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Rihanna v. Topshop – have we entered a new era in the protection of celebrity “image rights” in the UK?

Posted on February 3, 2015 by [Nathan Smith](#) in [Intellectual Property Law](#), [Practice Management](#)

There is no doubt that celebrities, and those representing celebrities, will take more than a little encouragement from the decision



The Court of Appeal delivered its keenly awaited judgment in the case between British fashion retailer Topshop and the world famous pop star Rihanna on 22 January 2015. The case raised interesting and significant questions regarding the protection of image rights within the UK.

Background

Under English law there is no “image right” which permits a celebrity to control the use of his or her image. Instead, a celebrity must rely on other, existing intellectual property rights such as copyright, trade marks, breach of confidence and passing off (which, in a well-known case involving the former Formula 1 racer Eddie Irvine and the radio station Talksport, was extended to cover situations involving false endorsement)

In 2012, Topshop began selling a fashion t-shirt featuring an image of Rihanna. The image was derived from a photograph of Rihanna taken when she was on a video shoot for the “We Found Love” single from her Talk That Talk album. The photograph was a striking image of Rihanna with her hair tied above her head with a headscarf. Similar images had been used by Rihanna in connection with the Talk That Talk album. The photograph had been taken by an independent third party photographer who had licensed its use to Topshop. Topshop did not obtain a licence from Rihanna to use the image and she brought a claim for passing off on the basis that purchasers of the t-shirt would falsely think that she had endorsed it.

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Topshop’s position was that the t-shirt was fashion wear, not promotional merchandise, and consumers bought it because they liked the product and the image of Rihanna for their own qualities. Rihanna had not asserted that the image had become distinctive of her and as such she was seeking a right to control the licensing of her likeness, a right which is not recognised under English law.

- At first instance, the judge confirmed that the mere sale by a trader of a t-shirt bearing an image of a famous person does not, in and of itself, amount to passing off. However, the judge upheld Rihanna’s claim on the basis that:
- Rihanna had made considerable efforts to promote an association in the public mind between herself and fashion and had established goodwill not only as a music artist but also in the world of fashion as a style leader.
- Topshop had made a significant effort to link their brand with Rihanna (Topshop held a competition in 2010 for customers to win a personal shopping appointment with Rihanna and publicised occasions on which Rihanna chose to wear Topshop clothing (including a visit by Rihanna to Topshop’s Oxford Circus store in 2012)). The judge considered that this showed that Topshop had recognised and sought to take advantage of Rihanna’s public position and this formed an important part of the background against which the impression created by the t-shirt had to be measured.
- The relationship between the image on the t-shirt and Rihanna’s Talk That Talk album cover and video for “We Found Love” (which had received a significant amount of press attention in the UK due to an objection by the owner of the land on which the video was filmed in relation to the risqué clothing worn by Rihanna) would be recognised by Rihanna’s fans. It looked like a publicity shot and could be taken by her fans to be part of the marketing campaign for the album.
- As a result, a substantial portion of those Rihanna fans considering buying the t-shirt would have been misled into thinking that it had been authorised by Rihanna. This would have damaged Rihanna’s goodwill through a resulting loss of sales to her merchandising business and a loss of control over her reputation in the fashion sphere.

Judgment of the Court of Appeal

The Court of Appeal recently confirmed the High Court’s decision.

Much of the Court of Appeal’s decision focused on the distinction between general character merchandising on the one part (the use of the likeness of famous characters, real or fictional, without implied authorisation or approval) and endorsement on the other part (where, as in this case, real people are assumed to have endorsed a product). The Court of Appeal stated that it by no means follows that simply because the name or image of a celebrity appears upon a consumable commercial item, the public will assume that it has been endorsed by that celebrity. This statement was supported by a case involving the Elvis Presley trade mark, where the Court of Appeal had previously stated that members of the public purchased Elvis Presley merchandise not because it came from a particular source, but because it carried the name or image of Elvis Presley.

Topshop attempted to rely on this principle in its assertion that the judge at first instance failed properly to have regard to the distinction between merchandising and endorsement. Topshop submitted that purchasers of t-shirts bearing images of pop stars buy them because they want to wear a t-shirt featuring an image of their favourite pop star and not because they believe that the items are connected with the pop star. As a result, merchandising carries with it no misrepresentation.

The Court of Appeal used Topshop’s argument to highlight the critical hurdles which a claimant must overcome in a merchandising case, being that the use of the name or image must equate to a material misrepresentation as to the source of the goods (i.e. that they have been approved by the claimant).

In upholding the original decision, the Court of Appeal held that the judge at first instance’s finding (that the sale of the t-shirt in the particular circumstances amounted to a misrepresentation that Rihanna had endorsed the t-shirt) had disclosed no error of principle.

Conclusion

At first glance, it might seem that this case has expanded the reach of the law of passing off to provide a quasi image right for celebrities. However, upon closer inspection, the reality is far less radical. It still remains the position under English law that individuals have no absolute right to prevent third parties from using that individual’s image or likeness. The wrong committed by Topshop in this case was not the use of an image of Rihanna, but doing so in such a way as to cause a misrepresentation. The outcome of this case also turned on the particular facts, notably Rihanna’s past association with Topshop and the use of such a striking image, similar images to which Rihanna herself had used to promote her Talk That Talk Album.

However, there is no doubt that celebrities, and those representing celebrities, will take more than a little encouragement from the decision. At the very least, it sets a precedent in relation to the use of a celebrity’s image on clothing and highlights the fact that a celebrity’s goodwill is capable of extending beyond their immediate industry. It also serves as a warning to retailers to be cautious in their use of celebrity images and not to take unnecessary steps which might suggest that the celebrity has endorsed their use of the image.

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