



Pretty as a picture

Jonathan Silverman explores the new and increasing challenges associated with the protection of image rights

All is about to change in the world of image protection and planning following the introduction of Guernsey's Image Right legislation from the beginning of next month.

This may at long last provide practitioners with the opportunity to protect the images of both real and fictional characters and at the same time create the option for some interesting long-term planning.

There is no question that the world of intellectual property has been facing new challenges in recent years. The ease by which photographs can be uploaded onto the web is but one. Web designers and social media users tend not to be particularly well versed in (or perhaps it is less respectful of) copyright law and seem to think nothing of taking an image and posting it on to social media websites with unplanned consequences.

Product endorsement

Burberry recently found itself in a scrap with Humphrey Bogart's estate. As part of its Facebook campaign it uploaded an image of the actor wearing his trademark trench coat in the film *Casablanca* simply, they said, to illustrate the history of the garment. But this caused offence to Bogart LLC which manages the publicity rights of the late actor, both because the use of the image itself is unauthorised and because Bogart apparently was a loyal customer of Aquascutum, a competing brand.

Their argument was that there was an implied product endorsement. A concept not unknown to James Bond, who has switched allegiance from Rolex to Omega in recent years. It does illustrate the need for careful content management, especially in the context of utilising social media for marketing purposes.

Care has to be taken when negotiating licence arrangements for photographs which a client may wish to use either in press advertisements or for point-of-sale material. It is of growing importance to consider whether the client is going to utilise the photograph on a website or their own or a parallel social

media site so as to ensure the license secured is sufficiently broad to cover the proposed usage.

Moreover with owners of images beginning to take a more enthusiastic stance towards enforcement of unauthorised usage it is important to stress to client companies that when settling their strategy they need to be particularly careful to ensure that any images used on any blogs and editorial cannot be interpreted as commercial endorsements for their product range, if they're not to take unnecessary risks.

Care has to be taken especially when uploading pictures of celebrities to social media feeds and one recommendation is to use more than one celebrity so as to water down the impact of an association, although perhaps the more prudent advice is to steer clear of well-known images which will be interpreted as an endorsement with potentially expensive consequences.

Iconic image

However, all is not necessarily flowing in favour of the image owner, as the estate of Marilyn Monroe recently found in New York, where there has been a long-running battle as to the propriety of the estate charges for the use of her image on t-shirts and other memorabilia.

Ironically and perhaps typically American, this had less to do with intellectual property rights and more to do with taxation. Monroe died in California but since New York at that time had no estate duties, the decision was made at the time of her death in 1962 to show her official domicile as New York, where she had a second home. Attractive as it was then as it saved a huge amount of taxes it may now be the undoing of the estate when it comes to collecting royalties because New York doesn't share California's attitude to protecting the estate of dead celebrities' images. The recent decision in the American Court of Appeal for the ninth circuit determined that royalties can no longer be collected for the use of her image.

Perhaps the new legislation in Guernsey will lead the way in helping to set up a mechanism which will regularise matters and provide a

framework under which image rights can be more effectively managed in the future.

Voice and gesture

Guernsey is the first jurisdiction to create a registrable image, enabling effective management and control of the commercial use of a person's identity, and images associated with that person, including distinctive expressions, characteristics or attributes.

The legislation draws on both trademark and copyright principles and dovetails in with both very comfortably to provide an additional platform for protection.

It allows celebrities, sports professionals, teams and other media personalities – both living and dead – to structure their image rights in Guernsey with the objective of being able to rely upon a clear legislative framework.

The ordinance centres on two key concepts, those of "registered personality" and "images", which are associated with the registered personality. The central right is one of registered personality and covers natural or legal persons, group personalities or fictional characters. Not only does the ordinance cater for both dead people and extinct legal persons one can also register to protect a natural or legal person in existence within the last 100 years prior to filing so this will clearly be attractive to the estates of deceased celebrities.

Moreover, image rights are not simply photographic. They will extend to the name, voice, signature, likeness, appearance, silhouette, feature, face and even gestures so this is going to widen significantly the rights which can be protected.

Clearly the legislation is in its infancy but it will be interesting to watch it develop and see to what extent practitioners choose to utilise the opportunities arising.



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