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The common law tort of appropriation of personality in Ontario.using legal transplant to solve the problem of the image rights lacuna in UK law.

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Abstract

The image rights of athletes and celebrities are worth considerable sums of money to celebrities, brands, and sponsors alike. The desire to have celebrities endorse goods or services has meant that celebrities can benefit financially from selling and promoting their image. However, there is no image right in UK law. This is in spite of the fact that image rights exist in the practical sense, for example, in standard sports contracts. Thus, the courts have used varying degrees of judicial creativity to provide remedy when faced with image rights invasions, namely through passing off and breach of confidence actions. However, in the absence of image rights legislation in Ontario, the courts have also employed a degree of creativity, this time creating a free standing tort of appropriation of personality, specifically designed to deal with image rights invasions. Thus, in the absence of UK Parliamentary desire to legislate for image rights, this paper analyses whether it is possible to employ a 'common law legal transplant' by adopting the Ontario approach within the UK common law. This would provide a specific remedy, rather than circumventing the traditional intellectual

property remedies which were not designed to deal with the issues image rights invasions create.

KEYWORDS
appropriation of personality, image rights, intellectual property, legal transplant

Celebrity and athlete endorsements are commonplace amongst those individuals lucky enough to be considered 'commercially attractive' to brands. With the growth of social media platforms such as TikTok, Instagram and X (formerly Twitter), celebrities can advertise products and reach millions of followers or rather, potential consumers, with the touch of a button.[1] These advertisements are a lucrative business and the promotion of the 'athletic persona' has proven to be financially beneficial to athletes, brands and advertisers alike. The sports industry, perhaps more than any other aspect of the 'celebrity' business, has become actively involved with the advertising industry, with brand promotion the norm, and expected, amongst successful athletes.[2] Put simply, the image rights of athletes and celebrities are profitable, worthy of protection and capable of exploitation. *However, in the UK, there is no statutory or common law image right*.

The term 'image right' is "used to describe rights that individuals have in their personality, which enables them to control the exploitation of their name or picture."[3] However, the absence of an image right within the UK statutory framework is in spite of the fact that in law, the link between celebrity and brand is well established.[4] This is evidenced through authorities such as the English cases of *Tolley v Fry*[5] in which a without consent, used the image of an amateur golfer in an advertisement, inferring an association with the product; by *Irvine v Talksport*[6] where radio station Talksport used the image of famous F1 driver Eddie Irvine in the promotion of the station, also inferring that the athlete had endorsed the product and by *Douglas v Hello*[7] in which a breach of confidence action was held to be capable of protecting a celebrity's private information, in this case, exclusive wedding photographs. This protection of the celebrity image is despite the fact that the judiciary has continually stated that image rights *do not exist in law*. By means of example, in *Robyn Rihanna Fenty v Arcadia Group Brands Ltd*[8] also known as *Rihanna v Topshop* (which will be discussed in more detail below) Laddie J stated,

> *it is important to state at the outset that this case is not concerned with so called 'image rights.' Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in England no such thing as a free-standing general right by a famous person (or anyone else) to control the reproduction of their image*.[9]

This rejection of an image right is paradoxical—given that image rights, at least in the practical sense, do exist.[10] To elaborate, although image rights do not technically exist in law as they are not recognised formally in legislation, or by the common law, they are used every day in commercial and employment contracts and are recognised by HMRC as a means of securing a tax deduction.

By using football as an example, the standard English Premier League (EPL) contract makes various provisions for image rights, including:

> *the Clubs' use of the player's image must not be greater than the average for all first team players*.[11]

This sort of acknowledgment of an image right is evidence of their practical existence. Football is not unique in this inclusion of image rights within their standard contract. England Rugby has various similar provisions.[12] For example:

> *the Image Rights of the Player belong solely and exclusively to him and may not be exploited by the Club or granted to any other third party without the express authority of the Player save as is provided in this Schedule and "the Player acknowledges that he will be obliged to participate in a reasonable number of Promotional Activities and RPA activities and duties so as to enable the terms and conditions of the Clubs contracts entered into with any sponsor, licensee or partner to be fulfilled. The Player hereby licenses his Image Rights to the Club for Promotional Activities…*[13]

Outside the scope of standard contract provisions for image rights, the existence of an image right is acknowledged in tax law and considered a means of securing a tax deduction. In practice, athletes assign their image to an image rights company, and their club or sponsor will pay that company a fee to exploit the athletes' image.[14] This fee is subject to corporation tax rather than the higher rate of income tax, which can result in a considerable saving for athletes. Acknowledging an image right in this area of law, the HMRC capital gains tax manual states that the only "pure" avenue for the protection of an image right under UK law is through the tort of passing off,[15] whilst the case of *Sports Club Plc and others v Inspector of Taxes*[16] gave sports clubs the 'green light' to make image rights payments to players, stating,

> *the ability to exploit their image in a commercial context in exchange for a fee… were genuine commercial agreements which the parties could seek to enforce*.[17]

Thus, at present, image rights are generally created under the terms of a contract between the person whose image is to be exploited and the person seeking to exploit their image for commercial gain. Although this is of a standard form in some cases, as outlined in the Premier League and England Rugby examples above, the individualised nature of the contractual relationship can mean that image rights are defined differently for different categories of people both within the same commercial sector and across different industries. Thus, to ensure a minimum level of common understanding of what an image right is and how it can be exploited, a degree of standardisation is required. Given that Parliament has shown no desire to create an image right, this is unlikely to come from the legislature, then the most appropriate means of creating this common understanding and ensuring standardisation across the law is for the creation of a specific image at common law. Although, arguably, this could be said to be imposing a pre-defined right on an individual without their consent, it reflects the reality that image rights exist and ensures that they are respected and protected.

As such, although image rights exist in practice, and cause considerable controversy in the area of taxation, as above, neither the UK Parliament nor the judiciary has shown any desire to solve these issues. The fact that when faced with image rights challenges, the courts have continually used varying degrees of judicial creativity to find remedy through the traditional intellectual property mechanisms, rather than create a statutory image right, piques interest in the way in which the courts in Ontario, Canada, have created a common law image right. In the absence of a free-standing image right within Ontario, and faced with a number of image rights cases, the courts created a common law tort of appropriation of personality in *Krouse v Chrysler Canada Ltd*.[18] *Thus, the purpose of this paper is to assess whether there is potential for a legal transplant in terms of the common law of Canada and the UK in relation to image rights.*

1 | LEGAL TRANSPLANTS—WHAT ARE THEY AND CAN THEY WORK?

Vast amount of academic literature exists about the concept of 'legal transplants.'[19] A legal transplant is 'the process whereby a national legal system implements the rules of another legal system in its own legal order.'[20] The alternative has been coined, 'indigenous law making' whereby a national legal system makes its own rules rather than employing a transplant.[21] In the UK, it has been argued that the study and indeed implementation of legal transplants is somewhat underdeveloped, with very few examples, one of which is the implementation of the Human Rights Act (1998) from the European Convention of Human Rights.[22] The study and theoretical basis of

legal transplants are beyond the scope of this paper, but the concept is relevant when examining the way in which Ontario has created the common law tort of appropriation of personality.

It is clear that given the lack of legislature desire to create a stand-alone image right in the UK, in the same way that provinces such as British Columbia, Manitoba, Newfoundland and Saskatchewan have in Canada through their Privacy Acts,[23] the possibility of what this paper regards as a 'legislative legal transplant' is unattainable. There is however, the possibility of what will be regarded as a 'common law legal transplant.' When examining whether a legal transplant is possible, there is support for the view that the failure or success of the transplant depends upon the culture and legal landscape from the jurisdiction in which the law originates to the jurisdiction into which it is transplanted. On the other hand, it has also been argued that if the law is 'good law,' then it can be transplanted successfully regardless. As Small explains,

> *The debate essentially revolves around the question of whether and to what extent law is transferrable between different cultures. On the one hand, the so called culturalists posit that success or failure of a legal transplant depends on the culture from which the law originates and the culture into which it is transplanted. On the other hand, the transferists argue that law is autonomous from culture and, as such, good law is transplantable irrespective of culture.*[24]

With regard to the Ontario common law tort of appropriation, this paper advocates that the law is not only good law, but that the legal landscape and culture in the UK and Canada, are sufficiently similar to ensure a successful transplant. With specific regard to the latter, the legal geography and culture in Canada and the UK are sufficiently similar to ensure the successful transplantation of the tort of appropriation of personality. Fundamentally, the preamble to the Canadian Constitution Act (1867) states that the constitution of Canada will be 'similar in principle to that of the United Kingdom.'[25] The Canadian system of governance is similar to that of the UK. Both countries share a constitutional monarchy, meaning the Crown is the head of state and legislation requires Royal Assent.[26] Both jurisdictions also have a national government (i.e., the UK government and Canada's federal government) as well as distinct territorial governments. For example, Canada has provincial governments for each of its 10 provinces, whilst the UK has devolved Scottish and Welsh governments. These systems are both achieved through the legal principle of the separation of powers.[27] Although Canada has a written federal constitution, it is similar to the UK in that much of its law is created through the common law. Thus, Canada has a mixed legal system. Across its provinces, public law (including criminal and administrative law) is based on the British common law (with some differing Canadian characteristics), whilst its private law is likewise based on the common law tradition, with the exception of Quebec.[28]

This brief overview is illustrative of the fact that the UK and Canadian legal systems are intrinsically linked. Much of Canada's laws are based on UK law, emphasised by the preamble of the Constitution Act. If the argument is that legal transplant 'depends on the culture from which the law originates and the culture into which it is transplanted,'[29] then it can be persuasively argued that the similarities between the UK and Canada ensure the chance of success of a legal transplant between the two jurisdictions is high. However, even if there is an argument that this is not the case, then the possibility of success remains, given that the law, if autonomous from culture, can still be transplantable if it is good law. Thus, it is necessary to examine the tort of appropriation of personality in Canada to illustrate that it is indeed good law, and in any case, is transplantable. In doing so, it is important to firstly examine how the UK courts have dealt with the absence of an image right in law, to compare their approach to that of the Canadian courts.

2 | JUDICIAL CREATIVITY OF THE UK COURTS IN PROTECTING 'IMAGE'

The judicial creativity of the UK courts when protecting image is evidenced most heavily through the traditional intellectual property remedies of breach of confidence and passing off.

3 | BREACH OF CONFIDENCE

The law of confidence in the traditional sense, is concerned with protecting confidential information, rather than selling the glitz and glamour of celebrity. In spite of this traditional nature of a breach of confidence action, celebrities have found this remedy a useful means of protecting their image and privacy.

It is imperative to note from the outset that celebrities who wish to utilise the law of confidence in cases of invasion of privacy or an unauthorised exploitation of their persona, must meet the required elements of the remedy, as set out by Megarry J in *Coco v A.N. Clark (Engineers) Ltd*,[30] namely:

(1) the information must possess the 'necessary quality of confidence,'
(2) the information must have been communicated in circumstances which imported an obligation of confidence,
(3) the information must have been used in a way that was not authorised
(4) the claimant must suffer a detriment as a consequence of the disclosure.[31]

In light of this definition, it is somewhat difficult to comprehend how the above elements can be reconciled with the commodification of the athletic or celebrity persona. In several circumstances, celebrities will struggle to claim confidentiality having carefully manipulated and perfected their image to ensure maximum exposure and publicity.[32] Similarly, the idea of suffering a detriment as a result of a publication that increases the profile of a celebrity is also problematic. In the following cases however, breach of confidence actions *have* succeeded in these circumstances (albeit claimants are still bound by the traditional elements). Thus, the use of judicial creativity has allowed an extension of the law of confidence to warrant the protection of private, rather than confidential information and has led to the development of the tort of misuse of private information.[33]

The first example of judicial creativity in protecting image was seen in *Campbell v MGN Ltd*,[34] concerning the complaint of the well-known, high-profile supermodel Naomi Campbell, who having voluntarily provided newspapers with various information regarding her private life (mainly an assertion that she did not partake in drug use), proceeded to sue the Mirror Newsgroup following their publication of an article in which Campbell was photographed leaving Narcotics Anonymous. The House of Lords had to consider whether the information published was confidential and whether Campbell's right to a private life under Article 8 of the ECHR should override that of the journalistic right to freedom of expression under Article 10.[35]

The court considered the details regarding Campbell's treatment (i.e., for how long, how often, and at what times) as information that thereby imported a duty of confidence, the fact that she was a drug addict or receiving treatment was not.[36] This view was taken by Lord Hope in light of the nature/type of treatment Campbell was receiving.

> the private nature of these meetings encourages addicts to attend them in the belief that they can do so anonymously. The assurance of privacy is an essential part of the exercise. The therapy is at risk of being damaged if the duty of confidence which the participants owe to each other is breached by making details of the therapy, such as where, when and how often it is being undertaken, public. I would hold that these details are obviously private.[37]

The court then embarked upon an assessment as to whether Campbell's right to a private life under Article 8 should be regarded as more important than the newspapers' right to freedom of expression under Article 10 of the Human Rights Act (1998). By virtue of the fact that Campbell's treatment had been deemed private information, the question was answered in the affirmative. The court held the right of the public to receive information regarding her treatment was of much lesser importance than their right to know that she was misleading the public when she stated she did not take drugs.[38] As such, it was held that having reasonably considered the Mirror's right under Article 10, the publication had indeed breached Campbell's right to a private life and Article 8 should therefore take

precedence. Campbell was entitled to an obligation of confidence and her right to a private life, in these circumstances, was of a higher importance than the Mirror's right to freedom of expression.

Having established the judgment of the court, and its reasons for making it, it is necessary to examine the effect this has had on celebrities, who, in the absence of a statutory image right, wish to protect their right to privacy, despite their status as a 'celebrity' in the first instance. Thus, the true importance of this case lies not within the balancing act between Article 8 and Article 10, but rather how the House of Lords dealt with the issue of privacy—as opposed to the traditional confidentiality requirement created by *Coco*. *The court regards the details of Campbell's treatment as private information—not confidential*.[39] This distinction is highlighted by both Lord Birkenhead and Lord Hoffman in their commentary regarding the changing nature of the tort. In the opinion of Lord Birkenhead,

> *the breach of confidence label harks back to a time when the cause of action was based on improper use of information disclosed by one person to another in confidence*,[40]

and Lord Hoffman who considered that the new approach to a breach of confidence action,

> *takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses on the protection of human autonomy and dignity—the right to control the dissemination of the information about one's private life and the right to the esteem and respect of other people*.[41]

Thus, it is evident that the court was willing and in fact, acknowledges that a breach of confidence action can be extended to include the protection of private information.[42] However, this is somewhat limited in scope, as it only covers private information, rather than the image of the celebrity and other aspects such as likeness, voice or personality which would be encompassed by a traditional image right. This reluctance by the judiciary to create a common law image right and its use of judicial creativity in a context which does not cover private information but rather commercially valuable information, is illustrated in *Douglas v Hello Ltd*,[43] in which they protect what can be regarded as 'commercial confidence.'

Douglas represents the second case involving the celebrity persona and a breach of confidence action within the UK.[44] Actor Michael Douglas and actress Catherine Zeta-Jones, entered into a contract with popular celebrity gossip magazine OK! for the sale of the exclusive rights to the publication of their wedding photographs, for a £1 m price tag. However, before their publication, rival magazine Hello! obtained photographs of the wedding surreptitiously and published them—despite the agreement between the Douglases and OK!.[45] The case came before the House of Lords, in which OK! appealed against the decision of the High Court which rejected OK's claim for damages from Hello!

Before examining the extension of the law of confidence, it is important again to highlight that the High Court ruled the *Coco* criteria had been met, affirmed in the House of Lords. The information (photographs) was held to possess the necessary quality of confidence as 'none were publicly available.'[46] The second criterion, requiring the information to have been communicated in circumstances which import an obligation of confidence, was held to have been met by the insistence of the couple 'that anyone admitted to the wedding was not to make or communicate photographic images.'[47] The detriment requirement was also held to have been met, given the obvious detriment suffered by OK![48] as a result of Hello's publication—an illustration as to the continuing prevalence of the *Coco* criteria, although it has notably been expanded as established by the above conclusions in relation to *Campbell*.

The pivotal point in respect of this case is once again the judicial creativity employed by the courts to provide a remedy for the unauthorised use of one's image, in the absence of an image right. The judgment of the House of Lords established that it is indeed possible to possess a 'commercial interest' in private information.[49] As Walsh explains, this suggests that,

> *where a celebrity profits from a magazine deal in which he gives an exclusive look into his mansion, etc., such private information can be protected through the law of confidence, notwithstanding the commercial interest in this information.*[50]

In the House of Lords, Lord Hoffman conveyed judicial acceptance of the commercial business which the commodification of celebrity has become,

> *the point which one should never lose sight of is that OK! paid £1 m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of any photographs of the wedding. That was quite clear,*

whilst also having directed the courts to keep 'one's eye firmly on the money and why it was paid.'[51] However, Lord Hoffman, similar to that of the court in *Rihanna*, also made it clear that the decision in the House of Lords did not, by any means, create an image right. He stated the case simply regarded information capable of being protected 'because it was information of commercial value over which the Douglases had sufficient control to enable them to impose an obligation of confidence.'[52]

Despite this insistence that the decision falls short of creating an image right, it is clear that the comments made by the judiciary in regard to protecting the commercial investment of the couple, illustrate the existence of image rights in a practical sense, and evidence the common theme of using traditional intellectual property laws to solve problems which they were not designed for. *Douglas* ultimately extends the law of confidence to protect what can be deemed 'commercial confidence'.

4 | THE JUDICIAL CREATIVITY AND THE PROBLEM

The law of confidence is traditionally concerned with protecting individuals from invasions of privacy. The celebrity persona generally concerns the commercial exploitation of the celebrity image, achieved through seeking media attention and chasing the latest magazine or endorsement deal. As a result, it is ultimately difficult to reconcile a breach of confidence action with the media-driven reality of celebrity, especially in a time where social media, in particular, is thriving and celebrities can communicate their daily lives in a few 100 characters at the click of a button. However, in the cases outlined above, the judiciary has focused on adapting the traditional remedy, albeit still bound by the criteria, to give protection to the celebrity image. *This protection may be beneficial for celebrities and athletes alike yet using a remedy to solve a problem it was not designed for instead of creating a common law image right is ultimately impractical and unhelpful given the prominence of 'image rights' in the practical sense*.

5 | PASSING OFF

The tort of passing off is the second 'traditional' intellectual property remedy that has been utilised to protect image rights. This remedy is traditionally concerned with the prevention of undertakings 'passing off' their products or services as that of another. Typical cases involved the imitation of a company's product under a similar name, packaging or the use of a popular slogan—all of which are calculated to confuse the mind of the consumer purchasing the product. Thus, the tort of passing off is very much focused on protecting the consumer, and ensuring they are not confused or misled into purchasing a product or service which they would not otherwise have bought. This is very much different from what is required when protecting image rights, where an individual needs protection from unauthorised exploitations of their image, to ensure they have exclusivity in that image and can

maximise either their privacy or commercial income, and as such, illustrates one of the fundamental issues with using passing off as a method of protecting image.

A passing off action requires three key elements, often referred to as the 'classic trinity,' namely: the existence of goodwill in the product, service or business, a misrepresentation concerning those goods and that misrepresentation must cause damage to the goodwill of the claimant.[53]

The first case in which passing off was extended to protect the image of a celebrity was that of *Irvine v Talksport*.[54] Irvine competed in Formula One and having finished second in the year of 1999, he was regarded as having considerable endorsement power,[55] emulating the 'celebrity athlete.' The dispute arose after radio station Talksport embarked upon a promotional campaign that distributed flyers bearing Irvine's image, the original photograph having been doctored to show the athlete holding a radio which had been manipulated to read Talksport.[56] The claimant argued the flyer implied he had endorsed the radio station and thus constituted passing off in regard to his image. The main question for the court was whether the law of passing off could apply in cases of false endorsement.

Quite simply, it was held, that 'there is nothing which prevents an action for passing off succeeding in a false endorsement case.'[57] However, as with the law of confidence, the traditional elements still apply. Thus, it is important to bear in mind that the claimant is still bound by the elements of the classic trinity.[58]

Upon addressing the requirements of the trinity, the court held that there could be 'little doubt' as to the goodwill of Irvine at the time of the case. Having established the popularity of Formula 1 itself, (watched by some 350 million television viewers worldwide), the court also highlighted the success of Irvine himself.[59] Not only had the sportsman continually found himself on the winner's podium in 1999, he received an 'immense amount of press coverage,' appeared in several magazines (both car and non-car related) and endorsed various products including clothing, racing helmets and footwear.[60]

With regard to the second requirement, as to whether Talksport's publication would lead a not insignificant section of the market to believe that Irvine had endorsed the station, the court also ruled in favour of the F1 driver. In reaching this conclusion, the court intimated that the issue to be considered is the effect of the promotion, not the intention with which it was conceived.[61] As such, it was accepted that whilst the radio station had not intended to mislead the audience,

> *it is legitimate to conclude that part, at least, of the intention was to convey the message to the audience that Talk Radio was so good that it was endorsed and listened to by Mr Irvine. Mr. Irvine's support of Talk Radio would make it more attractive to potential listeners with the result that more would listen to its programmes and that would make Talk Radio an attractive medium in which to place advertisements*.[62]

In the context of the 'not insignificant' number of recipients likely to infer Irvine had endorsed the station, the court held that a high number of those who received the brochure would assume the claimant had endorsed the station—thus fulfilling the second requirement.[63]

In respect of the requirement of damage, the defendant argued that by virtue of the fact the flyer was only distributed to around 1000 people, the claimant was not able to prove substantial damage.[64] However, the court referred to the *Taittinger SA v Allbev Ltd*[65] judgment in which it was held that although the damage had not affected the sales of the defendant's champagne in any significant way, this was not to say that the damage could not become significant or 'incalculable' in the future.[66] Applying this rationale in the context of the present case, the court concluded 'it is possible that the damage already done to Mr Irvine may be negligible in direct money terms but the potential long-term damage is considerable,'[67] meeting the third and final requirement and thus ruling in favour of Irvine.

The above illustrates that although still bound by the classic trinity, passing off can be applied to cases of false endorsement. Again, this ultimately requires a degree of judicial creativity. The tort of passing off was conceived to deal with passing off products as that of another and protect consumers from being misled, yet the creativity used

by the courts in Irvine enabled the protection of an individual's image, in the absence of a specific image right. Although the athlete successfully sought this remedy, in light of the above, it must be acknowledged that the need for this creativity simply reinforces the fact that passing off is not a sufficient solution to the issue of image rights. The tort of passing off was likewise conceived to deal with passing off products as that of another, but the creativity used by the courts in *Irvine* enabled the protection of the athlete's image, in the absence of specific legal protection. This theme of creativity is further exemplified by extending passing off to cover instances of false endorsement in Rihanna.

In *Fenty v Arcadia Group Brands Ltd (t/a Topshop)*,[68] singer Rhianna raised a passing off action against clothing brand Topshop for the unauthorised commercial exploitation of her image in 2012. Topshop began selling a t-shirt featuring the image of Rhianna, which bore striking similarities to her official album cover, namely, that she was wearing the same headscarf and sporting the same hairstyle. The photograph was taken by an independent photographer during her 'We Found Love' video shoot and although no copyright issue was raised, Rhianna argued the similarity between her album cover and the image on the t-shirt Topshop was selling, would lead consumers to believe the item had been officially endorsed, subsequently amounting to passing off.[69]

It is important to recall that very early on within the judgment, as noted above, Birss J explicitly states that the case concerns passing off and that no image right exists within the English legal framework;

> *it is important to state at the outset that this case is not concerned with so called 'image rights.' Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image.*[70]

As such, the case (at least in the eyes of the court) regards passing off and thus, the three elements of the classic trinity must be established.[71] Similarly, it is also worth emphasising that before ruling upon whether the traditional elements of passing off had been satisfied, the court first considered whether the law of passing off could apply in cases of false merchandising. The court held,

> *there is no difference between an endorsement case…The legal principles are the same in both. The claimant must have a goodwill to protect. If the goods are then sold in circumstances in which the purchasers understand there is to be a representation that the goods are authorised by the claimant or are in that sense "official" merchandise, but in fact that representation is a false one, then as long as the false representation is operative, the second element of passing off will be satisfied. To complete the tort the activity has to be damaging, but in a case like this, if the first two are proved, it most likely will be.*[72]

As such, it follows that passing off can apply in false endorsement cases, thus extending the law of passing off, provided the three elements of the classic trinity are satisfied. On addressing whether Rihanna possessed the necessary goodwill, the court referred to the popstar as 'world-famous' and in possession of a 'cool, edgy image.'[73] The court also highlighted a number of promotional deals to which Rihanna had become a party to, including 'big brand' names such as Gucci, H&M, River Island, Armani and Topshop's brother store Topman, all indicative that 'Rihanna has made the effort to promote a specific association in the public mind between herself and the world of fashion.'[74] As such, Rihanna was regarded as a 'style icon' and this had given her 'ample goodwill to succeed in a passing off action of this kind…The scope of her goodwill was not only as a music artist but also in the world of fashion as a style leader,'[75] thus satisfying the first element of the classic trinity.

The second element of misrepresentation was similarly held to be satisfied. Although Topshop argued that the t-shirt did not suggest it was official Rihanna merchandise,[76] the court considered that both Topshop's previous connection with Rihanna and the image itself constituted a misrepresentation. With regard to the former, the court concluded that 'Topshop makes a considerable effort to emphasise connections in the public mind between the

store and famous stylish people. It has done so in the case of Rihanna, placing emphasis on her public persona as a style leader,'[77] increasing the likelihood that the public would infer Rihanna had endorsed the product. In the context of the t-shirt itself, the court held that the similarity between it and the album cover was sufficient to constitute a misrepresentation, As such, the court held the public would be likely to infer the t-shirt was official merchandise endorsed by the popstar and so the second element was satisfied.

Regarding the final element, the court found no issue in ruling that the sale of the t-shirt had caused damage to the goodwill of Rihanna. Having found that a substantial number of customers would believe that the t-shirt had been officially endorsed, and as such, resulted in 'sales lost to her merchandising business,'[78] which caused 'a loss of control over her reputation in the fashion sphere.'[79] As a result, Rihanna succeeded in her claim against the high street chain, having satisfied the elements of the classic trinity, illustrating the continued relevance of the traditional elements of passing off in spite of the protection of the celebrity image. Although Topshop appealed this judgment, it was unsuccessful in court. Ultimately, *Rihanna* extends the law of passing off to cover situations of false endorsement.

6 | PASSING OFF = FALSE ENDORSEMENT AND FALSE MERCHANDISING

The above cases illustrate how the traditional intellectual property remedies of breach of confidence and passing off have been utilised to protect the celebrity image in the absence of an image right. However, to protect the image of these celebrities, the courts have continually had to use an element of judicial creativity as explored above. It is imperative to acknowledge that this judicial creativity has shifted the focus of passing off to protecting the individual rather than the consumer, which is not the purpose of a passing off action, reinforcing the issue with using nonspecific remedies, to deal with image rights cases. Furthermore, it is also important to acknowledge that as with breach of confidence, these types of cases resulting in litigation are rare. As Perot explains, advertisers are averse to taking the risk of using a celebrity persona without permission, to avoid legal action.[80] However, by having a specific tort or image right similar to Ontario which will be discussed below, that threat of legal action becomes much more substantiated, rather than having to circumvent the traditional remedies.

In sum, when examining the traditional remedies, a breach of confidence action has been extended to include private information and protection of commercial confidence, whilst passing off has been extended to cover instances of false endorsement and false merchandising. It is no doubt a positive that celebrities were provided with remedy in these cases, but it is important to bear in mind the level of judicial creativity used, and the reality that these remedies were not designed to deal with the issues that image rights disputes bring. Thus, this is where the approach used by the courts in Ontario provides an alternative, preferred approach, and one which the UK should consider the possibility of a common law legal transplant.

7 | THE TORT OF APPROPRIATION OF PERSONALITY

7.1 | Krouse v Chrysler Canada Ltd[81]—The conception of the tort

The High Court of Ontario's first foray into the common law protection of the celebrity persona in a dispute between professional football player Bob Krouse, and car manufacturer Chrysler. Chrysler embarked upon an advertising campaign that not only promoted their cars, but the device in question bore the names and numbers of professional football players. One photograph, featured Krouse in a defensive football scene in which only he was identifiable, albeit from behind, by his number 14 jersey.[82]

Krouse complained the photograph constituted an unauthorised commercial exploitation of his personality. Krouse argued the use of his image was a 'trespass' against his right to 'realise, if he can, a commercial advantage from the notoriety which professional athletes in our community and in these times possess.'[83] The use of trespass was dismissed on the basis that Krouse was able to realise a tangible benefit from licensing his image.[84] This is in contrast with the approach taken in the UK cases above, where the courts did not consider whether or not the celebrity had gained any sort of benefit from the unauthorised use of their image, and focused rather upon the element of damage in both confidence and passing off actions.

However, in dismissing trespass as an appropriate remedy, the court did accept the existence of a tort of appropriation of personality within the common law. This, like the approach adopted by the UK Courts, required a degree of judicial creativity. This creativity however, provided a remedy specific to image rights of athletes, rather than attempting to circumvent the traditional intellectual property remedies such as passing off and breach of confidence. It stated that, 'there is indeed some support in our law for the exploitation of a remedy for the appropriation for the commercial purposes of another's likeness, voice or personality,' before ruling, 'the common law does contemplate a concept in the law of torts which may be broadly classified as the appropriation of one's personality.'[85] The entirety of the support in the law referred to is discussed by the Court as follows:

> *Tolley v. J.S. Fry and Sons Limited, supra, although based in the law of libel does in the end protect a public athletic figure from invasion of or aggression against his status as an athlete by commercial interests for their gain. Thus far the Courts in this country and the United Kingdom have declined to found an award on any broad basis such as appropriation of personality or even an injury to the latent power of endorsement. Even in the United States such judgments, as have been granted, are largely based on statute. Indeed, the right first recognized in this general area of law, the right to privacy, has been held by the Court of Appeals of the State of New York not to apply to the incidental telecasting without authorization of a professional entertainer on a commercial television programme: Gautier v. Pro-Football, Inc. (1952), 304N.Y. 354. There is, of course, no privacy legislation in Ontario.*[86]

On analysis, the reasoning of the court is potentially problematic and the support to which it refers to does not indicate the pre-existence of an appropriation of personality tort. In *Tolley*, the claim of the appellant was based upon the law of defamation and takes place within the UK. As the court states, the UK has no legislation that protects a celebrity from an appropriation of personality. The US authority is based predominately on statute and not the common law, yet these jurisdictions are deemed as 'support' of the existence of the appropriation of personality tort at common law.[87] However, these points can be considered somewhat academic. *The important take-away is the protection of an image right, through a specific tort within the common law, rather than attempting to circumvent traditional remedies that simply do not fit*. Similarly, the reliance on the law of other jurisdictions illustrates how legal transplants can work in reality.

With specific reference to the judgment, despite confirming the existence of the tort, the Court of Appeal held that this right to realise one's commercial endorsements did not apply in Krouse's circumstances.[88] This was based upon an acknowledgment that by virtue of his profession as a footballer, Krouse should expect some loss of privacy and even some loss of potential commercial exploitation given athletes authorise and invite communications by the media, with exposure being the 'life-blood' of pro-sport.[89] This is again, in contrast to the approach taken in the UK, whereby in *Douglas*, the courts used a breach of confidence action to protect the commercial confidence of celebrities, in spite of these celebrities actively seeking the limelight. However, it should be acknowledged that the pictures in *Douglas* were from a private event and not images taken in public. Moreover, the judgment in *Krouse* is somewhat difficult in failing to quantify how much 'some' loss of privacy and exploitation amounts to—and was based on a description of the relationship between sport and the media, rather than founded by any legal principle. It stated:

> *Newspapers, magazines and television regularly produce articles, features and discussions about the game of football, past and present, and an almost endless flow of facts and speculations concerning individual games and participating players. In these general commentaries the reader or the viewer is also exposed to events occurring in games and in or about the lives of the participating professional athletes, all with at least the tacit approval of those who apparently benefit from such publicity, namely, the owners of the teams, and the individual players.*[90]

However, the tort is further clarified and expanded by the cases discussed below, in the way which the common law should operate, and although its conception may not have been ideal given the judicial creativity used in deeming 'support' in the law for the tort, *Krouse* is at least authority for the proposition that appropriation of personality now exists in the common law and of the potential avenues for legal transplant. The tort has the potential to protect celebrities against unauthorised use, for commercial purposes, of their likeness, voice or personality.

8 | ATHANS V CANADIAN ADVENTURE CAMPS[91]—CONFIRMING AND DEFINING

Athans confirms the existence of the tort within Ontario, whilst clarifying the scope of the protection which an unlawful appropriation of personality provides. Athans, a famous water skier, purchased a photograph of himself in action, which having been utilised so often for commercial purposes, had become akin to his trademark.[92] The defendants, Canadian Adventure Camps (CAC), ran children's summer camps. It featured the photograph in the form of a drawing in their brochure and an advertisement in a water skiing magazine. Athans was recognisable in the drawing, although his physical characteristics could not be explicitly made out. Athans raised an action against CAC on the basis of both passing off and appropriation of personality.[93]

Athans' claim of passing off failed on the basis that there was no likelihood of confusion and the public would not be deceived into thinking that the athlete had endorsed the summer camps. This is important in illustrating the lower threshold requirement between passing off and appropriation. Passing off requires a misrepresentation, whereas the appropriation of personality tort focuses specifically on appropriation. This is made out explicitly in the judgment:

> *The decisive point, however, is that, as I hold, it is improbable that the relevant segments of the public who would read the advertisement and the brochure would associate the business of C.A.C. with the athlete, George Athans. As I have said, there is no evidence that any but the most knowledgeable persons concerned in the sport of water-skiing would identify the drawings with Mr. Athans. It is obvious that the brochure and advertisement are designed to attract customers who wish to send their children to a summer camp where water-skiing is featured in the programme. There is no evidence, and experience suggests it is unlikely, that that segment of the public would be particularly knowledgeable about the sport of water-skiing, or would identify the drawings with Mr. Athans.*[94]

Thus, the above is particularly illustrative of the limitations of passing off as a remedy for unauthorised image rights exploitations. The claimant is bound by the classic trinity and the requirement of misrepresentation is higher than appropriation. In relying on passing off as a remedy, the UK is making it more difficult for celebrities to protect their image by having to circumvent the traditional remedies, rather than providing specific protection, as Ontario has done with its tort of appropriation of personality.

In regard to Athans, this tort did provide Athans with a positive outcome. Affirming *Krouse*, whilst also clarifying 'the nature of this tort by infusing the right appropriated with characteristics of property rights,'[95] the court stated, 'it

is clear that Mr Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him of protect that right, if it is invaded.'[96] On analysis of whether a wrongful appropriation of personality had occurred, the court adopted two differing approaches, which are considered in detail below.

The first basis concerned what was regarded as the classic elements of tort—'wrongful action, damages and causation.'[97] On this approach, the Judge found that CAC had not infringed the athletes' personality as the public would not infer that Athans had endorsed the camps,[98] and even if that inference could be drawn, Athans suffered no loss or damage[99] by virtue of the fact his image/reputation was not damaged by the advertisements.[100] Again, this is somewhat different from the approach in the UK, where the courts didn't take into account these sorts of considerations, instead focusing within the limits of the remedies in question, mainly passing off and breach of confidence.

The second approach however, provides further clarification of the tort and is specific to the issues faced by celebrities in image rights disputes. The court noted that rejection of the first aspect of his claim did not mean that no remedy could be provided, holding,

> *the drawings bear such a striking resemblance to Mr. Athans' promotional material in the form of the photograph and its various derivatives… as to lead to the inescapable inference that the defendant's drawings were merely a further representation of Mr. Athans' "trademark" pose,*'[101]

concluding that Athans was identifiable in the advert. The court also considered that the photograph had become an essential part of marketing his image, and that he had an exclusive right to do and outlined the nature of the tort, stating,

> *The commercial use of his representational image by the defendants without his consent constituted an invasion…of his exclusive right to market his personality and this, in my opinion, constitutes an aspect of the tort of appropriation of personality. This conduct gives rise to an action sounding in tort that is separate and distinct from any action based on infringement of trademark or copyright, should that exist.*[102]

The court found in favour of Athans on the basis that the tort of appropriation provides an athlete or celebrity with the exclusive right to market their personality and any unauthorised exploitation of such, where they are identifiable, whether damaging or not, constitutes an infringement of this right. The court made it clear that this tort is indeed a tort in its own right, and is distinct from the more traditional intellectual property remedies.

Athans serves as confirmation of the existence of the tort of appropriation of personality at common law and the process followed by the court and its comments are indicative of a free standing tort which protects the celebrity persona. *Krouse* warranted protection for the unauthorised use of one's likeness, voice and personality, whilst *Athans* extends this into the protection of one's image through portraits and caricatures,[103] as long as the plaintiff is identifiable in the appropriation. Thus, as highlighted above, the tort was developed from the courts' interpretation of UK and US law, which ultimately strengthens the argument that legal transplants can work, whilst it is also important to acknowledge the benefit of a free standing specific tort, as opposed to circumventing the traditional remedies which are not equipped to deal with such issues and require a high level of judicial creativity. In the subsequent cases post *Krouse* and *Athans*, the tort of appropriation is further developed and clarified.

9 | GOULD ESTATE V STODDART PUBLISHING CO[104]—FOR COMMERCIAL PURPOSES ONLY

Gould gives some further indication of what is required for a successful appropriation of personality claim, although the case did not turn on the tort itself. Gould was a concert pianist, interviewed for the Weekend Magazine by journalist Jock Carroll. Carroll took numerous photographs of the musician, as well as a recording of the interview

itself.[105] Some 40 years later, 14 years after the passing of Gould, Carroll published 'Glenn Gould: Some Portraits of the Artist as a Young Man,'[106] a book based on his previous interview. The Gould Estate sought action based on breach of contract, breach of copyright and appropriation of personality.[107]

The High Court rejected both the breach of contract and breach of copyright claim, the former on the basis 'there was no contract between them, and on the record there was no evidence that Gould or his agent imposed any limitation on the consent'[108] and the latter on the basis that no breach had occurred by virtue of the fact Carroll was the copyright owner, by virtue of being the author.[109] Having rejected both initial claims, the High Court dismissed appropriation of personality briefly. In its opinion,

> *the concept of appropriation of personality has no application. Once Gould consented, without restriction, to be the subject-matter of a journalistic piece, he cannot assert any proprietary interest in the final product nor can he complain about any further reproduction of the photographs nor limit the author of the journalistic piece from writing further about him.*[110]

Put another way, and somewhat frustratingly, as the case could be decided on the basis of copyright, the use of the appropriation tort was unnecessary. Referring to the decision of the Superior Court of Justice, the Court of Appeal stated.

> *the motions judge approached the case as an issue of misappropriation of personality, but the case could be decided on the basis of conventional principles related to copyright, and in accordance with those principles, the disposition of the motions and the dismissal of the actions was correct and the appeals should be dismissed.*[111]

This approach appears to contradict the ratio of *Athans*, where no dispute arose as to the copyright ownership of the CAC's advertisement materials—yet the claim as to appropriation of personality succeeded. As Abramovitch explains,

> *In Gould, Finlayson J.A. held that ownership of a work disposed of the matter without considering the limitations of ownership rights. It is trite law that ownership rights cannot be exercised where they cause harm to another, and the Courts have, since Krouse, accepted that misappropriation of personality is one such restricted harm.*[112]

In any case, clarification on this issue is desirable.

However, the decision of the lower court is useful, addressing the issue of appropriation of personality and the limitations of the tort itself, namely: the types of commercial gain required for a successful claim and the duration of the right of personality. It was stated that the tort of appropriation of personality should be balanced, on the basis of public policy, against freedom of expression. However, for Lederman J, remedy for the tort should not encompass unrestricted commercial exploitation. Unlike *Krouse* and *Athans*, the book on Gould could not be regarded as being for solely commercial purposes, rather, it sought to give an insight into the life of one of Canada's highest regarded musicians. Therefore, the court distinguished between the types of commercial advantage applicable in appropriation of personality cases, by means of the 'sales v subject' distinction. The former will evoke the protection of the tort, whilst the latter provides no remedy. Sales exploitation shall occur where 'the identity of the celebrity is merely being used in some fashion. The activity cannot be said to be about the celebrity.'[113] For example, sales exploitation covers instances in which the celebrity's image has been used without authorisation—false endorsement cases. Conversely, subject exploitation occurs,

> *where the celebrity is the actual subject of the work or enterprise, without biographies perhaps being the clearest example…The subject of the activity if the celebrity and the work is an attempt to provide some insights about that celebrity.*[114]

By the reasoning of Lederman J, under the common law tort of appropriation of personality in Ontario, a successful claim requires not only commercial benefit for the defendant but said benefit must occur from endorsement or similar circumstances and shall reject instances in which information about a celebrity is simply conveyed to the public.

With regard to the duration of the tort, the court established that one's right to their personality, or rather their descendants' right, shall exist beyond death. Following a discussion of the statutory frameworks within Canada[115] and with reference to a number of US examples, the Court held that,

> *the 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 any intangible property. There is no reason why such an asset should not be devisable to heirs.*[116]

The significance of this is that it confirms the tort of appropriation of personality is transferable upon the celebrity's decease. With reference to the duration of this right, the court noted,

> *for present purposes though, suffice it to say that Gould passed away in 1982, and it seems reasonable to conclude that whatever the durational limit, if any, it is unlikely to be less than fourteen years. The protection granted by other intangible property rights such as patents and copyrights is longer. So, too, any durational limit on Gould's right of publicity would not yet have expired.*[117]

In any case, it is legitimate to assume under common law, the duration of the tort of appropriation of personality exists beyond death by a period of not less than at least 14 years.

Gould did not turn upon appropriation of personality, however, the ruling of the lower Court provides a little more illustration as to its scope by emphasising that the defendant must benefit from commercial gain. This gain however, cannot be realised from simply conveying information about a celebrity, in the subject context, but must have been founded upon an instance in which a celebrity's personality is used for a particular purpose, mainly in endorsement situations. This distinction allows for freedom of expression whilst also preventing a monopolisation by celebrities over 'what goes public' and in light of *Gould*, it is clear that the tort of appropriation of personality shall exist for a period of no less than 14 years after death.

10 | HORTON V TIM DONUT LTD[118]—ONCE LICENSED, NO CLAIM

In another useful illustration of the scope and limits of the tort of appropriation of personality, the *Horton v Tim Donut Ltd* case defines how this tort can operate for athletes. Tim Horton, a professional hockey player and well-known Canadian celebrity, opened several donut stores with his partner Ronald Joyce. Following his passing in 1974, Horton's widow sold her share of the restaurants to Joyce. Joyce opened the 'Tim Horton Charitable Foundation,' a charity created to aid disadvantaged children. To raise money for the charity, Joyce hung and sold a number of photographs of Horton in various stores. Mrs Horton began proceedings against both Joyce and Tim Donuts for the appropriation of her late husband's personality for commercial gain.[119]

Requesting dismissal of the action, the court agreed with the defendant that there was no evidence for a trial based upon the appropriation of Horton's personality. The court held that in the initial establishment of the businesses, Horton's personality, with his consent, had been licensed to both Joyce and Tim Donuts. Distinguishing the present litigation and previous case law, it was noted,

> *Unlike the facts in Krouse, Athans and Gould, the concept of TDL was developed by Tim Horton and Ronald Joyce to exploit the commercial personality of Tim Horton in the restaurants that bear his name and image. Representations of Tim Horton, including his name, signature and photographic likeness in hockey uniform, were part of early marketing initiatives of the company.*[120]

By virtue of these facts, it was held,

> *TDL acquired the personality rights of Tim Horton…if I apply the reasoning in Krouse and Athans to these facts, I do not see how the hanging of the portrait in stores which already represent the commercial personality of Tim Horton, raises a triable issue that amounts to a lost marketing opportunity for the state.*[121]

The tort shall only serve in so far as the celebrity personality has not previously been licensed with authorisation.

By virtue of *Horton*, one can tentatively argue that appropriation of personality shall not be available in circumstances where the celebrity's personality is used for charitable reasons, as opposed to overtly commercial ones. The court stated,

> *The portrait in question had as its purposes a charitable object. The proceeds from the limited edition prints were directed to this end*[122]*…It is inescapable and uncontradicted that the predominant purpose of the portrait is charitable and commemorative. It is neither exploitive, nor commercial.*[123]

For the Court, the portrait fell into the "subject" category as distinguished by *Gould*—

> *Just as the author in Gould, added his own creativity to the book on Gould's life, so here, has Mr Danby sought to express through his artistic talent, a portrayal of a great Canadian sports figure. In my view, this is of as much public interest to the sports world as a book on Mr Gould's life is to the music world. Any commercial purpose is incidental at best. Accordingly, the portrait falls into the protected category and there is no right of personality in Tim Horton which has been lawfully appropriated.*[124]

Horton provides that any appropriation of one's personality, which has previously been licensed to the defendant by the celebrity in question, is not an unlawful appropriation. In reality, should celebrities license aspects of their personality, for example, a particular image to a particular business, they cannot then control its usage. Within the tort, appropriations for charitable purposes, shall not be covered. By virtue of *Horton*, it is legitimate to conclude that unless the appropriation is for commercial gain, it shall not be covered by the common law.

11 | THE DEVELOPMENT OF THE TORT OF APPROPRIATION OF PERSONALITY

Krouse represented the first case in which the tort of appropriation of personality was recognised in Ontario. It is necessary to acknowledge that the 'support' in the law under which it was conceived was perhaps dubious and required a certain degree of judicial creativity. However, this judicial creativity differs significantly from that in the UK. In Ontario, the courts created and then subsequently developed a tort specific to image rights exploitations, whereas the UK had a continued reliance on traditional intellectual property remedies.

On analysis of the Ontario cases discussed above, various conclusions can be reached about the tort. Firstly, and most obviously, by virtue of *Krouse*, the common law of Ontario has a specific tort of appropriation of

personality. However, celebrities should expect at least some degree of loss of privacy, given their status as a celebrity or athlete in the first place. *Athans* confirmed and defined the existence of the tort, clarifying that it is a proprietary right that allows the exclusive marketing, for gain, of one's personality, image and name, and the law will protect that right if it is invaded, so long as the individual is identifiable in the appropriation. In *Gould*, the sales v subject distinction, outlined by the lower court, clarified that the appropriation must be for commercial purposes, not simply to convey information about a celebrity. The right to one's personality will also exist beyond death. In respect of *Horton*, the appropriation will not be remedied if it was for charitable purposes, and celebrities, or their estates, cannot complain of an appropriation if they have already previously consented or licensed their image, with a view to exploitation for commercial games. Although the tort was undoubtedly conceived with a degree of judicial creativity, *Krouse* and subsequent cases have created a common law tort of appropriation of personality, which has been continually developed and defined, and is specific to the kinds of issues which unauthorised image rights exploitations faced. This approach is preferable to that of the UK and provides support for the argument that a legal transplant is possible.

12 | RECONCILING JUDICIAL CREATIVITY WITH THE TORT OF APPROPRIATION OF PERSONALITY

The above analysis provides a case-by-case illustration of how the courts in the UK and Ontario have dealt with the issue of celebrity image rights. Both jurisdictions have ultimately used a level of judicial creativity to provide remedy, but in two very differing ways.

The UK has relied heavily on traditional intellectual property remedies, particularly that of passing off and breach of confidence. Both of these remedies prescribe that certain requirements are met, and so the celebrity is ultimately bound by these elements. At times, this has been able to provide a remedy, but the problem remains that these remedies were not designed or created with the types of issues image rights or privacy cases involve. This has led to breach of confidence actions protecting commercial confidence and passing off actions covering false endorsement and false merchandising cases – ultimately stretching the limits of judicial creativity. *The issue is that despite the judiciary's continued insistence that image rights do not exist in UK law, in the practical sense, they do*. As above, many professional sports contracts contain image rights provisions, and athletes can make tax savings based on an image right that does not exist in law.

The support for the existence of the tort of appropriation of personality no doubt also used a degree of judicial creativity, but this creativity created a specific tort and was developed by subsequent case law, so that there now exists a free-standing tort of appropriation of personality in the common law of Ontario, rather than the UK approach of circumventing the traditional intellectual property laws. This tort covers the appropriation of an individual's name, likeness and image, and protects celebrities from unlawful uses of their personality. It gives these individuals the specific right to commercially exploit their image, in the knowledge that should this right be invaded, then the law can provide an appropriate, specific remedy.

As discussed above, given that there has been no overwhelming intention from the UK Parliament to legislate for image rights, the alternative is to employ a common law legal transplant. The argument that the success of the transplant depends upon the culture and legal landscape from the jurisdiction in which the law originates to the jurisdiction into which it is transplanted, is supported here in that for the reasons outlined above, Canada and the UK have a very similar legal and cultural landscape. However, even if that were not the case, the argument that if the law is good law, then it can be transplanted is also met. The law created by the courts in Ontario is indeed good law. It is well structured and developed, and most importantly specific to the issues that are created when commercially exploiting one's image. Thus, this paper concludes that the common law tort of appropriation of personality could be successfully transplanted into UK law to address the fact and the issue that image rights do not exist in law but do in the practical sense.

CONFLICT OF INTEREST STATEMENT

The author declares no conflicts of interest.

DATA AVAILABILITY STATEMENT

The data that supports the findings of this study are available in the supplementary material of this article.

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ENDNOTES

[1] By means of example, Elon Musk purchased Twitter for a sum of $44 billion in 2022. 'Musk Admits Twitter Purchase Wasn't 'Financially Smart'—And He Paid Twice What It's Worth' (*Forbes*) <https://www.forbes.com/sites/nicholasreimann/2023/04/17/musk-admits-twitter-purchase-wasnt-financially-smart-and-he-paid-twice-what-its-worth/?sh=575aac8e65c6> accessed 18 April 2023.

[2] For example, Michael Jordan has made over $1 billion from his endorsement deal with Nike. Jordan made more from endorsement deals than he ever did playing basketball. 'Michael Jordan Has Made Over $1 Billion From Nike—The Biggest Endorsement Bargain In Sports' (*Forbes*) <https://www.forbes.com/sites/kurtbadenhausen/2020/05/03/michael-jordans-1-billion-nike-endorsement-is-the-biggest-bargain-in-sports/> accessed 19 April 2023.

[3] Proactive Sports Management Ltd v Wayne Rooney and others (2001) EWHC Civ. Div. 1444, at [1].

[4] For further discussion on the absence of an image right in law, see Bains S, 'Personality Rights: Should the UK Grant Celebrities a Proprietary Right in Their Personality? (2007) ELR Parts 1–3 and Barajas ADL, 'Personality Rights in the United States and the United Kingdom—is Vanna too much? Is Irvine not enough?' (2009) ELR 253.

[5] [1931] AC 333.

[6] (2002) W.L.R. 2355.

[7] (2007) UKHL 21.

[8] (2013) EWHC 2310 (Ch); (2014) E.C.D.R. 3; (2015) 1 W.L.R. 3291.

[9] Ibid [2].

[10] For example, see Perot, E, *Commercialising Celebrity Persona*: *Intellectual Property Law in Practice* (Hart Publishing 2023).

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[13] England Rugby, Standard Contract, Schedule 2, 1(1.1) (1.2) <https://www.englandrugby.com/dxdam/6a/6af05ffc-de18-42cf-8967-1ee2e688bd60/PremiershipStandardPlayerContract.pdf> accessed 19 April 2023.

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[15] Capital Gains Manual, 'Intellectual Property Rights: image rights: the Law of Passing-Off' <https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg68410> accessed 19 April 2023.

[16] (2000) S.T.C. (S.C.D) 443.

[17] Ibid [79].

[18] (1974), 1 O.R. (2d) 225.

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[20] Amos, M, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 35(2) HRQ 386–407, 386.

[21] Ibid.

[22] Ibid, 387.

[23] The British Columbia Privacy Act (1968), The Manitoba Privacy Act (1988), The Newfoundland Privacy Act (1981), The Saskatchewan Privacy Act (1979).

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[25] Canadian Constitution Act, (1867).

[26] Sommerville C, McMurtry A, Sun, W, 'Legal Systems in Canada: Overview' (2021), DLA Piper (Canada) LLP.

[27] Ibid.

[28] Ibid.

[29] Small (n 24).

[30] [1968] F.S.R. 415.

[31] Ibid [419].

[32] For example, see Goodenough, OR, 'Retheorising Privacy and Publicity' (1997) 1 IPQ 37–70b and Stallard, H, 'The Right of Publicity in the United Kingdom' (1998) Loyola of Los Angeles ELR 565.

[33] See Bennett, Thomas, D.C., Daithi Mac Sithigh, *The Campbell Legacy: Reflections on the Tort of Misuse of Private Information* (1st edn, Routledge 2018).

[34] [2004] UKHL 22; [2004] 2 A.C. 457.

[35] [2004] UKHL 22 [88,103].

[36] Ibid, para [88,89] and [125].

[37] Ibid [95].

[38] Ibid [117].

[39] For further explanation of this point, see Walsh, C, 'Are Personality Rights Finally on the UK Agenda,' (2013) 35(5) European IPR 253–260, particularly at 257–259.

[40] [2004] UKHL 22, [13].

[41] Ibid [51].

[42] Note that many commentators discuss Campbell in the context of developing the tort of misuse of private information in the UK. Although this is outside the scope of this article, works such as Bennett, Thomas, D.C., Daithi Mac Sithigh, 'The Campbell Legacy: Reflections on the Tort of Misuse of Private Information,' Routledge, (2018) First Edition.

[43] [2007] UKHL 21, [2007] 2 WLR 920.

[44] The case was held in the House of Lords alongside that of OBG v Allan [2005] EWCA Civ 106 and Mainstream Properties Ltd v Young [2005] EWCA Civ 861.

[45] [2007] UKHL 21 [1].

[46] [2007] UKHL 21 [113].

[47] Ibid [113].

[48] Ibid [115].

[49] Ibid.

[50] Walsh (n 39) 253, 258.

[51] [2007] UKHL 21, [117].

[52] Ibid [124].

[53] As established in Reckitt and Coleman Products Inc v Borden [1990] 1 All E.R. 873 and Erven Warnink B.V. v J Townend and Sons (Hull) Ltd [1979] 2 All E.R. 927, [1980] R.P.C. 31.

[54] [2002] 1 W.L.R. 2355.

[55] Ibid [2].

[56] Ibid [4,8].

[57] Ibid [46].

[58] Ibid [46–47].

[59] Ibid [47].

[60] Ibid [51–52].

[61] Ibid [68].

[62] Ibid [72].

[63] Ibid [73].

[64] Ibid [74].

[65] [1993] F.S.R. 641.

[66] [2002] 1 W.L.R. 2355, [37].

[67] Ibid [74].

[68] [2013] EWHC 2310 (Ch); [2014] E.C.D.R. 3; [2015] 1 W.L.R. 3291.

[69] [2015] 1 W.L.R. 3291, [3293– 3295].

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[71] For further discussion of the lucuna in the law, see Porter, H, 'Character Merchandising: Does English Law Recognise a Property Right in Name and Likeness?' Volume 10, Issue 6, (1999) ELR 180.

[72] Ibid [65].

[73] Ibid [38].

[74] Ibid [41].

[75] Ibid [45,46].

[76] Ibid [47].

[77] Ibid [56].

[78] Ibid [74].

[79] Ibid.

[80] Perot E, Chapter 5 - Advertising Industry, pages 97–127, and Chapter 6 'Merchanising Industry, pages 129–146' in *Commericialising Celebrity Persona: Intellectual Property Law and Practice* (2023), Bloomsbury Publishing.

[81] (1974), 1 O.R. (2d) 225.

[82] Notably, no copyright or consent issue existed—Chrysler had obtained the right of use of the photograph from the original photographer, who likewise had permission from Krouse's club—the Hamilton Tiger Cats.

[83] Krouse v Chrysler Canada Ltd (1974), 1 O.R. (2d) 225.

[84] Ibid, 16.

[85] Ibid.

[86] Krouse v Chrysler Canada Ltd (1974), 1 O.R. (2d) 225, 17.

[87] For further discussion as to English and US law in relation to personality and image rights, see Klink, J, '50 years of Publicity Rights in the United States and the Never-ending Hassle with Intellectual Property and Personality Rights in Europe' (2003) IPQ 363, Volume 4.

[88] The High Court of Justice, in the first instance, ruled in favour of the plaintiff holding that there had been an un-authorised appropriation of his personality.

[89] Krouse v Chrysler Canada Ltd (1974), 1 O.R. (2d) 225, 20.

[90] Ibid.

[91] (1977) 17 O.R. (2d) 425.

[92] Athans v Canadian Adventure Camps (1977) 17 O.R. (2d) 425. <http://www.canlii.org/en/on/onsc/doc/1977/1977canlii1255/1977canlii1255.html?resultIndex=2> accessed 12 July 2023.

[93] Ibid.

[94] Ibid [23].

[95] Abramovitch, S, 'Misappropriation of personality' (2000) Canadian BLJ, Volume 33, 230–233.

[96] Athans v Canadian Adventure Camps (1977) 17 O.R. (2d) 425. <http://www.canlii.org/en/on/onsc/doc/1977/1977canlii1255/1977canlii1255.html?resultIndex=2> accessed 3 July 2023.

[97] Abramovitch (n 95) 230–234.

[98] "On a careful reading of the advertisement and brochure as a whole, I cannot detect that there is any possible suggestion, apart from the drawings themselves, that Mr. Athans is in any way associated with the camp. On the basis of the drawings alone, it is not only improbable, but is highly unlikely that potential customers of the camp would consider that George Athans." Athans v Canadian Adventure Camps (1977) 17 O.R. (2d) 425. <http://www.canlii.org/en/on/onsc/doc/1977/1977canlii1255/1977canlii1255.html?resultIndex=2> accessed 3 July 2023.

[99] Ibid.

[100] Athans v Canadian Adventure Camps (n 96).

[101] Ibid.

[102] Ibid.

[103] Conroy, A. M, 'Protecting Your Personality Rights in Canada: A Matter of Property or Privacy' (2012) WJLS, Volume 1, Issue 1, 1–20

[104] (1996) 30 O.R. (3d) 520, (1998) OR (3d) 520.

[105] Gould Estate v Stoddart Publishing Co (1996) 30 O.R. (3d) 520. <www.canlii.org/en/on/onsc/doc/1996/1996canlii8209/1996canlii8209.html?resultIndex=1> accessed 3 July 2023.

[106] Carroll, J, *Glenn Gould: Some Portraits of the Artist as a Young Man* (1995), Stoddart Publishing.

[107] Gould Estate v Stoddart Publishing Co (n 105).

[108] Ibid.

[109] Ibid.

[110] Ibid.

[111] Ibid.

[112] Abramovitch (n 95) 230–237.

[113] Gould Estate v Stoddart Publishing Co (n 105).

[114] Ibid.

[115] British Columbia, Manitoba, Saskatchewan and Newfoundland all have Privacy Acts which legislate for the appropriation of one's personality.

[116] Gould Estate v Stoddart Publishing Co (n 105).

[117] Ibid.

[118] (1997) CPR (3d) 451.

[119] Horton v Tim Donut (1997) CPR (3d) 451, (5-12) Retrieved September 15, 2016. <http://www.canlii.org/en/on/onsc/doc/1997/1997canlii12372/1997canlii12372.html?resultIndex=1> accessed 12 July 2023.

[120] Horton v Tim Donut (1997) CPR (3d) 451, (20). <http://www.canlii.org/en/on/onsc/doc/1997/1997canlii12372/1997canlii12372.html?resultIndex=1> accessed 3 July 2023.

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] Ibid.

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