/1983);
- a tennis player during a match for illustration purposes of a leaflet (Court of Paris, 21/12/1983);
- a football player for advertising products (Court of Appeal of Paris, 30/11/1987).

French judges generally award damages to the player or his/ her assignee (often a sport club managing exploitation of image rights), if applicable, and consider, in particular, the loss of advertising profits resulting from the lack of possibility for the player or his/ her assignee commercially to exploit the image.

The question of whether the use of the photograph falls within the field of giving information or not (which requires specific consent) is difficult.

As for instance, in recent summary

proceedings, Real Madrid as well as football players such as Zinedine Zidane, Ronaldo and David Beckham failed to obtain immediate relief to stop the use of their image and names by several foreign companies offering online gambling services for football matches. The Court of Paris held that the use of their image and name on the disputed website was not directly associated by the companies with the promotion of their gambling activities, but aimed at presenting and illustrating the match concerned by the bet. As a consequence, judges ruled that no evidence had been shown that the use of the pictures and names was violating the players’ image

Image right protection ... does have a quite strong tradition in Germany

rights (Court of Paris 8 July 2005). The merits of this case are currently pending before the Court of Paris.

Trademark protection: Although it is possible in France to register as a trademark the name or image of a person, the resulting protection is rather limited.

To enforce trademark rights, it needs to be demonstrated that the image or name is being used for identical or similar products/ services than those covered by the trademark registration. The claimant would also have to show use of the image and/ or name as registered in respect of those products and services.

As a consequence, for professional players in France, personality rights protection is more effective than trademark protection to protect their image/ name.

Germany

Image right protection, in particular with respect to personalities, does have a quite strong tradition in Germany compared with other European legislations. It is mainly based on the notion of a person’s “personality right”.

Such “general personality right” was developed by the Federal Court and the Federal Constitutional Court in the 1950s. However, there are also specific legal provisions, protecting any person against unauthorised use of specific aspects of their personality, which are the right in one’s own picture and the right in one’s own name.

In the case of *Real Madrid v Ladbrokes et al*, the main focus will be on the protection of the right in one’s own picture.

Image rights under German law: The right in one’s own image was introduced in

1907. Photographs must only be offered to the public or placed in circulation with the consent of the portrayed individual. As a general rule, the use of a personality’s image, therefore, requires *consent*.

There are important exceptions to the requirement for consent. This allows the use of a person’s image if the image is only part of a landscape or locality, a photograph is taken at a demonstration or similar event or if the dissemination or exhibition is predominantly for an artistic purpose.

The most important exception, however, is the exception with respect to images of “contemporary history”. Law distinguishes between images that display personalities with respect to a specific event – so called “**relative public figures**” – and images of personalities that are in general of public interest, without referring to a specific event – so called “**absolute public figures**”. The latter are so famous and successful that the general public is interested in any objective information on them, which the courts assumed with respect to Franz Beckenbauer, Jan Ullrich and Katharina Witt. Those “absolute public figures”, in general, have to tolerate the use of their image without consent.

As professional football has become a multimedia event with round-the-clock information on all personal details concerning top-class-players, one might assume that many professional football players would have to be regarded as “absolute public figures”, such as David Beckham, Michael Owen or Ronaldo.

The limits on this freedom: The exception with respect to absolute public figures does not necessarily mean that photographs of these personalities may be used for any purposes. The right does not extend to dissemination and exhibition infringing the justified interest of the portrayed person or, in case of a defunct portrayed person, of the next in kin. Therefore, the freedom of information is limited by the justified interests of the person in question, eg, in the area of privacy and with respect to the use for advertising purposes. A balance of interest is required between the personality’s interest not to be exploited commercially and the public interest of information about such person.

In a case that involved *Franz Beckenbauer*, the Federal Court held that the use of photographs taken from matches and portraying *Franz Beckenbauer* for a wall calendar was information about the “athletic style” of the matches and the person of Franz Beckenbauer. The court, therefore, ruled in favour of the producer of the calendar and denied the requirement for consent. The requirement of consent was also denied in a case concerning the use of a photograph displaying *Boris Becker* on the front page of a tennis manual.

In the “panini-case”, in comparison, which dealt with the use of pictures for a sticker album, the Federal Court denied any public interest in the photographs themselves and held that there was no public interest with respect to pictures in the collection.

In the most recent case, *Oliver Kahn v EA-Sports*, the Hamburg district court and the Hamburg Court of Appeal held that consent by Oliver Kahn himself was required for the use of his name and image in a computer game, because Mr Kahn’s image was used for commercial purposes and there was no public interest in the use of Mr Kahn’s name or image.



As a result, the use of the image of a personality for advertising or commercial purposes generally requires consent, unless there is a prevailing public interest in the information. The latter may apply, if the image is used in a work of public interest, eg, if showing different techniques of football players in a manual etc.

In the *Real Madrid* case, however, such public interest may be denied by German courts.

Trademark Protection: Although names of persons as well as images can be registered as trademarks, a trademark registration does not grant broad protection.

As a result, the protection provided to images by German law is much broader and generally sufficient to protect a personality against the use of images for advertising purposes.

United Kingdom

There is no personality right as such in the UK. Celebrities have to rely on other areas of the law to protect their image.

Privacy: The United Kingdom does not have a law of privacy as such.

This question was considered in the *Naomi Campbell v Mirror Group Newspapers* case where Ms Campbell claimed that publication of information about her and photographs of her was a breach of confidence because it infringed her right to privacy. The House of Lords stated that there was a two-stage test. First, a court must decide whether the information is private and/ or confidential. Second, if so, the court must weigh up the right of privacy against the right of freedom of expression. In striking the balance between the two rights, the court must decide whether

the benefits of publication are proportionate to the harm that may be done by the interference of the right to privacy.

In this case, the House of Lords confirmed the law of confidence can be used to protect a person’s right of privacy from publication of a story. The case shows the law of confidentiality is developing in the light of the human rights dimension.

The House of Lords observed that photographs of persons in circumstances in which the person has a reasonable expectation of privacy can be particularly intrusive. Unless there is a compelling public interest for publication of such photographs, there is

Perhaps the strongest right in the UK ... could be passing off

likely to be an invasion of privacy. In the case of *Douglas v Hello!* the court held that the publication of wedding photographs was a breach of commercial confidence in circumstances where photography was expressly prohibited at the Douglas wedding.

Subject to the following, it may, however, be difficult for a sportsman to stop the use of a photograph taken of them in public. The sportsman will not own the copyright in the photograph and will not be able to use the law of copyright to prevent the exploitation of the photograph.

Defamation: Is there anything in the advertisement which would make ordinary people think the worse of the sports personality identified in the advertisement? Does the advertisement expose the personality to ridicule or contempt?

If so, the sports star may have a cause of action. Perhaps our lady tennis player promotes a healthy lifestyle and is known for her fitness regime. Would she want to be seen advertising cigarettes or soft drugs? An old

case in the UK found that an amateur golfer had been defamed in an advertisement which implied that he entered into a commercial contract to promote chocolate products.

Passing off: Perhaps the strongest right in the UK (in contrast to France and Germany) could be passing off. Eddie Irvine, the Formula 1 racing driver, brought an action in the UK against a radio station who had used a photograph of him in a promotional brochure. The photograph had been digitally manipulated so that it showed him holding a radio on which the name of the radio station had been attached, rather than a mobile phone.

Mr Irvine brought an action claiming that the photograph suggested he had endorsed the radio station, contrary to the fact. He claimed that because he was a famous and easily recognisable racing driver, he had a valuable reputation, which it was important for him to protect against unauthorised use.

The Court found that, if a famous person obtained a recognised reputation, it was valuable because it enabled that person to obtain money for endorsing someone else’s business. The law of passing off could be used to prevent other persons using that reputation without their consent. The Court found there was no good reason why passing off should not be used to prevent cases of false endorsement and took note of the fact that it was common for famous people to obtain money by endorsing products and allowing the people marketing their products they had endorsed to use their name and image.

An advertising campaign featuring our tennis player appears on the internet and in magazines which are sold in France, Germany and the UK. These three jurisdictions offer different ways for the personality to protect her image. She can therefore choose where to sue in order to stop damage being caused to what may be her most valuable asset, namely her name and image. ☺

European law firm, Taylor Wessing is sponsoring the World’s Most Photographed photographic exhibition at the National Portrait Gallery, London, running from 6 July–23 October

About the authors

Christopher Benson, Michael Gerlinger, Marc Schuler and Valérie Budd, are IP solicitors respectively at Taylor Wessing’s UK, German and French offices.

