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Editorial

*Property, Privacy and Personality Research Stream.
Comparative Aspects of Personality Rights: Research Project
and Case Studies*

Abstract

The AHRC Research Centre for Studies in Intellectual Property and Technology Law is currently undertaking a five-year study of personality rights. This is a comparative analysis of the measures instituted in a variety of jurisdictions to protect different aspects of the human personality, such as image, identity, personal privacy, dignity and related economic interests. As part of this project, co-directors have devised a series of case studies, the purpose being to discover not only if there is a commonality in the ethic underlying the protection of personality, but also to ascertain at what level the public interest might operate to restrict or define the scope of the rights. The Centre has developed a web-based resource of cases that highlight the range of issues that can arise and the different means used to protect the underlying interests. This is a dynamic resource which is being developed on an on-going basis. The Centre welcomes visitors to the site and contributions both on the cases contained therein and on other issues or cases from legal systems around the world.

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Introduction

This research project is managed under the auspices of the Arts and Humanities Research Board (AHRB) Research Centre for Studies in Intellectual Property and Technology Law based in the School of Law at the University of Edinburgh (the Centre). The project is part of the Centre's *Privacy, Property and Personality* research stream. More details about the Centre and its research can be found at <http://www.law.ed.ac.uk/ahrb/>.

Our intention is to find points of similarity and of difference in approaches taken to the protection of personality in a number of different jurisdictions around the world. To this end, we have drawn up a series of case studies which can be found below. Thanks are due to our team of experts for their useful comments and input to this process. We are now inviting specialists from around the world to solve the problems from within their own jurisdiction. We are also seeking volunteers to help us with this task.

We would ask that returns be submitted by the end of June 2004. Once these have been collated, we will make them available on our website. Thereafter, we will invite all who contributed to join us for a round-table discussion in Edinburgh, the purpose of which will be to highlight and explore in more depth areas of particular interest; these will be areas both of convergence and of divergence. We will aim to make the results of these deliberations available on our website and/or in hard-copy form and to disseminate our findings further through conferences, colloquia and the media.

Our overarching aims are to inform regulators, legislators, lawyers, judges, celebrities, merchandisers, artists and the consuming public alike about the varied approaches taken to protection of personality; to highlight points of both convergence and divergence in protection within different jurisdictions; to illuminate the reasons why these differences exist; and, most challengingly, to assess the respective merits and demerits of the various approaches taken to protecting personality. Ultimately we wish to increase knowledge and understanding of this area of law.

The Research Project

We wish to test the following hypothesis in conducting our comparative research into aspects of personality protection:

Personality rights may be protected either on the basis of private economic interests or on the basis of dignitary interests. Permeating both of these are public interest considerations which serve to limit the scope of the rights in question.

In addition, we want to explore the interaction between these interests and to consider how the relationship between them manifests itself in personality rights in different jurisdictions. For example, are economic and dignitary interests mutually exclusive, does one take prominence over the other, or, do they, in fact, overlap? What is the rationale underlying the particular approach in any given jurisdiction? Where do the interests intersect and where do they diverge? When, and at what level, does the public interest come into play? How is public interest defined? What influence does the pattern of changes in the socio-economic culture over time have on the jurisprudence emanating from a particular jurisdiction?

Our purpose is:

1. to discover whether there are commonalities in the ethic underlying the protection of personality rights in particular jurisdictions. In other words, we want to examine if there is a common core of rights and interests across jurisdictions and to investigate the values underpinning that core;
2. to highlight points of difference and similarity, both in the underlying ethical considerations and in the application of the law to a given set of facts, and to investigate why these differences or similarities arise;
3. to consider the extent to which any personality rights which are recognised are tempered or limited by other considerations, for example the public interest.

We wish to consider in particular the following when applied to a specific set of facts:

1. Can this problem be solved from within the dignitary and/or economic conceptions of personality rights?
2. If so, what is the most likely legal remedy to be relied upon in a given jurisdiction? In other words, in which category of law does the problem fall? For example, is it an issue primarily for property law, tort, or another specific law (statute, sui generis legislation)?
3. Might any public interest considerations be taken into account either as a complete defence, or as a limit on the scope of the right itself?
4. If the problem cannot be solved within the hypothesis to be tested (i.e. economic or dignitary interests) then how, if at all, would this scenario be dealt with in your jurisdiction?
5. If no protection is available, what are the reasons for this?

Case Studies

We are seeking to solve the following case studies (drawn up with the assistance of our team of experts):

1. Portrait Rights

A press photographer takes photographs of a person (without his/her knowledge or consent) in a public park in a city. These are intended for publication. The photographs are neither embarrassing nor morally offensive. What protection is available for the subject? Does the answer change if:

1. The person is famous.
2. The person is famous only in connection with a certain event (such as Chris Ingram in the UK who became 'famous' as a result of cheating on the quiz show *Who Wants to be a Millionaire?*)
3. The person is not famous, but accompanies a famous person.
4. The person is not famous when the photograph is taken, but becomes famous five years later and the photograph is re-published.
5. The photograph is taken of the landscape, including the person only incidentally. Does it make a difference if the person is (i) famous as such; (ii) not famous?

6. The accompanying text is offensive?

2. A press photographer takes photographs for publication without the knowledge or consent of the subject.

What protection do the subjects have in these different scenarios?

1. The photographs show intimate contact (kissing and toe sucking) between a couple in a place to which there is no public access, e.g. a private function.
2. The photographs show intimate contact (sexual activity) between a couple on a secluded but not private beach.
3. The photographs were taken on unfenced private property but show no intimate contact between the couple. Does it make a difference whether any measures had been taken to exclude photographs being taken, and if so what (such as a high fence or notices stating that no photographs were to be taken)?
4. The photographs are taken from a public spot which overlooks private property. The subjects are on that private property.
5. The photograph shows an individual engaged in an intimate act in a private place. The individual was not famous when the photograph was taken, and permission was given for it. Ten years later the person has become famous. It is proposed to re-publish the photograph.
6. The photographs show children engaged in play.

3. Reporting of facts

A paper intends to report on an affair between two individuals without their knowledge or consent. What, if anything, can the individuals do to prevent publication?

1. The paper can prove the facts; the individuals are famous. Publication of the facts is likely to lead to one of the individuals (i) losing a high profile job in the media; or (ii) losing a highly prestigious but unremunerated position as a trustee of a charity.
2. The paper can prove the facts; the individuals are not famous.
3. The paper can prove the facts; the individuals are not famous. Publication of the facts is likely to lead to one of the individuals losing a highly prestigious but unremunerated position as a trustee of a charity.
4. The paper can prove the facts; one of the individuals is famous, the other is not.
5. The paper cannot prove the facts; they remain disputed.
6. The story is proved wrong. Is there a difference if: (i) the paper researched the story but was mistaken; (ii) carried out insufficient research; (iii) made up the facts?
7. Would the sexual orientation of the individuals make a difference (married, unmarried, gay).
8. Would it make a difference if one or both of the couple had children?

What would be the position if the individual had taken part in an interview, given consent to the publication of the article, but then wanted to withdraw that consent prior to publication because she did not like the way in which she was portrayed in the article?

4. Without the knowledge or consent of the individual a paper reports correctly on:

1. the medical condition of a person; does it make a difference if the condition is (a) non life threatening and generally innocuous, e.g. an in-growing toenail, or (b) life threatening and potentially embarrassing, e.g. Hepatitis B infection?
2. the love life of a person
3. criminal offences committed by a person ten years previously which have become of current interest because of a 'copy-cat' crime. In so doing the first criminal, who has been released from prison, is identified.

Are there any (other) specific categories of news that may not be reported upon? If so, are there any factors that may justify reports in those categories? For example, that the person has publicly stated contradictory facts? Is the tone of the report of relevance (a colourful and lurid report as compared to one which states the facts and does little more)?

5. Merchandising

A company produces without the knowledge or consent of the individual concerned:

1. T-shirts bearing a photograph of an individual
2. T-shirts bearing a drawing of an individual
3. T-shirts bearing a caricature of an individual
4. T-shirts bearing a copy of the front page of a newspaper carrying a story and picture about an individual who had an extra marital affair
5. T-shirts bearing the signature of a person
6. T-shirts bearing a photograph of a pet belonging to an individual.

Does it matter whether the individual is famous? Does it make any difference if the individual is alive or dead?

6. Endorsement

A company releases a commercial advertisement using the name, physical and vocal likeness of an individual without the knowledge or consent of that individual.

1. How is it decided if the individual endorses the product? Does endorsement have to be shown as likely, or do the courts assume that the individual endorses the product? Does it make a difference whether the company intended that the individual be seen as endorsing the product or that the company had merely intended that the likeness be used to illustrate the advertisement? Does the type of endorsement make a difference, for instance

where the individual gives the impression that it is a good product? Does it make a difference if the intention was parody, but the use was commercial?

2. The advertisement gives the impression that the individual is not clever enough to use the product or that he dislikes the product. Because of the general perception of the individual, this gives the product a favourable appearance.
3. The physical and vocal likeness is that of a celebrity
4. The individual is known for endorsing a company's products
5. The physical and vocal likeness is that of an unknown (in celebrity terms) individual
6. The advertisement is for a product that the individual is known to disagree with or find distasteful (e.g. cigarettes).
7. The image of the individual is used merely for eye-catching effect.
8. The physical and vocal likeness is that of a look-alike of a celebrity who has given consent to the publication
9. The advertisement parodies an individual celebrity.

Does it matter if the individual is alive or dead?

7. Arts

A company produces the following items without knowledge or consent of the subject. What remedy, if any, would the subject have? The products are:

1. A musical, film or book or other article about the life of an individual
2. A computer game that contains a pixel-version of an individual. Does it make a difference if (a) the game contains violent and/or sexual scenes involving the character, (b) the game involves violent and/or sexual scenes, but which do not involve the character?
3. A fan book about an individual.
4. A set of collectable cards containing images of individuals (e.g. footballers).

Would it make a difference if the product contained an explicit statement that it was not endorsed by the individual? Does it matter if the individual is alive or dead?

8. Medicine

A doctor discovers that a patient is suffering from an inherited genetic condition. The disease carries a 50% chance that siblings and children of the patient might be affected. The condition does not manifest itself until late in life and a cure is available. Many relatives may not know that they have the disease. Can the doctor do any of the following?

- (a) Contact relatives to inform them of the condition without first consulting the patient?
- (b) Contact relatives even when the patient refuses to allow disclosure?

(c) Reveal the patient's condition when asked by another patient who is the first patient's sibling?

(d) Inform the patient's employers or insurers without first consulting the patient?

Does it make a difference if the condition is incurable or if the available therapies only work in 10-15% of cases?

The Personality Database can be found [here](#).

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