Different approaches to the protection of celebrities against unauthorised use of their image in advertising in Australia, the United States and the Federal Republic of Germany

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Different Approaches to the Protection of Celebrities against Unauthorised Use of their Image in Advertising in Australia, the United States and the Federal Republic of Germany

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Introduction

In today’s highly competitive commercial environment, consumers are subjected to an unrelenting stream of advertising. This occurs in every conceivable way and at every possible opportunity, mostly through the mass media. In reality the consumer is often faced with a choice between virtually identical products, as far as quality and price are concerned. To gain a commercial advantage over competitors in this world of ‘bland’ brand names and undistinguished products, advertisers employ different techniques. They can turn to a celebrity for help. Celebrities themselves are products of the mass media: they live through them and by them, so they form a logical target for advertisers.

It can pay to be famous, or to have a public profile of any kind, because using the image of a celebrity in advertising is effective. So the question of protection of the celebrity’s entitlements poses itself: should the value of celebrity be protected and how?

Nature of the Endorsements and Identity of the Endorsers

About two years ago a magazine advertisement appeared in the United States for an anti-acne product. It featured a picture of General Noriega, the dictator of Panama, who was at that time very much in the news. The accompanying message said something to the effect that ‘If you don’t want to look like this then use our product’. General Noriega’s face is pockmarked. It seems unlikely that he had given permission to use his picture, as he had other things on his mind. He might have more time to look into the matter now.

This of course is an unusual example, but the range of celebrity endorsements is very wide and often hard to categorise. They vary with the identity of the endorser and with the nature and strength of the endorsement given to a product. The manner in which the association is achieved will also differ considerably (for example by name, image, typical trait or attribute, voice).

The target in this article is specifically endorsements by a celebrity rather than by an expert, a consumer group, or an organisation. Celebrity endorsements also needs to be distinguished from the use of spokesmen or testimonials.

The term to ‘endorse’ a product is in truth too narrow to employ here, because it suggests an active element which is not always present in the kind of advertisements concerned. Maybe ‘image advertising' would be a more appropriate term, but it is simpler in this context to adopt a wide understanding of the word ‘endorsement’, covering the whole spectrum from active support of, to mere presence with a product.

The identity of the endorser: connected or unconnected

The endorser may have a strong link with, or connection to the product she is endorsing. This can be through a direct professional or occupational congruence between the field of activity and the advertised product, for example a well-known racedriver and motor oil or a famous hairdresser endorsing shampoo. Presumably people are then endorsing products of which they have a professional knowledge or which their expertise allows them to evaluate adequately. In this situation it is not necessary that the celebrity actually expresses her approval for a product. Joining a product with someone with known expertise in a connected field can produce the same result, sending a powerful message to the public.

On the other hand, it can be that the endorser is a well-known person, such as an actress, without a professional link with the product that is being advertised. It is merely the association that will enhance sales, not the fact that the product is explicitly or implicitly supported by someone who is presumed to know something about it. In this fashion, a well-known popstar might be associated with a soft drink or a golfer with rental cars. In a sense this is the weakest kind of endorsement. But in any case the identity of the endorser will locate the message sent on a scale from factual support (rational effect) to mere association (more subliminal effect).

Objective or subjective endorsement

Goods and services for which endorsement advertising is used vary widely. This can influence the informative value of an endorsement, and how it is viewed and evaluated. A simple product like a chocolate bar or a soft drink will rely on more ephemeral endorsement, like tasting good, which is merely a subjective judgment. A more complex product like a stereo set or travel services might rely on more professional or more technical and objective advertising for enhancement. The nature of the product will control the kind of associative advertising that is seen as useful and is able to promote sales most effectively.


2 A useable definition of image might be: any aspect of the celebrity's identity which is recognisable to the public as representing that person.
Some markets will be totally undifferentiated, and thus certain kinds of associative advertising will be more effective than others. Emphasising the technical benefits of one product as compared to another will be relatively useless in such a market, and the value of positive association will be great.

Express or implied endorsement

As has already been stated, the endorsement can be something that actually deserves that name in its strict sense or it can be something less. If a person expressly by her use of words endorses a product, that is, indicates that a product has certain positive characteristics, the effectiveness of such a statement might differ according to the expertise of the endorser. It might also be influenced by the fame of the endorser. This kind of endorsement can be based on opinions or on representations of (expert) knowledge.

On the other hand, the endorsement can be by inference only, not in express words but by the association of a celebrity with a product, merely by them appearing together. This kind of advertising can be just as effective as an express endorsement.

Desired effect

The desired effect of celebrity advertising can vary, and it is useful to distinguish advertisements where the main or only purpose is to 'grab' the attention of the consumer. Other advertisements might aim at giving the impression that a celebrity approves of a product, whereas 'grab'-style use is aimed at getting the attention of consumers who are becoming increasingly unresponsive to the mountains of advertising that confront them. Celebrities attract huge interest, so using their image may well make consumers take notice without making them think that the celebrity actually endorses the product or gave permission for that aspect of the image to be used.

The varying nature and contents of endorsements could require a varied approach to legal regulation. Before making specific comments on appropriate distinctions and legal attitudes, it may be helpful to comment on the status of the problem in three different jurisdictions.

The Image of the Celebrity: Protection in Australia, the United States and (West) Germany

Introductory survey

In Australia, the law relating to the tort of passing off and trade practices legislation have provided the main sources of protection. As far as the United States is concerned, attention will be focused primarily on right of publicity cases, because this is a development which contrasts in an interesting way with Australia, but shows some parallels with the German situation. In Germany, one can speak of a mixed approach, centred on the general right of personality, but with recent developments in other areas, above all Unfair Competition Law. This overview will be followed by some general conclusions about the nature and appropriateness of different approaches.

Australia

Some of the most recent cases in Australia dealing with endorsements have involved one of its most celebrated comics, the star of the Crocodile Dundee films, Paul Hogan. The first case concerns an advertisement devised and aired for a shoe company. It was based on the famous knife scene from Crocodile Dundee 1. The TV-ad revolved around a situation similar to that in the film. The central part was played by an actor with only a slight physical resemblance to Hogan, but wearing all the characteristic Mick Dundee accoutrements — the hat with the band of teeth and the leather sleeveless vest and so on. The words he used, instead of the famous phrase 'You call that a knife?', were: 'You call those leather shoes? Now these are leather shoes — Grosby leather, soft, comfortable, action-packed leather'. To some extent at least the whole ad was conceived as a skit on the real character and film. But Gummow J upheld an action for passing off, as well as one under section 52 of the Trade Practices Act 1974 (Cth).

The other case was one where Crocodile Dundee was not portrayed by another actor but by a Koala bear. A store at Surfers Paradise had made extensive use on its goods and outside the shop of a Koala bear character wearing the Crocodile Dundee hat and sleeveless vest. The word Dundee was also prominently and repeatedly displayed. Pincus J held that this constituted a passing off and an infringement of section 52 of the Trade Practices Act.

These cases illustrate how far the action for passing off has been extended to protect celebrities whose name, likeness or image is employed to enhance sales of products without their consent. They also extend protection to a broadly defined image, including virtually any characteristic recalling the celebrity in the minds of a sufficient number of consumers.

Extension of the tort of passing off

The problem of protecting the commercial value of the image of a celebrity has been handled through the use of the common law tort of passing off, as well as section 52 of the Trade Practices Act. This article will concentrate on the tort of passing off, as the development of its scope is an interesting example of the flexible, case by case approach to commercial problems typical of the common law.

The tort of passing off arises where a competitor creates the impression that his product is in some way connected to another, competing product, and this without permission to do so. He 'passes off' his product as another, profiting from the goodwill that attaches to it. This can occur in many different ways and resulting damage can take different forms.

Originally this tort covered only a relationship between

3 Hogan & Ors v Pacific Dunlop Ltd 83 ALR 403, Gummow J of the Federal Court.
4 Hogan & Ors v Koala Dundee Pty Ltd & Ors 83 ALR 187, Pincus J of the Federal Court.
5 In general for Australia see S.K. Murumba, Commercial Exploitation of Personality, LBC, Sydney 1986.
two manufacturers or sellers trading in substantially similar goods, where an unpermitted use of the name itself was being made. These restrictions on the use of passing off were gradually whittled down. This development has taken the tort further away from its roots in Australia than in England. Now the fact that the celebrity is not engaged in a similar trade as the seller of the goods is no longer a problem. Any use of an image, which is an attribute that evokes an identity with a substantial number of people, can constitute a tort of passing off. There are certain limitations which will be referred to later. The same is true with regard to the applicability of section 52 of the Trade Practices Act. In effect the tort of passing off is now a tort of misrepresentation in a commercial context.

Recent cases have confirmed this position. In Hutchence & Others v South Seas Bubble Co Pty Ltd & Another\(^7\) a company had sold T-shirts with an INXS design on them without the permission of the holders of the design. Wilcox J stated:

The better view now is that there is no necessity for a common field of activity between the plaintiff and the defendant, provided that there is a misrepresentation by the defendant concerning the defendant’s name or product resulting in a likelihood of damage to the plaintiff, as for example confusion adversely affecting goodwill ... or wrongful appropriation of the plaintiff’s name and reputation. (obiter)\(^8\)

Limitations on the extended tort of passing off

The case of 10th Cantanas & Others v Shoshana Pty Ltd & Another\(^9\) confirms the extension of the scope of the traditional tort, but simultaneously imposes certain limitations. In this case a well-known TV personality: Sue Smith (a not unusual name) failed in an action against the producers of an advertisement which showed a young woman only slightly resembling the celebrity in bed watching TV, with ‘Sue Smith just took total control of her video recorder’ printed on screen. Sue Smith failed on appeal because a majority of the Court thought it unlikely that the advertisement would be read as containing a reference to her. Although using the normal test, Pincus J also stated:

It should not be too readily accepted that the mere mention of a name in an advertisement necessarily connotes that the goods advertised have any characteristic — for example that they have been approved, or even examined, by the person named.\(^10\)

This introduces a somewhat stricter norm, requiring not only a mere association with, but an apparent approval of the qualities of a product. A coincidental use of one’s image in some association with a product is not necessarily sufficient.

In Honey v Australian Airlines Ltd & Another,\(^11\) the well-known long-jumper Garey Honey also failed in an action against Australian Airlines, which had produced a poster with a photograph of Honey in action, without his permission. Here again the test was applied, but the court held that Honey had not demonstrated that a significant number of people seeing the poster would conclude that he had endorsed Australian Airlines in some way. Again, a mere association was not thought to be sufficient and an additional element was required: if most people would not infer from the circumstances and look of the advertisement that it represented approval by the celebrity, no tort of passing off was committed.

In Olivia Newton-John v Scholl-Plough (Australia) Ltd\(^12\) a picture of an Olivia look-alike was used in an advertisement for cosmetics superscribed with the words ‘Olivia? No. Maybelline’. Burchett J of the Federal Court found that the use of a look-alike only, plus the clear negation of a connection instantly negated any impression of willing association of the plaintiff. Any subliminal effect the advertisement might have would need to be proved by the plaintiff. It was not, so the plaintiff’s action failed.

Obviously, the extension of the tort to the situation where the relationship is not between competitors in the same field of commerce has necessitated certain adaptations and limitations, as illustrated by the cases above. These seem to be heading towards a test that a reasonably significant number of people should infer from the advertisement that the celebrity had some willing association with the product concerned. This flexible test seeks a balance between use where an element of approval is present, and merely informative, incidental or skit style use of an aspect of the image (including the name).

Trade Practices Act

As well as the extended tort of passing off, section 52(1) of the Trade Practices Act 1974 (Cth) is increasingly relevant:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

This seems to be a more general statement which adequately covers the same situations as the extended tort of passing off, and it will not be examined further here. For purposes of comparison it is more interesting to concentrate on the tort of passing off because it gives a more evolutionary perspective.\(^13\) The advantages of use of the Trade Practices Act are that there is no need to prove damage, nor the existence of a reputation, to achieve injunctive relief. This makes the test even lighter.

Also of interest is section 53(c) of the Trade Practices Act which states that a corporation shall not, in trade or commerce, ‘represent that goods or services have sponsorship, approval, performance or affiliation that it does not have’. On the face of it this would seem to cover a misrepresentation that a celebrity has approved of a product. However, this section has mainly been used against corporations which falsely present themselves as having the approval of a standards-authority or board. Misleading or deceptive advertising attracts civil sanctions, whereas the specific provisions like those in section 53 carry additional criminal penalties.

The United States

Unlike in Australia a development occurred in the United States, not based on torts of misrepresentation nor on...
unfair competition, consumer protection or trade practices statutes and regulations, but on the emergence of a novel concept — that of the right of publicity. There has been a generally less flexible approach to the use of fair trading and trade practices legislation, in that it is primarily viewed as aimed at protecting the consumer from deception, or competitors in a restrictive sense from unfair trade practices, rather than the pecuniary or commercial interests of the celebrity.

Because the right of publicity is a development that is largely confined to United States jurisdictions, it is worth concentrating on it here. The conceptual framework is quite different from the Australian passing off approach and thus interesting from a comparative viewpoint. However, the state of the law regarding the right of publicity is somewhat unsettled and differs from state to state, so this article will give an overview of the basics, without attempting to go into much detail.

In Carson v Here’s Johnny Portable Toilets, a company rented and sold portable toilets with ‘Here’s Johnny’ on them. This appeared to be a reference to a phrase which was used to announce Carson as he entered on stage for a famous TV show. It was a well-known phrase. Johnny Carson was not amused by its display on portable toilets. The Court held that it constituted an infringement of his common law right of publicity, which gave Carson the exclusive right to use his own name and personality in the promotion of products.

In the Here’s Johnny case, as in the Hogan cases in Australia the links between the actor or public personality and the representation are fairly tenuous. There is no attempt to associate the product with an actual picture or the actual voice of the personalities. The similarity lies in the fact that certain characteristics of the actor’s public, ‘acquired’ image (in the broad sense) are used to create an association in the prospective purchaser’s mind. In the Carson case it’s the typical phrase, in the Hogan cases the typical attributes of Crocodile Dundee. Only the Carson case reveals a hint of moral objection: the actor did not like to be associated with toilets. This shows the extent to which protection is available both in the United States and Australia, but under different approaches. However, there may be relevant differences which will be referred to later.

The right of publicity

Protection through the right of publicity is by no means the only way in which protection is granted to a public personality. It is also controversial as to its extent, and differs in recognition from state to state as far as statutory regulation and interpretation by the courts is concerned. The states in which most of the litigation has occurred are those with traditional links to show business, mainly New York and California.

The right of publicity was expressly recognised in the Haelan Laboratories case in 1953. It finds its origins in the right of privacy. This may sound contradictory and has indeed led to some conceptual confusion. The right of privacy is aimed at protecting individuals from having details of their private lives publicised, different from the commercial interest a celebrity seeks to protect. Its purpose is to protect the confidential nature of certain information concerning the private sphere of life. If an individual becomes publicly known, the right to prevent others from publicising details of private life diminishes concurrently. The private sphere becomes more public. Nonetheless, to protect the commercial value of the personality, the basis of privacy was used.

The right of publicity is now moving away from its privacy roots and is mostly viewed as a property right, with the necessary consequences that entails. Even so it is still to some extent saddled with its privacy pedigree. It could be described, with the proviso that its precise definition is not settled at law, but taking present trends into account, as the right a celebrity has over all the aspects of her image, and over which she has control as over property, which is limited only by concerns of public interest, like freedom of information.

Privacy to property

So the right of publicity is now categorised as an intangible asset. The limits on use are ‘property style’ limits, as those imposed by freedom of information and constitutional safeguards generally. But in principle and unless an overriding public interest can be shown, the celebrity has complete control.

Recognition as property rather than as a personal right (in the sense of a right to protection of basic human values), has important consequences concerning descendability and assignability, and the ability generally to realise its value in the marketplace (alienability). A lot of consideration has been given to these questions as a result. This creates questions as far as the duration of the descendants’ monopoly over the image is concerned and also their rights to exploit the image if the celebrity had not done so during her lifetime.

The situation as to the nature and use of the right of publicity is now somewhat confused and unsatisfactory, although a slow process of clarification, away from privacy to some form of property, is far advanced. In certain states statutes restrict the use of the image, as in New York where the relevant right of publicity statute restricts protection to name, portrait and picture. In California, there is a more general right of publicity protection under statute. In other states no statutory provisions exist, which causes difficulties with forum shopping due to differences in protection from state to state. Broad protection is however usually available in one way or another.

Comparative note

There appears to be a relevant difference in the levels of protection granted in Australia and the United States.

14 See however application of the Lanham Act for trademark related protection (15 USC ss 1125 a) 1982. See also the FTC Act, 26 September 1914 (current version 15 USC ss 41-77).
16 698 F.2d 831, 835 (6th Cir. 1983).
17 For example New York Civil Rights Law section 50 Right of Privacy. California Civil Code sections 3344 and 590.
18 Haelan Laboratories Inc. v Topps Chewing Gum Inc. 202 F.2d 866 (2d cir.) 346 US 816 (1953).
19 See however Prosser, ‘Privacy’, 48 Calif. L Rev 383, where appropriation for the defendant’s advantage of a plaintiff’s name or likeness is categorised in later development of the privacy tort, as one of the four torts constituting invasion of privacy.
Broadly speaking, in the United States no element of the image may be used unless it is in the context of legitimate supply of information for non-commercial purposes ("news"). In Australia, elements of the image may not be used if an impression of approval for a product is misleadingly conveyed. The 'grant' value of advertising is largely ignored. Difficulties concerning alienability and descendability are not addressed by the Australian approach, whereas they are in the United States because of the property-style approach, which to some extent provides instant answers to these questions.

Germany

The recent victory of the West German team in the soccer World Cup in Italy probably gave birth, in one fell swoop, to a whole new group of people available and willing to advertise all kinds of products in Germany. Together with 'old' stars like Boris Becker and Steffi Graff, there is certainly no shortage on the supply side of the celebrity endorsements business. Even so, the position of the celebrities themselves, as far as protection from unauthorised exploitation of their image is concerned, is somewhat unclear, although quite comprehensive in effect. Many different approaches seem possible under German law, depending on the particular characteristics of the case. The flexible but unitary basis of the Australian approach is not available. But from a comparative point of view the different approaches are interesting, because they are to some extent a mix of methods used to tackle the problem in other countries: through the property-style approach, and the general right of the personality together with sections 12 BGB and 812 BGB. In other words a mix of tort, copyright, human rights and restitution.

The right to self-development

German law, like US law, shows traces of a general, moral or personal rights based approach to the problem of the protection of celebrities' rights over their image. However, this has not resulted in the general property style approach of the right of publicity.

Two aspects need to be distinguished. First, the general right of the personality, or right to self-development, which is based on section 1 of the FRG constitution, entitled 'Schutz den Menschenwürde' but above all on section 2 'Persönliche Freiheitsrechte'. These articles, and the legal construction based on them, were primarily viewed as aimed at guaranteeing the personal freedom, including privacy, of the individual, and not so much the commercial aspects of the development of one's personality.

Second, there are certain specific derivatives of the general right of the personality which statutorily protect certain aspects of the personality. The main ones in this context are section 12 BGB, protecting the name23 and section 22 KUG protecting the 'Bild' (picture, or image in the material sense).24 Again originally both these sections were viewed as protecting the personal or individual, not commercial interests of the person.

The KUG imposes sanctions on the unauthorised use of one's picture. Because of this penal background of the statute, section 22 and others KUG do not provide for damages, only for destruction of remaining copies. However, if there is a breach of this statute, which would be the case if a celebrity's picture were used without his permission, then it can be applied in conjunction with section 812 BGB on unjust enrichment. In effect this boils down to a claim in restitution.

Unjust enrichment only occurs if someone has infringed a legally protected right and thus enriched herself at the expense of the holder of that right. Restitution normally consists of a fictitious licence fee, the amount the celebrity could have commanded for the use of her image. Relief under this article is limited to this and cannot include any form of damages stricto sensu.

Section 12 BGB provides for the protection of the name in a similar vein. However, the article itself does not provide for relief through the awarding of damages, and here again one has to rely on the unjust enrichment clause of section 812. Relief is limited to a fictitious licence fee as a form of restitution. Where the right over the name is concerned, one has also to keep in mind that the attitude the courts take is that in principle the use of the name

23 Wird das Recht zum Gebrauch eines Namens dem Berechtigten von einem anderen bestritten oder wird das Interesse des Berechtigten dadurch verletzt, dass ein anderer unbefugt den gleichen Namen gebraucht, so kann der Berechtigte von dem anderen Beseitigung der Beeinträchtigung verlangen. Sind weitere Beeinträchtigungen zu besorgen, so kann er auf Unterlassung klagen. Translation: If the right to use the name of the person entitled to it is contested or if the interests of the person entitled to the name are harmed because another uses the same name without permission, that person may demand the harmful use be ceased. If further prejudice is to be feared that person can apply for an injunction.

24 Section 22 reads: Bildnisse dürfen nur mit Einwilligung des Abgebildeten verbreitet oder öffentlich zur Schau gestellt werden. Wird diese Einwilligung nicht als erteilt gelten, wenn der Abgebildete dafür, dass er sich abbildet ließ, eine Entlohnung erhielt. Erhielt der Bereichsname die Einwilligung in der Zweifel als erteilt, wenn der Abgebildete nicht von einem anderen bestritten oder wird das Interesse des Berechtigten durch die Nutzung des Bildnisses schädigpt, so kann er auf Unterlassung verlangen. Section 12 BGB reads: the use of the name of a person who died more than ten years ago is forbidden. However, if there is a breach of this statute, which would be the case if a celebrity's picture were used without his permission, then it can be applied in conjunction with section 812 BGB on unjust enrichment. In effect this boils down to a claim in restitution.

25 (1) Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfallt oder der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt. (2) Als Leistung gilt auch die durch Vertrag erfolgte Anerkennung des Bestehens oder des Nichtbestehens eines Schuldverhältnisses. Translation: (1) Whoever acquires something without a legal basis through the efforts of another or similarly at her expense, is obliged to give it back. This obligation subsists even when the legal basis disappears later or if the intended results of an effort as stipulated in a contract do not occur. (2) The contractual recognition of the existence or absence of an obligation also qualifies as an effort.

20 Gesetz betreffend das Urheberrecht an Werken der bildenden Kunst und der Photographie, 9 January 1907. Most of the articles of this law were scrapped in 1966, leaving only those concerning the protection of material images or pictures (Bildnissen).

21 Section 12 BGB (German Civil Code) concerns the right over the name. Section 812 BGB concerns unjust enrichment.

22 (1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstösst. Translation: Everyone has the right to free development of their personality, insofar as they do not harm the rights of others and do not contravene the constitutional order and moral law.
should be free. A plaintiff will have to prove that the name has real commercial value, that is, that could be or is used to commercial advantage, before being able to stop its use, even for commercial purposes.\textsuperscript{26}

Both these sections have the advantage that the burden of proof is relatively light on the part of the celebrity, once the name or image has been used without permission. No fault, negligence or damage need be proved.

However, theoretically, where neither picture nor name, but some other recognisable element of the celebrity’s image has been used, the general right of the personality on a traditional, non-commercial basis, that is, sections 1 and 2 of the FRG Constitution, could also be used. Here the burden of proof will be far greater, in the sense that the celebrity will not benefit from a presumption of unwarranted use of the aspect of the image in his favour. The German courts still approach the presumption of unwarranted use of the aspect of the celebrity’s image has been used, the general right of the personality on sections 1 and 2 of the West German Constitution, could also be used. However, the burden of proof will be far greater, in the sense that the celebrity will not benefit from a presumption of unwarranted use of the aspect of the image in his favour. The German courts still approach the presumption of unwarranted use of the aspect of the celebrity’s image has been used, the general right of the personality on sections 1 and 2 of the FRG Constitution primarily protect the individual, privacy rights, mainly against limitation by the state. So when it comes to the application of this section in an area of purely commercial interests, the attitude of the courts will be restrictive. They either require that an element of defamation or of harm to the reputation be present, or that it be proved that no other interests outweigh the interest that the celebrity has in protecting the commercial value of his or her image, a requirement that does not exist under section 12 BGB or 22 KUG.

However, it is hard to imagine the celebrity not being able to sue under those two latter sections and needing to use the general right of personality, since the recent \textit{Erhard} decision established that the right over one’s own picture could by analogy be extended also to the voice, or to the general get-up of a celebrity, in that way bringing virtually all aspects of the image under the protection of either 12 BGB or 22 KUG.\textsuperscript{27}

General tort clause

The possibility of recovering damages does exist under German law, notably through section 823 BGB.\textsuperscript{28} The difficulty with this section is that the burden of proof is exceptionally great. The celebrity will have to prove fault on the part of the manufacturer. In effect this means proof that the manufacturer knows that damage will occur, or is negligent in his use of the image. In addition the causal relationship and the actual occurrence and extent of damage will have to be proved. This turns an approach through 823 BGB into a rather fruitless strategy, and no such cases have in fact occurred, the possible results being limited and the far easier approach through 812 BGB being available.

Trade practices legislation or unfair competition law

A fairly broad obligation of fair trading does exist under German competition law, the UWG. Section 1 states that anyone in commerce who acts against good mores in competition will be liable for damages (in limited circumstances) or injunctions.\textsuperscript{29} Traditionally the problem of the extension of the competitive relationship to include a person, like the celebrity, who is not in the same field of activity, was a definite hurdle for the application of this law. However, the notion of competitive relationship is now very flexible and broad. Important in this development was the \textit{Statt Blumen X-Kaffee} decision of 1972 of the Federal Supreme Court which determined that a competitive relationship can exist between manufacturers in different product areas.\textsuperscript{30}

There is no decision as yet of the Federal Supreme Court, extending this explicitly to the situation of the celebrity versus the manufacturer who uses the celebrity’s image without permission. However, there have been decisions in related areas which allow one to predict that there would be no difficulty on this front.\textsuperscript{31} There is a distinct tendency to narrow down the requirements of a competitive relationship, so that the simple possibility of damage or restriction of competition would be sufficient. Effectively the position is now that if the celebrity (and this is in a sense a tautology) has the potential to commercialise her image, this is sufficient for section 1 UWG to be applicable. A good example of a lower court’s decision in this vein is the ‘Boris for you’ decision of the LG Hamburg of 1988.\textsuperscript{32} The defendant had used the name Boris on a brand of perfume, which would clearly make people think of Boris Becker as associated with the product. Strictly speaking this is not a case of advertising by use of an aspect of the image, but the similarities are sufficiently great. Following the requirement set out in the \textit{Dimple} decision,\textsuperscript{33} the Court found that the commercial use of the name Boris was to be expected (was ‘sinnvoll’, could reasonably be predicted) and that therefore a competitive relationship existed. The Court pointed out that Boris was already active in the field of merchandising

29 Gesetz gegen den unlauteren Wettbewerb, 7 June 1909 (law against unfair competition). Section 1 reads: Wer in geschäftlichen Verkehre zu zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstossen, kann auf Unterlassung und Schadenersatz in Anspruch genommen werden. Translation: Anyone who for the purpose of competition commits acts in the course of trade, that infringe good mores, is liable to incur injunctions or damages.


perfume. However, it would be sufficient for there merely to be potential exploitation in that area. If the defendant has indeed used the image without permission on such products, this would be sufficient to say that obviously the celebrity also has the potential to use her image for the selling of those products.

There are also some analogous decisions, such as the Rolls Royce decision, in the area of famous trade marks, and their use to sell products not directly related to the trade mark product (namely cars).

It would probably be correct to say in the circumstances, and taking into account that no decision has been directly in point, that wherever the commercial interests of the celebrity potentially or in fact touch upon or conflict with those of the manufacturer, there is a sufficient competitive relationship. Analogies are appropriate with the right over the name of section 12 BGB, which only restricts the use of the name if the potential to make commercial use of it exists. So in theory protection extends to an indirect competitive relationship, as in Australia. That at least is the opinion of a majority of the commentators.

The second requirement is that the actions of the manufacturer are against commercial mores. The same Boris foryou decision, stated that the unauthorised use of the exceptionally good name of a product or person (and thus their good reputation) is 'sittenwidrig', against good mores. No doubt this requirement will be further specified as it is fairly vague and broad at the moment. In any case, it would seem that the UWG will be a valuable tool to celebrities in the future. The reason it was not used until now is most likely that the right over the name and the picture were always available. Whether the shape of limitations will follow the Australian example will have to be awaited.

Relief under the UWG would normally take the form of an injunction. To be able to recover damages, proof of intent (knowledge of the illegal character of one's actions) would have to be provided, and this is a fairly difficult requirement. The cases where this has been attempted are rare.

The hesitancy of the Federal Supreme Court regarding the commercial aspects of the personality right, may lead to an approach based rather on the expansive interpretation of Trade Practices legislation, more akin to Australian law. However, because of the constitutional, human rights overtones of the problem, the development may yet go the way of the United States, but without overt property recognition. Indeed, the recognition of the property nature of a celebrity's rights over the image may remain a uniquely American development.

Conclusions

From a comparative viewpoint it is interesting to observe the differences in the approach between Australia on the one hand and the United States and the Federal Republic of Germany on the other. The latter two have an approach which is to a large extent influenced by the constitutional context, and the respect for personal freedom that requires. Because Australia does not have the written constitutional guarantees of freedom of speech, right of privacy and of free development of the personality, it faces the problem in a different way, not from a personal rights angle, but from a commercial regulation viewpoint. Therefore the tort of passing off was taken up and extended to fit the purpose, maybe a little artificially, but in a typical common law way.

Both tests of unacceptable use of the image of the celebrity are very flexible, and only a great deal of refined case law will bring them to a standard of predictability which is now lacking. Potentially the results are similar but will again be influenced by the different constitutional approach, leading to a somewhat broader protection in the United States and the Federal Republic of Germany than in Australia. Arguments as to relative advantages and disadvantages are inconclusive at this stage.

The preferred conceptual approach depends on the value one puts on the celebrity's rights over an interest in her image: does it justify a starting point of absolute protection or not? The following points are worth considering in this context, apart from the question whether all jurisdictions have the required legal make-up to allow a shift towards one or another approach.

The passing-off approach does not resolve the questions of alienability, descendability and duration of protection after death, aspects which would need to be statutorily regulated. There is no explicit guarantee that the freedom of information be protected. However, in the Australian perspective, non-commercial use equates freedom of information to a large extent.

In Australia the test of whether a celebrity's image may be used in commerce depends on the court's appreciation of the attitude the average consumer may take to it, rather than leaving it up to the celebrity to decide, with limitations imposed by public interest (a consumer-based test instead of an individual rights-based test). From a property rights, or basic 'human' rights-based outlook this may seem unacceptable.

On the other hand, the property style approach (whether overt or not) also reveals certain inadequacies. Conceptually, does it make sense to say that because the protection requirements of celebrities are akin to property style protection, we qualify their rights as property rights and accept the traditional consequential effects of such a classification? On a more practical plane, if one recognises a property right over the image, should it be allocated only to the celebrities themselves or also to all others involved in creating their media image (such as the production company, the sports promoters and so on)? It is also questionable whether giving the celebrity's rights the status and nature of property rights serves any great purpose in society, when the kind of advertising they are engaged in may be of little informational or other social value. Maybe the law should not proceed too quickly and unwittingly down this road.


35 General right of the personality and self-determination in Germany, and right of privacy together with freedom of information in the United States.