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IDENTITY PROTECTION IN THE UK
How unauthorised commercial exploitation of a person`s identity should be protected under English law. A comparative study of publicity rights in the UK, the US and Norway.

Abstract

Technological development is a huge drive force and presents several new challenges in many aspects. Identity protection, or the lack of it, is a resulting topic with a strong and growing impact on society and individuals. The UK has taken a different approach to the protection of identity than other relevant jurisdictions. Through comparative analyses with relations to selected states in the US and continental Europe, it comes evident that identity protection in the UK should be up for a revision. A better balance between identity protection and freedom of expression should be found.

Based on discussions the relative position of four selected jurisdictions is subjectively placed on a two-dimensional figure. The UK position is markedly lower on identity protection than the reference jurisdictions: California, New York and Norway. The current level of protection in the UK is deemed insufficient.

Furthermore, a preferred position of the future UK is defined and placed in the illustrative figure and a suggested approach for the UK to reach that position is discussed.

The current regime in the UK, which is mostly based on passing off, is especially insufficient in two prominent ways. First, it provides very limited protection for non-celebrities. Second, it is generally restricted to misrepresentation. The future UK would benefit from a higher protection level for identity.

In conclusion, the UK should introduce akin rights as the right of publicity or image rights. The new right should be based on misappropriation to ensure all individuals control of their own identity. The issues in regard to unauthorised exploitation should no longer be ignored but should be acknowledged and appropriately addressed

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Abbreviations

CCC	California Civil Code
CDPA	Copyright, Designs and Patents Act
CJEU	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IPR	Intellectual Property Rights
MPA	Marketing Practice Act
NYCRL	New York Rights Law
PTN	Personal translation from Norwegian
TMA	Trade Mark Act
2nd Cir.	Second Circuit
6th Cir.	Sixth Circuit
9th Cir.	Ninth Circuit

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1. Introduction

1.1. Topic and related issues

This thesis will assess the current law provided in the UK to protect against unauthorised commercial exploitation of an individual´s identity. The aim is to determine if a sufficient level of protection is provided, or whether amendments are necessary. The assessment will focus on unauthorised exploitation in the context of endorsement, merchandising and advertisement where exploitation of identity continues to increase.[1]

Conversely to other jurisdictions, the UK has taken a conservative approach. Rather than having a specific regulation created for publicity protection, it relies on existing legal regimes.[2] A comparative analysis will be conducted to evaluate whether the UK should introduce additional concepts into domestic law. The experience from other jurisdictions where the image rights and right of publicity are accepted will, therefore, be valuable.

The preformed comparative analysis discloses that a comprehensive regulation addressed to protect against misappropriation of the identity is preferable. The commercial practice requests a specific publicity right provided to cope with the inherent commercial value of identity. The right should not be limited to celebrities but be provided to all individuals.[3] The main incentive for such rights is to give individuals the ability to control their identity. Thus, it should not solely be focused on income and economic value. While the desire to control the identity often may have roots in commercial interest, [4] it is not always the case.[5] For instance, the objection to the unauthorised use of the name and likeness of Nelson Mandela was not incentivised by the purpose of receiving or income.[6] Rather it was based on his desire to be in control of the use to preserve his image and reputation. For this reason, the exploitation of identity is a hybrid of economic and dignitary interests.[7] The individual has a better right to its

[1] Hazel Carty (2004) Advertising, Publicity Rights and English law. *Intellectual Property Quarterly*, 209-258 p.212
[2] Ibid 232.
[3] Melville B. Nimmer (1954) The Right of Publicity. *19 Law & Contemporary Problems,* 203-223 p.204; Thomas J. McCarthy & Roger E. Schechter, (2019). Right of Publicity and Privacy 2d. *Thomson Reuters*. §1:27.
[4] Catherine Walsh (2013). Are personality rights finally on the UK agenda? *European Intellectual Property Review 35(5),* 253-260. p.253
[5] Huw Beverley-Smith, (2002). The Commercial Appropriation of Personality. *Cambridge: CUP* p.5.
[6] Frederick W. Mostert (1997). *Famous and Well-known Marks.* UK: LexisNexis.
[7] Ibid 23-24.

own identity. Both celebrities and non-celebrities should be provided protection against unauthorised use and the ability to control the commercial use of their identity.[8] Accordingly, the conservative approach adopted in the UK has notable flaws. The fragmented and incidental protection does not provide a sufficient level of protection for celebrities, nor for private individuals. Thus, instead of stretching existing laws, the UK should provide a specific provision created to protect against misappropriation of the identity of all individuals.

The regulation against unauthorised exploitation of identity is especially prominent nowadays. The reason for the current pressing need for protection is the technological development that has occurred. The availability on the internet has created a new digital arena for exploitation for commercial gain by advertisers. It has never been easier to produce, market and sell goods and services. Furthermore, the alternatives for consumers has never been larger. Moreover, digital development has facilitated a closer relationship between celebrities and their fans. Twitter, Instagram, and similar platforms have enabled a closer connection, which creates a perfect avenue for commercial exploitation of celebrities.

Furthermore, this close relationship might motivate individuals to express their support or alliance with various celebrities. As has been pointed out by Hazel Carty, an unauthorised product can have as much attention or glamour attached to it as an authorised product for many consumers.[9] In this perspective, it is not obvious why PewDiePie or Rihanna`s "merchandise" sells. Whether it is because people think it actually originates from their favourite celebrity or if it sells because the people will have it as a badge of allegiance. Should this separation be decisive in the assessment of whether the identity should be protected? Should the use of another`s identity be prohibited even if all parties involved are aware that the product does not originate from the plaintiff. Or should protection be restricted to circumstances where the public is deceived?

In essence, people desire to control the use of their own identity. Simultaneously the public has interest in information flow and the promoters in freedom of expression. In nature, these aspects will lead to a conflict of interest. For instance, the unauthorised economic gaining of other`s effort will generally seem like an unfair practice, while restrictions of information hamper the efficiency of society. It is therefore important to find the right balance between

[8] McCarthy & Schechter (n 3) §1:3.
[9] Hazel Carty (1993) Character Merchandising and The Limits of Passing off. *13 LS*, 289-307 p.298.

those interests. This thesis will discuss how the UK should adapt to find this balance in the future.

1.2. General aspect – The commercial magnetism

Celebrities have always captured the attention of the public. As Frederick Mostert[10] states well-known personalities have "immense publicity value, commercial magnetism or advertising power embodied in the name, likeness or photograph". As already mentioned this attractive force of fame makes it well suited for commercial appropriation.[11] Celebrities have the potential to be immensely influential. What they wear, and which products they are perceived to use will, therefore, translate into a selling power.

The valuable asset of being associated with celebrities is recognised by businesses. Celebrities are regularly used to endorse products (endorsement). For example when the famous soccer player Wayne Rooney is used to promote Nike T90 football shoes. Alternatively, the use of the actor Brad Pitt to front unrelated products such as the perfume, Channel N° 5. The possibility to extend to other fields depends on the celebrity's degree of fame or notoriety. Moreover, the association linked to celebrities might solely be an "attention grabber".[12] Instead of endorsing a product, the celebrity is a part of the product itself (merchandising[13]). A T-shirt bearing a picture of Rihanna or toiletry with Elvis Presley is assumed to sell due to the celebrities.

The commercial use of identity is most commonly linked to celebrities. However, the new platforms, including social media and Memes, have led to increased exploitation. The use of a person`s identity is no longer restricted to celebrities. Regular persons with no obvious public profile are more commonly used in advertisements.[14] For instance, non-celebrities might be used in advertisements to promote upcoming festivals.[15] Their value will generally be based

[10] Frederick W. Mostert (1986). International aspects of the right of publicity. *The Merchandising Reporter, Vol. 5, No. 3*, 3-5. p.3.
[11] Beverley-Smith (n 5) 1.
[12] Ibid 9.
[13] Character Merchandising Report Prepared by the International Bureau of the World Intellectual Property Organization (WIPO), WO/INF/108, 1994, p.9." Defines Personality merchandising to involve «the use of the essential attributes (name, image, voice and other personality features) of real persons in the marketing or advertising of goods and services».
[14] Beverley-Smith (n 5) 3.
[15] Appendix I.

on the fact that they are normal, relatable persons. Hence, everyone will benefit from the ability to control the use of their identity.

Usually, such exploitation of persons will rely on a licensing agreement. However, this is not always the case. Individuals are frequently commercially exploited against their will. Recently, images of the manager of Manchester United, Ole Gunnar Solskjær,[16] and BBC breakfast star Carol Kirkwood, [17] were used in the advertisement without their consent. The strength of protection obtained by individuals against unauthorised commercial exploitation is, therefore, essential. The ability to control the use of identity is nowadays more important than ever due to the increased practice related to personality merchandising.

It is with this development and increased use of various people`s identity in mind the current laws in the UK should be assessed.

1.3. Term explanation

The term “publicity right” is frequently used synonymously with “images rights” or “personality rights”.[18] Thus, despite different terminology, it will encompass the protection of similar interests. All these rights cover an individual's ability to object to unauthorised commercial exploitation of their identity.[19] In this thesis, "publicity rights" will be used as a collective term for such rights.

The term "identity" is in this context used as a broad interpretation of all aspects related to a person. This includes the name, image, voice, likeliness or other personal aspects such as characteristics of a person or physical style.[20]

16 Damian Burchardt (2019, March 8th). *The Sun News website of the year.* From The Sun: https://www.thesun.co.uk/sport/8595516/solskjaer-paddy-power-mage-advert/ (Accessed: April 4th 2019)
17 Charlie Milward (2019, May 24th). *Home of the Daily and Sunday Express.* From: Express: https://www.express.co.uk/showbiz/tv-radio/1131431/BBC-News-Carol-Kirkwood-diet-pill-advert-fake-news-Martin-Lewis-BBC-Breakfast-video (Accessed: May 28th 2019).
18 Savan Bains (2007). Personality Rights: Should The UK grant celebrities a Proprietary right in their Personality? Part 1. *Entertainment Law Review*,164-169 p. 164.
Jeremy Blum & Tom Ohta (2014). Personality disorder: strategies for protecting celebrity names and images in the UK. *Journal of Intellectual Property Law & Practice, Vol. 9, No 2*,137-147 p.137.
19 Ibid 137.
20 Ibid 139.

1.4.Structure

The study will first assess the current protection of identity under UK law to point out the weaknesses and potential improvements. It continues to consider the main aspect of the protection granted in the US and Norway. The US appears as a natural choice, seen as one of the leading jurisdictions in the area.[21] Norway, on the other hand, is chosen to illustrate the approach taken in Continental Europe. Opposite to most other jurisdictions in Continental Europe, Norway is a juridical mixture of civil and common law. This juridical structure gives a solid foundation to draw parallels to the UK as a common law system. The experience from the other jurisdiction will be important to determine the future protection of identity in the UK. Finally, the possibility of introducing general publicity rights in the UK will be considered.

[21] Roberta Rosenthal Kwall (1997). Fame. *Indiana Law Journal, 73*, 1-45 p.*15.

2. Current position in the UK

2.1. No specific regulation

As already mentioned, the UK does not recognise any specific publicity protection.[22] The UK approach is in contrast to most jurisdictions including continental Europe[23] and the US [24] where publicity rights are accepted. In *McCullouch v Lewis A. May Ltd*[25] it was clearly stated that "there is nothing like a commercial right to a personality" in the UK. This reluctant attitude is a consequence of not recognising identity as a protectable right.[26] In *Fenty* v *Arcadia Group Brands Ltd*[27] this restrictive approach was confirmed by stating that "there is [...] no "image right" or "character right" which allows a celebrity to control the use of his or her name or image". These decisions make it evident that the UK has not intervened in creating rights that protect an individual's identity equivalent to the right of publicity or image rights.[28]

The lack of a specific law forces the individual to rely on more incidental protection in other legal actions to protect their identity. Copyright, trademark, breach of confidence and the tort of passing off are some of the potential legal grounds. The main focus will be on the breach of confidence and passing off as the most successful actions to prevent commercial exploitation in the UK.[29] The study will demonstrate that the UK approach does no longer fit with commercial practice.

2.1.Copyright

Copyright will afford little assistance in the protection of identity. Copyright, Designs, and Patents Act ("CDPA")[30] is broad enough to encompass a person`s name, image, and likeliness. However, a name has been rejected as copyrightable since 1869.[31] Furthermore,

[22] Beverley-Smith (n 5) 4; Carty "Advertising, Publicity Rights and English law (n 1) 232; Tanya Aplin & Jennifer Davis (2017). *Intellectual Property Law, Text, Cases and Materials* (3rd edn). OUP. p.590.
[23] Huw Beverley-Smith, Ansgar Ohly & Agnès Lucas-Schloetter (2005). P*rivacy, Property and Personality Civil Law Perspectives on Commercial Appropriation.* Cambridge: CUP p. ix, 10.
[24] McCarthy (n 3); Beverley-Smith, Ohly & Lucas-Schloetter (n 23) 5.
[25] 65 R.P.C. 58 (1947).
[26] Lionel Bently, L. (2010). Identity and the Law. *Giselle Walker & E.S. Leedham-Green (eds.) Identity, Cambridge University Press*, 26-58 p.26.
[27] EWCA (Civ 3 2015) at [29.].
[28] Bains (n 18) 165; Aplin & David (n 22) 591.
[29] Bently, Identity and the Law, (n 26) 35.
[30] CPDA 1988 section 1.
[31] Du Boulay v Du Boulay (1867-9) LR 2 PC 430.

courts have generally been unwilling to protect a person`s likeliness because the likeliness is not considered to be owned by the individual.[32] Hence, neither a person`s name nor likeliness will be afforded protection.

Nor is a person's image provided broad protection. Copyright is only provided to the author of an original work[33] Thus, the depicted person will only be protected against the use of a picture created by himself. The broad interpretation of the originality in *Painer,*[34] indicates that a selfie might arguably be protected. However, pictures used for commercial purposes are typically not a selfie but unprotected pictures taken by others.

Accordingly, copyright law is not suited to protect a person`s identity. This reluctant attitude leaves a very limited scope of exploitation of an individual actionable under copyright law.

2.1.Trade Mark

Individuals are furthermore unlikely to get sufficient protection under the Trade mark Act ("TMA").[35] Protection is only achieved through registration.[36] Registration might be a major hurdle. It is no automatic in getting an image or name registered[37] Protection is only provided for marks able to distinguish the goods of the trade marks holders from the goods of others.[38] While non-celebrities are unlikely to register their features, celebrities have typically struggled to register their name and likeliness. Distinctiveness decreases the more famous the celebrity gets. In effect, this makes difficulties for registration. For example, the name "Elvis Presley" was refused registered. Since the name was so commonly known, it was not able to distinguish the goods from others.[39] Nevertheless, the fact that the signature "Elvis A Presley" was held registrable, illustrates it might be permitted.

Recently the CJEU has expanded the function doctrine of what the trademarks system shall protect.[40] Nevertheless, the identity of the registrar will most certainly not be protectable. Consequently, courts have generally restrained from granting protection to names or symbols

[32] Elvis Presley Trademarks, Inc., (1999) R.P.C. 567 (CA).
[33] CDPA 1988 section 2 (1), section 9.
[34] C-145/10 Eva-Maria Painer v. Standard VerlagsGmbG and Others (2011). CJEU held a portrait copyrightable due to the artist free and creative choices.
[35] TMA 1994.
[36] Ibid section 2.
[37] Carty, Advertising, Publicity Rights and English law (n 1) 211.
[38] TMA 1994 section 1(1), section 3.
[39] Elvis Presley Trademarks, Inc., (1999) R.P.C. 567 (CA).
[40] C-487/07 L'Oréal v. Bellure (CJEU 2009).

associated with a person where no likelihood of confusion to the source of the origin of the goods is present.[41]

The protection for registered trade marks is furthermore quite limited. To constitute an infringement the marks must be identical or similar to the registered mark.[42] This criterion makes it especially difficult to protect images.[43] The registration of multiple pictures of the same person is likely to be rejected.[44]

Consequently, trademarks will similar to Copyright only provide limited protection of identity. The individual will therefore not have sufficient control of its identity.

2.2.The Breach of confidence –Privacy in the backdoor

The potential protection of identity through the breach of confidence has increased. An exclusive right of privacy is rejected in the UK.[45] However, it has developed a right against unjustifiable disclosure of private information under the breach of confidence.[46] This development is a result of the enact of the Human Rights Act 1988 which gave effect to article 8 of the European Convention on Human Rights ("ECHR").[47]

Two cases have been especially influential for better potential privacy protection and the ability to object to commercial use of identity. First, *Campbell v. Mirror Newspaper*[48] made information protectable if the person had a «reasonable expectation of privacy".[49] The potential protection was further increased when *Douglas v Hello!*[50] acknowledged some protection even without "reasonable expectation of privacy".[51] The couple`s precautions in preventing others from taking pictures made the pictures protectable as private information.

[41] Reshma Amin (2010). A Comparative Analysis of California`s Right of Publicity and the United Kingdom's approach to the Protection of Celebrities: Where are they Better Protected? *Case Western Reserve Journal of Law, Technology & the Internet, 1*, 93-120. p.112
[42] TMA 1994 section 10.
[43] Diana, Princess of Wales Trade Mark (2001) ETMR 25.
[44] Alistair J. Bonnington (2006). Image Rights - a Defender`s Perspective. *2 Convergence* , 6-16 p.8.
[45] Wainwright v Home Office (2004) 2 AC 406 at (31); Campbell v. Mirror Group Newspapers Ltd (2004) UKHL 22.
[46] Blum & Ohta (n 18) 142.
[47] Campbell v Mirror Group Newspapers Ltd (2004) 2 AC 457, para 17;
Jonathon Schlegelmilch (2016). Publicity Rights in the UK and the USA: It is time for the United Kingdom to follow America`s lead. *Gonzaga Law Review Online, volum 1*, 101-118. p.117.
[48] Campbell (n 47).
[49] Ibid 466, para 21.
[50] Douglas v Hello! Ltd sum nom OBG v Allan (2007) UKHL 21 (2008) 1 AC1.
[51] Bently, Identity and the Law (n 26) 38; Blum & Ohta (n 18) 142; Schlegelmilch, (n 47) 117.

The breach of confidence is in the decisions used as a tool to give effect to articles 8 and 10 of the ECHR.[52] The potential protection provided has developed beyond the traditional breach of confidence. Consequently, the breach of confident might be used to prevent some commercial exploitation of identity. Thus, the success in *Douglas* might potentially better be seen as an introduction of publicity right rather than mere privacy or breach of confidence. [53] In my opinion, to increase the protection of identity is a step in the right direction. With the increased practice of exploitation, an individual`s ability to control the use of image and other aspects must be acknowledged. However, the breach of confidence is an unsuited regime.

As correctly noted by Beverley-Smith et al.,[54] the potential for the breach of confidence to develop into a comprehensive publicity right is limited. Pictures and other aspects of a person are not on its own considered to be confidential. Rather it is required that the activity the person is engaged in is private.[55] Consequently, a person engaged in daily activities would not be protected.[56] The name, likeliness or image of a person normally used for commercial purposes will generally not constitute a protectable private matter. The use of, for instance, a picture taken of Lady Gaga on the Golden Globe in an advertisement would not violate the breach of confidence since it does not involve any private activity.[57] The breach of confidence and the developed privacy tort would, furthermore, not allow non-celebrities to prevent the use of accurate pictures of them in an advertisement which is not offensive or humiliating.[58] Unlike the right of publicity, the breach of confidence would not protect an unknown person for unwanted fame.[59]

Accordingly, individuals need to take particular steps to make their personal aspect sufficient confidence or must be captured in a private activity to be protected. Thus, the breach of confidence affords limited protection of identity. It is evident that the right does not afford a general right to control the identity. Unfortunately, this leaves the identity unprotected in many situations and free to use for commercial purposes.

[52]Aplin & Davis (n 22) 547.
[53] Ibid 591.
[54] Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 93.
[55] Ibid.
[56] Lionel Bently, Brad Sherman, Dev Gangjee, & Philip Johnson (2018). *Intellectual Property, I copy therefore I am* (5th Edn.). OUP p.1267; Campbell v. MGN Ltd [2004] 2 AC 457, (154).
[57] Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 93.
[58] Douglas v. Hello! Ltd (No. 2) [2003] EWHC 786, para. 218 (Lindsay J), (obiter).
[59] Daniel Gervais & Martin L. Holmes (2014). Fame, Property & Identity: The Purpose and Scope of the Right of Publicity. *Fordham intellectual Property, Media and Entertainment Law Journal, Volume 25, Article 4*, 181-225 p. 195.

2.3. The Tort of Passing off

2.3.1. Importance

The tort of passing off ("passing off") is the most common regime to enforce publicity right under UK law.[60]

To succeed in a claim of passing off, the individual must establish that the use of his identity leads to a misrepresentation that would damage the goodwill.[61] Accordingly, passing off is set out to protect a person`s goodwill and does not provide any general publicity protection. Although the tort has expanded over the years,[62] the exploitation of a person for commercial purposes will only constitute an infringement in certain circumstances. The afforded protection is, therefore, too limited.

2.3.2. Common field of activity

The previous requirement for a "common field of activity" [63] made the afforded protection of identity very limited. Businesses making use of a celebrity`s identity and the particular celebrity are often engaged in unrelated fields. Thus, it would not constitute a violation. Accordingly, celebrities frequently failed to protect their identity.[64] Unfortunately, this made businesses able to use a celebrity`s likeliness as long as they were not in direct competition. The decision in *McCulloch v Lewis A May*[65] exemplifies the issue. Mr. McCulloch, commonly known as «Uncle Mac» was refused protection against a cereal`s use of his nickname and other aspects associated with him. Even without direct competition, McCulloch would desire to control his identity and have a valid reason for doing so. Thus, the removal[66] of the requirement was an important step towards increased protection of identity through passing off.

[60] Bently, Identity and the Law (n 26) 36; Beverley-Smith, Ohly, & Lucas-Schloetter (n 22) 46; Blum & Ohta (n 18) 138; Aplin, & Davis (n 22) 566.
[61] Reckitt & Colman Ltd v Borden Inc, (1990) 1 WLR 491, 499.
[62] Arsenal FC plc v Reed (2001) RPC 922, Irvine v Talksport Ltd (2002) 1 WLR 2355; Fenty v Arcadia Group Brands Ltd (no. 2) (2015) EWCA Civ 3.
[63] McCulloch v Lewis A May (1947) 2 All E.R. 845; Tavener Rutledge Ltd v Trexapalm Ltd (1975) F.S.R. 479 Ch D.
[64] McCulloch (n 63); Lyngstad v Anabas (1977) F.S.R. 62.
[65] McCulloch (n 63).
[66]Lyngstad v Anabas Pros. Ltd., (1977) F.S.R. 62, 67 (Eng.); Mirage Studios v Counter-Feat Clothing Co. Ltd. (1991) FSR 145, 157; Irvine v Talksport Ltd (2002) 1 WLR 2355.

2.3.3. Goodwill - the commercial magnetism

The classic formulation of the tort indicates that persons without goodwill are excluded from an action. The use of celebrities will normally be «the attractive force which brings in the custom».[67] Thus, celebrities will usually have acquired sufficient goodwill. Rihanna was, for instance, held to have goodwill both as a «music artist» and a «style leader» attached in her image in *Fenty v Arcadia Group Brands Ltd.*[68] The establishment of goodwill will, however, be an insurmountable obstacle for non-celebrities. Although celebrities are more likely to be used in advertisements, this is not always the case. As already mentioned it has become more common to use regular persons in commercials. One practical example is the use of pictures of people at last year's festival to promote the upcoming one.[69] Regular persons will not have sufficient goodwill in their image. Consequently, the absence of goodwill would prevent them from an action of passing off.[70] The restriction of passing off to only provide protection to celebrities is unfortunate. The increased use of YouTube, Twitter, and online social networks have blurred the line and made a distinction between a celebrity and a non-celebrity more arbitrary.[71] All individuals should be afforded equal rights to prevent unauthorised commercial exploitation.

2.3.4. Misrepresentation

Today, the real issue for the protection of celebrity`s identity is that the use of the name, image or likeliness must misrepresent the public. As already mentioned celebrities might be used in various ways to grab the attention of the consumer. However, the mere use of a celebrity is not on its own sufficient for liability. To fall under the tort, a substantial part of the public has to be misled in believing there is a relevant connection between the celebrity and the product.[72] This will usually be an impression that the celebrity has approved, endorse or have some kind of control over the goods or services.[73] It will not be sufficient that the particular use reminds of or is associated with the celebrity.

[67] IRC v Muller & Co`s Margarine Ltd. (1901) AC 217 (Lord Macnaghten) 223.
[68] [2014] FSR 70, para 46, (2015) EWCA Civ 3 para. 11.
[69] Appendix I.
[70] Beverley-Smith (n 5) 71.
[71] Fraley v. Facebook, Inc., 830 F, Supp 2d 785 (N.D. Cal 2011) 808.
[72] Irvine v Talksport Ltd (2002) 1 WLR 2355.
[73] Beverley-Smith (n 5) 72.

Traditionally, courts have been very reluctant to acknowledge the commercial use of personality as a misrepresentation. ABBA[74] and Spice Girls[75] were, for instance, rejected protection against the use of their image and name on pillowcases, t-shirt, and stickers. The courts did not think the public would be under the impression that the pop groups had authorised the garment.

The widespread market practice of personality licensing was however finally acknowledged in 2003. Passing off was in *Irvine v Talksport Ltd*[76] expanded to encompass false endorsement. This illustrates a more positive attitude to the protection of the identity of celebrities in the UK.[77] However, Laddie J made an unfitting distinction between endorsement and merchandising, when he limited passing off to endorsement.[78] The legitime interest in controlling the identity is equal for endorsement and other forms of merchandising. This distinction seems, therefore, unfortunate.

This separation was, however, removed in *Fenty.*[79] In the case merchandising was finally accepted as a potential misrepresentation. The decision marks a slight shift in the UK approach to the protection of identity. The fact that Topshop was held liable by the use of the image of Rihanna on a T-shirt illustrates improvements and increased potential for the protection of identity. Furthermore, it might appear like an introduction of publicity rights. However, as noted by Birss J[80] the use of an image or a name does not amount as passing off on itself, it all depends on the special circumstances. Hence, the protection provided under passing off is still limited and is far from giving an exclusive publicity right.

The requirement of misrepresentation will in many cases make the protection of a person`s identity difficult. The commercial use of identity will not always constitute an impression of a sufficient connection between the celebrity and the products. Thus, various commercial practices of identity will not be prevented in the UK.

[74] Lyngstad v Anabas Pros. Ltd., (1977) F.S.R. 62, 70 (Eng.).
[75] Halliwell v Panini, (Lightman, J.) (1997) (Ch.D.) (LEXIS) (U.K.)
[76] 1 WLR 2355 at 39-46. (Laddie J).
[77] Bently et. al. (n 56) 891.
[78] Irvine (n 75) para. 9.
[79] Fenty v Arcadia Group Brands Ltd (no. 2) (2015) EWCA Civ 3.
[80] Fenty v Arcadia Group Brands Ltd (t/a Topshop) & Anor (2013) EWHC 2310 (Ch); (2013) WLR(D) 310, para. 75.

Furthermore, it appears that celebrities generally would have more difficulties in proving misrepresentation in case of merchandising compared to endorsement.[81] This despite that the strict distinction between merchandising and endorsement was removed in *Fenty.*[82] As already mentioned, the legitim interest in controlling the identity will be equal in these situations. As Nimmer[83] points out "publicity values may be usefully appropriated without the necessity of passing off, and therefore without violating the traditional theory of unfair competition». Hence, protection should not be limited to misrepresentation, but encompass all commercial exploitation of identity.

The recent expansion of misrepresentation has caused some scholars to argue that passing off is moving towards protection of misappropriation.[84] Passing off has in other common law systems such as Australia extended to cover misappropriation.[85] However, is not the case in the UK.[86] The above-mentioned *Fenty*[87] is demonstrative. Rihanna succeeded due to the establishment of misrepresentation. Thus, the use of a celebrity`s name, image or likeliness, will not constitute passing off, as long as it does not mislead the public. This is in stark contrast to most other jurisdictions' approaches to unfair competition with a requirement of misappropriation. As made evident, passing off has not developed into a misappropriation tort. However, it is in my view time to introduce a separate law regulation protection against the appropriation of a person`s identity into the UK.

2.3.5. Damage

The misrepresentation established must, furthermore, cause damage to the person`s goodwill. The most relevant damage for commercial exploitation is the loss of licensing revenues and the loss of control.[88] The requirement of damage will in most cases be fulfilled. However,

[81] Eg. Arsenal FC plc v Reed (2001) RPC 922; Lyngstad v Anabas Pros. Ltd., (1977) FSR 62. Cf. Irvine v Talksport Ltd (2002) 1 WLR 2355.
[82] Fenty v Arcadia Group Brands Ltd (t/a Topshop) & Anor (2013) EWHC 2310 (Ch); (2013) WLR(D) 310 [33]
[83] Nimmer (n 3) 212.
[84] Walsh (n 4) 253; Christopher Wadlow (2011). *The Law of Passing-off: Unfair Competition by Misrepresentation 4ed.* London: Sweet & Maxwell.; Jennifer Davis, 'Why the United Kingdom should have a law against misappropriation' (2010) 69 Cambridge Law Joural, 561-581 Cf. Michael Spence (1995). Passing off and the misappropriation of valuable intangibles . *Law Quarterly Review, 112*, 472-498 p. 498; Spyros Maniatis (2014). Personality endorsement and character merchandising: A sparkle of unfair competition in English law. In, *Intellectual Property, Unfair Competition and Publicity convergences and development*, 97-117. Northampton: Edward Elgar Publishing, Inc., 117; Bently et. al. (n 56) 926; L'Oreal SA v. Bellure NV, [2007] EWCA (Civ) 968, [164] (U.K.). (Jacob J) (obiter dictum)
[85] Henderson v. Radio Corporation Pty. Ltd (1969) R.P.C. 218.
[86] Beverley-Smith (n 5) 30.
[87] Fenty v Arcadia Group Brands Ltd (t/a Topshop) & Anor (2013) EWHC 2310 (Ch); (2013) WLR(D) 310, para. 35.
[88] Bently et. al. (n 56) 914.

Springfellow v. McCain[89] demonstrates its potential restriction. The well-known nightclub Springfellow was unlikely to expand to the field of chips. Consequently, the club was considered not to suffer any damage and prevented from passing off. The judgment seems to be based on the view that the acceptation of passing off would allow an overly broad monopoly in the use of a name.[90] Such a limitation does not seem reasonable nowadays since individuals are often quick to exploit to other areas if possible.[91]

According to the decision, the protection of identity will be especially limited when celebrities are used on unrelated goods. The individual should be able to decide which products his name, image or likeliness should be associated with. Thus, it is where the identity is used on goods and services which otherwise would not be authorised, the need for protection is the most. It will, therefore, be especially important for the individual to control the use in these situations.

2.3.6. Summary of passing off

Passing off has expanded to also include situations where the public is deceived in believing that the particular celebrity endorses, has some kind of control or responsible or otherwise is involved in the good or service. [92] This expansion makes the tort more suitable and up-to-date with current commercial practices, where celebrities to a large extent rely on licensing as an important revenue stream. Hence, celebrities have some ability to control the commercial use of their identity.

However, even the broadest interpretation of case law provides only limited protection against commercial exploitation.[93] The lack of protection is especially caused by two elements. First, the requirement of misrepresentation will restrict protection. Second, the tort will only be enforceable for celebrities due to the requirement of goodwill. Consequently, passing off falls short to offer the kind of protection celebrities and non-celebrities need.

[89] (1984) RPC 501.
[90] Aplin & Davis (n 22) 570.
[91] Ibid.
[92] Bently et. al. (n 56) 894.
[93]Schlegelmilch (n 47) 116.

2.4. The UK approach as a whole

As demonstrated, the conservative approach in the UK gives limited protection of a person`s publicity value. The absence of a comprehensive system for publicity protection makes it difficult for individuals to object to the exploitation of their identity in the UK.[94] The attempts of the court to stretch and adapt passing off and the breach of confidence to increase the protection has failed. The lack of protection is evident. The copyright law might at best provide some protection for photographs but does not protect other aspects of a person`s identity. Furthermore, the protection under trade marks will also be limited because of the law's restriction to registered marks. While celebrities` names and other features usually are considered unregistrable, non-celebrities will not bother to register their aspects. Although the breach of confidence has developed to protect some publicity interests, it is still far away from granting general publicity rights. The same is evident in passing off. Despite increased willingness to acknowledge the economic value in endorsement and merchandising for celebrities, the requirement of misrepresentation and goodwill limits the afforded protection.[95]

As correctly stated by Lapter "the English courts have narrowly construed publicity protection under these devices".[96] Consequently, celebrities and non-celebrities are in several situations left without the ability to control their identity. The expansion of protection under passing off and the breach of confidence have led scholars like Catherine Walsh[97] and Hazel Carty[98] to argue that the UK is heading towards the protection of publicity rights. Opposed to Carty, I welcome this development. It is in my opinion time to do necessary adjustments in the regulation to give a sufficient level of protection of identity. The new commercial practice requires stronger protection. However, publicity protection should be afforded under a separate regime, and not indirectly through passing off or other already existing laws.

[94] Amin (n 41) 110.
[95] Schlegelmilch (n 47) 118.
[96] Alain J. Lapter (2007). How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford A Global Perspective on the Right of Publicity. *15 Texas Intellecual Proterty Law Journal 239*, 278-312. p.278
[97] Walsh (n 4) 253.
[98] Carty, Advertising, Publicity Rights and English law (n 1) 253.

3. Two selected approaches to publicity rights

3.1. General perspective

If publicity rights are to be introduced in the UK, awareness of other jurisdictions' approaches to the issue will be valuable. Experience from others will ensure the finding of the most appropriate model for the protection of identity.

Publicity protection is laboured differently in the US and Continental Europe. In the US the right is referred to as the right of publicity.[99] Continental Europe refers to the right as image rights or personality rights.[100] Apart from this terminological difference, the different foundations of the rights have been emphasised.[101] While the right of publicity has parallels to intellectual property rights,[102] Continental Europe has taken a more dualistic approach. The economic interests inherent in the identity tends to be protected through the broad action of unfair competition[103] and the aspect of personal dignity through personality rights/image rights.[104]

Thus, despite common aspects of broad protection, the rights will not necessarily afford exactly the same protection.

3.2. US – The Right of Publicity

3.2.1. General perspective

Conversely, to the UK, the idea of property rights inherent in the identity has gained wide acceptance in the US.[105] There are two potential ways to protect identity in the US; the Lanham Act article 43(a) and the right of publicity.[106] While the primary purpose of the Lanham Act is to prevent consumer confusion, the purpose of the right of publicity is to prevent misappropriation by giving the individual the ability to control its identity.[107] The

99 McCarthy & Schechter (n 3); see also Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 5.
100 Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 5.
101 Stephen R. Barnett (1999). The Right to One`s Own Image: Publicity and Privacy Rights in the United States and Spain. *The American Journal of Comarative Law 47, no. 4*, 555-581, p.556.
102 McCarthy & Schechter (n 3) § 1:7.
103 Antonina B. Engelbrekt (2017). The Scandinavian Model of Unfair Competition Law. *ResearchGate, Stockholm University*, 1-21.
104 Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 5.
105 Bently, Identity and the Law (n 26) 26.
106 Barbara A. Solomon (2004). Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Rght of Publicity. *94 Trademark Reporter*, 1202-1228 p.1204.
107 1 Anne Gilson LaLonde, Gilson on Trademarks § 2B.03 (2013).

Lanham Act is more limited because of the restriction to cases of likelihood of confusion.[108] This thesis will, therefore, focus on the right of publicity providing the best protection.

3.2.2. Scope of protection

Professor McCarthy, the leading American scholar of the right of publicity, has defined the right as the "inherent right of every human being to control the commercial use of his or her identity".[109] Aaron Bartz[110] defines the right as the right to "own, protect, and profit from one's name, likeness, voice, or identity". As these definitions indicate, persons are given access to control and profit from the use of the aspect of their personality. Accordingly, a person`s identity is provided broad protection in the US. The sentiment behind the right is that "one`s name, image, and reputation has value in the media, or for merchandise, or for promotion of goods and services".[111] This value belongs to the individual and the individual itself should, therefore, be in control of the use of the identity.

In the absence of federal law, the level of protection provided vary from state to state.[112] The right of publicity for living persons is recognized by over 30 states, either in statutes, common law, or both.[113]

This thesis will analyse the main aspect of the right of publicity in New York and California, which are the leading states in the right of publicity.[114] Both are high-level commercial states with a high focus on the film industry.[115] Consequently, the right is well-developed under California and New York since litigation has mainly occurred where advertisers and celebrities are concentrated.[116] Despite this similarity, the right provided has notable differences. While the right is provided through both statutes and common law in

[108] Carson v. Here`s Johnny Portable Toilets, Inc 698 F.2d 831 (6th Cir. 1982) The use of the catch-phrase "Here`s Johnny" failed to established likelihood of confusion under the Lanham Act, but was protected under the right of publicity.
[109] McCarthy & Schechter (n 3) §1:2, §7:22.
[110] Aaron A Bartz, . . . And Where it Stops, Nobody Knows: California's Expansive Publicity Rights Threaten the Federal Copyright System, 27 Sw. U. L. Rev. 299 (1997) p.302
[111] Gillian Black (2011). Exploiting image: making a case for the legal regulation of publicity rights in the UK. *European Intellectual Property Review*, 413-418. p.413
[112] McCarthy (n 3) §6:8.
[113] Ibid §1:2
[114] Dan Hunter (2012) *Intellecual Property, The Oxford Introductions to US Law.* Oxford : Oxford Univercity Press, p.211.
[115] McCarthy (n 3) §6:26.
[116] Leonard A. Wohl (1988). The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes. *Fordham Law Review, Vol.57, Issue 3, article 5*, 445-462. p.458.

California,[117] common law has been rejected in New York since 1984.[118] Furthermore, New York limits protection to living persons. In California, deceased persons are protected as well.[119] Hence, the distinctive approaches will illustrate different aspects of the right of publicity and the afforded protection.

3.2.3. Historic development

Today, the right of publicity is commonly considered as a special form of misappropriation.[120] It originated, however, as a subcategory of privacy.[121] Both privacy and publicity protect against the appropriation of attribution but are nonetheless set out to protect different interests. Despite these misappropriation regimes, a general tort of misappropriation has little practical significance in the US.[122]

The starting point of the right of publicity was the highly influential article of Warren and Brandeis analysing the potential protection of privacy.[123] However, the difficulties of incorporating a right to prevent unauthorised commercial exploitation under the right of privacy led to the development of a distinct right.[124] A separate right of publicity was first acknowledged in *Haelen Laboratories. Inc v. Topps Chewing Gum Inc*.[125] The decision made contradictions among scholars. Prosser[126] incorporated the protection under his «four torts of privacy». While Bloustein[127] argued for separate publicity right outside of privacy.

The right of publicity has as a result developed along two lines. California, like most other states, provides separate publicity and privacy rights. New York has, on the other side, codified the right of publicity under privacy law. Consequently, the exploitation must fit

117 CCC §3344; Waits v. Frito-Lay Inc 978 f 2d 1512 (9th Cir. 1992); Comedy III Prods. v. Gary Saderup, Inc., 25 Cal 4th 387 (2001) «In this state the right of publicity is both a statutory and a common law right».
118 NYRL §§ 50 and 51; Stephano v. News Group Publications, 485 N.Y.S 2d 220, 474 N.E.2d 580 (N.Y. 1984) 224.
119 CCC §3344.1; Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F3.d 983, 986 (9th Cir. 2012).
120 McCarthy (n 3) §1:7.
121 Beverley-Smith (n 5) 15.
122 International News Service v. Associated Press, 248 US 215 (1918); Cheney Bros. v. Doris Silk Corp 35 F.2d 279 (2d Cir. 1929); Goldstein v. California, 412 US 546 (1973); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 233 (1964); National Basketball Association v. Motorola Inc., 105 F3d. 841 (2nd Cir, 1997) (The court limits the misappropriation doctrine)
123 Samuel D. Warren & Louis D. Brandeis (1890) The Right to Privacy. *Harvard Law Review, 4 No.5*, 193-220.
124 Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 53.
125 (1953) 202 F. 2d 866
126 William L. Prosser (1960). Privacy. *California Law Review, 48*, 383-423. p.388
127 Edward J. Bloustein (1964). Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. *39 N.Y.U.L.R* , 962-1007 p.971.

within the privacy framework of section 50 of the New York Civil Rights Law ("NYCRL") to obtain protection.

3.2.1. Protection in New York and California

Generally, the right of publicity is infringed when the person is identifiable from the unauthorised commercial use of the identity. Nevertheless, the provided protection varies between states due to the different definitions of identity.

New York limits the protection to the use of a “name, portrait, picture or voice”.[128] Liability is restricted to these aspects of identity. This restriction is a result of not recognizing common law. The court held in *Lombardo v. Doyle, Dane & Bernbach*[129] that the statute should be "strictly construed and not be applied to prohibit the portrayal of an individual's personality or style of performance." Consequently, the imitation of the singer Lombardo did not satisfy the requirement under NYCRL §51. In *Onassis v. Christian Dior,*[130] the New York Supreme Court noted that many aspects of identity, additionally to name, portrait, picture or voice, which thus far not were accorded protection. Nevertheless, the look-alike of Jacqueline Kennedy Onassis infringed her right of publicity because the use made the impression that Onassis actually appeared in the advertisement. The fact that liability requires an illusion of the use of the actual individual was confirmed in *Allen v. National Video, Inc*.[131]

These decisions indicate a potential for a broad interpretation of the exhaustive list to also encompass look-alikes. It will nevertheless only be if the use is "indistinguishable from the real person".[132] Furthermore, due to the amendment adding "voice" in the statutes, McCarthy[133] has argued that the same result is likely for sound-alikes. However other potential ways of identity exploitation, for example, a dressing style or a famous catch-phrase will not be protected in New York. This restrict approach might be caused by the right`s codification under privacy. The use of another person`s features, in contrast to the plaintiff, does not seem to fit with the protection of dignity. Imitations would, therefore, only constitute a violation in special cases. Although this approach affords protection to the most significant

128 NYRL §§ 50 and 51.
129 58 A.D.2d, 620 (2d Dep`t 1977) 623.
130 122 Misc. 2d 603 (N.Y. Misc. 1984) at 612.
131 610 F. Supp. 612 (S.D.N.Y. 1985).
132 Ibid 623.
133 McCarthy (n 3) §6:80.

aspect of an individual`s identity, the protection is in my view too limited. The legitimate interest in controlling the identity will be present apart from the protectable aspect in a "name, portrait, picture or voice".

In contrast, California affords protection to every aspect of an individual`s identity. This broad concept of identity is a result of the recognition of the right of publicity under both statute[134] and common law.[135] The statute is, similar to the New York approach, restricted to personal aspects of the actual person. The extent of this restraint is exemplified in *Midler v. Ford Motor Co.*[136] The use of a sound-alike was refused protection under California Civil Code ("CCC") §3344. The court stated that "[t]he voice they used was [another person's], not hers».[137] However, as stated in *White v. Samsung*[138] «[…]the common law right of publicity is not so confined» and covers all possible aspects of a person`s identity. This broad scope made the sound-alike of Mr. Midler a violation under common law.

Thus, the common law of the right of publicity under California prevents unauthorised uses of any identifiable aspects of a person`s identity. Liability may, therefore, be held from the use of characteristics such as a distinct marking of a racing car[139] or a catch-phrase.[140] The most extreme example is *White v. Samsung.*[141] The use of a robot dressed like the well-known hostess of "Wheel of Fortune» Vanna White constituted a violation. The fact that neither a photograph nor other personal aspects of White were used illustrates how broad the afforded protection is. Although identity protection is important, the decision demonstrates the right`s development beyond its original intention. Rather than granting a person a monopoly in every aspect associated with him, the protection should, in my view, be limited to the more essential and personal aspect of the identity. Which a dressing style is certainly not.

Liability of the right of publicity is in both states based on misappropriation.[142] The term misappropriation is not defined by courts. The general meaning of "appropriate" is "to take

[134] CCC § 3344.
[135] Midler v. Ford Motor Co 849 F. 2d 460 (9th Cir. 1988); White v. Samsung Electronics of America, Inc., 971 F 2d 1395 (9th Cir, 1992).
[136] Midler (n 135).
[137] Ibid 463.
[138] 971 F 2d 1395 (9th Cir, 1992) at 1397 (Majority opinion); McCarthy (n 3) §6:51.
[139] Motschenbacher v. R.J Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) at 826–7.
[140] Carson v. Here`s Johnny Portable Toilets, Inc , 698 F2d. 831 (6th Cir. 1983).
[141] White (n 135).
[142] Rogers v. Grimaldi 875 F 2d 994 (2nd Cir 1989), 1003; Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 69.

something for your own use, without permission".[143] Thus, violation of the right of publicity does not require any deception or any confusion from the use.[144] The mere use of another`s identity to get the public`s attention for commercial purposes will, therefore, infringe the right.[145] As stated by the majority in *White v. Samsung*[146] liability may be held regardless of whether the public believed that White was endorsing the advertised product.[147] Hence, the use of essential aspects of a person`s identity will constitute an infringement as long as the particular use makes the individual sufficiently identifiable.[148] The requirement for the person to be recognisable from the use is logical since it would otherwise not constitute a misappropriate of the individual`s identity.[149] The misappropriation approach is in my opinion beneficial. The right will be restricted to cases where the identity is actually effected, but at the same time ensure that the individual maintains the control of its image, name and other essential aspects.

No liability will generally be held for the commercial use of unrecognisable body parts.[150] However, the use of a distinct arm or leg would potentially be protected. Thus, for instance, the mere use of Julia Robert`s well-known mouth to promote a lipstick infringes her right of publicity. The lipstick company is appropriating Julia Robert`s fame. The use constitutes an infringement as long as she is recognised, even without anyone thinking she is involved with the cosmetics. Conversely, the same commercial use does not amount to passing off. Mainly because it is not a misrepresentation. Furthermore, the person might also meet difficulties in demonstrating goodwill. Even if the particular aspect might identify the person, the individual would not necessarily have achieved sufficient goodwill in a particular aspect.

Goodwill is, however, not an issue for protection under the right of publicity. Some academics[151] have argued for limiting the right to celebrities. However, the view of the

143 Cambridge Academic Content Dictionary (2019).
144 Beverley-Smith (n 5) 4; Rogers v. Grimaldi 875 F. 2d 994 (2nd Cir. 1989), 1003-1004.
145 McCarthy (n 3) §3:2, §5:19.
146 White (n 142) 1398.
147 David Tan (2010). Much ado About evocation: A Cultural analysis of "Well-knowness" and the Right of Publicity. *Cardozo arts & Entertainment 28*, 313-350 p.332.
148McCarthy (n 3) §3:10.
149 Waits v. Frito-Lay Inc., 978 F 2d 1093 (9th Cir 1992) at 1102.
150 Prosser (n 126) 405 "[T]here is no liability for the publication of a picture of his hand, leg and foot, […] with nothing to indicate whose they are".
151Samuel J. Hoffman (1980). Limitations on the Right of publicity. *28 Bull Copyright Soc`y*, 111 p.112-114; Lapter (n 96) 278-312; Schlegelmilch (n 47) 102.

majority of scholars[152] and courts[153] is that the right should be available for everyone.[154] Thus, in contrast to passing off, the right of publicity can as easily be invoked by unknown persons as famous ones.[155] The right of publicity is provided for "any person".[156] The previously mentioned use of the two girls to promote the upcoming festival would, therefore, be protected under the right of publicity. This is in my view, the way to go. The commercial value of non-celebrities is evident by the very fact that the promoters made use of their identity. Why should a business want to exploit a person`s identity if no commercial value was assumed? Non-celebrities have the same or even stronger legitime interest in controlling the use of their identity. Regular persons should be allowed to stay unknown. Hence, non-celebrities should not be excluded from publicity rights. The greater value related to celebrities should instead be reflected in the offered remedies.[157] Furthermore, the separation between celebrities and non-celebrities is today arbitrary with new platforms such as Instagram, Facebook, Twitter, and Memes. Thus, both celebrities and non-celebrities should have equal rights to control their identity.

Finally, whether deceased persons should be protected is regulated differently in various states.[158] While Indiana[159] provides the longest protection (100 years after the death) and California[160] protects 70 years after death, a post-mortem right is not recognised in New York.[161] In my opinion, a better view would be to afford protection somewhere in between. There are compelling arguments to limit the monopoly and place the identity in the public domain. Deceases are no longer in need of controlling their identity. However, with respect to relatives, protection should be provided a while after death. Hence, the right should be provided between 15-20 years after death.[162]

[152] See e.g Nimmer (n 3) 217; McCarthy (n 3) §4:19.
[153] Motschenbacher v. R.J Reynolds Tobacco Co., 498 F.2d 821,825 n.11 (9th Cir. 1974); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, (N.D.Cal..2011).
[154] McCarthy (n 3) §4:14-4:16; see also Nimmer (n 3) 217.
[155] Peter Jaszi (2017) The commercial Appropriation of fame: A Cultural Analysis of the Right of Publicity and Passing off, Book Review, Singapore Journal of Legal Studies, 391-394, p.394.
[156] NYRL § 51; CCL § 3344.
[157] Nimmer (n 3) 217.
[158] McCarthy (n 3) §9:17.
[159] Indiana Code §32-36-1-8.
[160] CCC § 3344.1; Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F3.d 983, 986 (9th Cir. 2012).
[161] Prione v. MacMillian, Inc., 894 F3d 579 (2d Cir. 1990).
[162] See e.g Norway Copyright Act §104 (2) (15 years post-mortem) and Virginia VA Code 1950 §8.01-40 B (20 years post-mortem).

3.2.2. Restrictions on the right of publicity

The right of publicity does not protect against all the potential use of identity. Firstly, it is restricted to commercial use. Hence the right will not protect a person from general exploitation on Facebook or social media. Secondly, the particular use might be protected through the right of freedom of speech in the federal constitution under the First Amendment. Freedom of speech will then take precedence over the right of publicity. [163] In *Comedy III Prods. v. Gary Saderup, Inc.I,*[164] the conflict between these rights was resolved. The First Amendment could not be used as a defense because the use did not "add significant creative elements so as to be transformed into something more than mere celebrity likeliness or imitation".[165] Controversially, in *Winter v. DC Comic,*[166] the use of two musicians depicted as "half-man, half-worm" in a comic book was transformative and therefore protected under First Amendment. The right to free speech is generally given a high degree of position in the US. However, commercial speech or advertising is provided low protection under the First Amendment.[167] Thus, where the use of the identity is purely commercial, a defense based on free speech is unlikely to be granted.[168] However, the "wholly unrelated-test" adopted in New York[169] seems to provide broader free speech defense than in California.[170] Nevertheless, in both states, the right of publicity will, in many situations actually prevail the advertisers` right to exploit the individuals.

3.2.3. Summary of the US approach

As demonstrated the right of publicity will grant far better protection than passing off. The protection of misappropriation increases the potential to prevent others from exploiting their identity and better control of the use. The broader protection is mainly because the use of a person`s name, image or voice in many circumstances does not mislead the public. The individual will, nevertheless, have an equal interest in preventing the identity from being

[163] California has adapted the «transformative use» doctrine, see Comedy III Prods. v. Gary Saderup, Inc., 25 Cal 4th 387 (2001), New York has adapted the "relatedness test", see Rogers v Grimaldi 875 F2d. 994 (2d Cir 1989).
[164] Comedy III (n 163).
[165] Ibid [1]. (Mosk J).
[166] Winter v. DC Comic, 30 Cal. 4th 881 (2003).
[167] Colin R. Munro (2003). The Value if Commercial Speech. *Cambridge Law Journal, 62, no.1* , pp. 134-158 p.135-138; Ohralik v. Ohio State Bar Association 436 US 447, 456 (1978).
[168] Neal H. Klausner & Sara L. Edelman (2017). Expert Q&A on Right of Publicity Claims. *Practice Law the Journal, A companion to practical Law online* at 18; Jordan v Jewel Food Stores Inc.,743 F.3d 509 (7th Cir. 2014) 743, 83 F. Supp. 3d 761 (N.D. Ill. 2015).
[169] Rogers v. Grimaldi 875 F2d. 994 (2d Cir 1989), 997-1002.
[170] Gervais & Holmes (n 59) 213.

exploited without consent despite any confusion.[171] The broad protection provided under the right of publicity comes as a natural consequence of the interest it seeks to protect. The right of publicity protects the inherent commercial value of a person's identity, rather than the goodwill protected under passing off.

As made evident the right of publicity varies across the different states and might not be said to be perfect. The protection provided in New York is too narrow. Infringement should not be restricted to appropriation of "name, picture, portrait or voice". On the other hand, the common law right of publicity in California which protects all identifiable aspects of a person`s identity is too broad. The right granted through common law is flexible and has increased in a manner beyond the intentional purpose due to the court's discretion. Courts and academics have expressed concern about the danger related to an overly expansive right of publicity.[172] It will, therefore, be important to limit the scope and clearly define the boundaries of a potential future right in the UK.

Nevertheless, the right of publicity is in both states addressed to protect the publicity interests. This approach avoids insufficient attempts to stretch and adapt existing laws to afford publicity protection. The law will, therefore, be more equipped to regulate the new increased commercial practice in the usage of identity.

Both states, though in various extent, provide protection specifically constructed to protect against any commercial misappropriation of an individual`s identity.[173] This protection of appropriation of the commercial value is essential. The fact that a general tort of misappropriation is rejected in the US illustrates the possibility of introducing a misappropriation tort created to address the specific subject matter of a person`s identity.

[171] Nimmer (n 3) 212.
[172] White v. Samsung Electronics America, Inc., 971 F 2d 1395 (9th Cir 1991). (Alex Kozinski) (minority opinion); Carson v. Here`s Johnny Portable Toilets, 698 F. 2d 831 (1982).
[173] Motschenbacher v. RJ Reynolds Tobacco, 4988 F. 2d 821 (1974); Carson v. Here`s Johnny Portable Toilets, 698 F. 2d 831 (1982); White v. Samsung Electronics Am., 971 F. 2d 1395 (9th Cir. 1991).

3.3.Norway – The Image Rights and Unfair Competition

3.3.1. General perspective

Continental Europe has taken a different approach to publicity protection. The study does not permit a full review of all the legal systems in Europe. Thus, Norway is chosen to give an overview of the image rights/personality right. It is not an attempt to give a complete analysis of all aspects. Rather it aims to provide some guidelines by analysing the main aspect of the right.

Although an overreaching right similar to the right of publicity is not provided in Norway, publicity protection is provided under two different regimes. Individuals might seek protection against the use of their image[174] and unfair use[175] of other aspects of their persona both provided in statutes. Together, these legal regimes afford broad protection of identity.

3.3.2. Image rights

3.3.2.1. Legal ground

Copyright Act §104 recognises "Retten til eget bilde" (the right to its own image). The provision states that a picture may only be circulated or displayed with the depicted person`s consent. Thus, the depicted person is given the right to decide when and where the photograph might be used. The right was traditionally created to protect the personal interests of the depicted person but has developed to also cover the economical aspect of a picture.[176] Thus, the image right has a dualistic purpose, to protect both economic and non-economic interests inherent in pictures. One of the most common ways to commercially exploit a person is through pictures. Thus, such an exclusive provision is valuable.

The image right provides broad protection. Firstly, protection is not limited to persons with sufficient goodwill like passing off. Thus, similar to the right of publicity both celebrities and non-celebrities are protected. As already mentioned, the protection of non-celebrities is necessary due to new commercial practices. Secondly, it is not a requirement of commercial activities to be protected. Hence, pictures displayed on for example Facebook[177] or other

174 Copyright act §104.
175 MPA §25.
176 Maria Jongers (2006). Retten til eget bilde. *Oslo: Complex nr. 5, Senter for rettsinformatikk*. p.26.
177 LH-2018-144282: The publication of a picture on Facebook infringed the right in Copyright Act §104.

social media could potentially fall under the provision. The afforded protection is, therefore, broader than both the US and the UK. Even if the requirement for the picture to be circulated "public"[178] give some limitation. Non-commercial exploitation of a person`s image goes beyond the scope of this thesis. It will, therefore, not be further considered.

The use of another`s image for commercial purposes requires a special duty of care. [179] The special caution which should be taken is because people generally do not want to have their personal pictures exploited in advertisements.[180] Even if a person has consented to the taking of a picture, it does not necessarily mean the permission to use the picture in advertisements.

Similar to the right of publicity, liability is based on misappropriation of another`s picture. This is justified under both the dignity and the economic value perspective. In both cases, deception among the public is not required for infringement. It will, therefore, be an infringement of the image rights even though every party is aware that the depicted does not have anything to do with the products and services in the advertisement. This approach will secure the individual better control over his or her identity.

The decisive criterion for protection is whether the individual is identifiable by the particular picture. The snowboarder Andy Finch was, for instance, successful in preventing an advertisement use of a picture of him jumping taken from behind making his face invisible.[181] The same result would be held in the US. Finch would nevertheless unfortunately not be protected in the UK. As demonstrated, the association with or recognition of a celebrity used in the commercial is not sufficient for passing off. Rather it requires an assumed connection through some kind of control or endorsement by the celebrity. Such misrepresentation is unlikely in this case. Nor would any of the other enforceable laws in the UK give any protection.

However, the use of pictures of look-alike would not fall under the provision in Copyright Act §104.[182] The image right does only protect the depicted person, not the individual`s goodwill

[178] Copyright Act §104.
[179] Rt. 1983 s. 637 at 640.
[180] Ibid.
[181] Rt. 2009 s.1568.
[182] Henry John Mæland (1985) Retten til eget bilde. *Lov og rett*, 195-224 p.205.

which is made use of in the imitation. The image right is, therefore, more limited compared to California.

The image right has nevertheless subsequently juridically developed to cover circumstances that fall outside the Copyright Act §104. Thus, other aspects of the identity additional to images might be protected on a common-law basis, including look-alikes. For instance, the imitation of the voice of a famous journalist used in a radio advertisement was an infringement based on the judge-made law.[183] The general legal protection of personality which is recognised increases the potential scope of protection of identity.[184] This wide expansion gives all individuals great protection. The afforded right goes beyond the protection provided in New York, by offering protection of sound-alike similar as in *Midler v. Ford Motor Co.*[185] Nevertheless, the developed law is unlikely to expand to go as far as *White v. Samsung*[186] by providing protection of a dressing style.

3.3.2.2. Restriction and limitation

The broad protection of identity through image rights has several restrictions. There are five exceptions to the right which allow the circulation of a picture despite consent.[187] These exceptions attempt to strike a balance between the right to privacy and the dignity of the depicted person and the free expression of others. In all the exceptions the public interest prevails over the need for protection.[188]

However, the exceptions appear incompatible with the use of another`s image for commercial purposes. Generally, the expectations seem to be formulated to allow the media and press to report and enlighten the public. The festival advertisement is illustrative.[189] The picture of the two girls does not fit in the exhaustive list of the exceptions. The girls would, therefore, be able to object to the use. However, if the picture was used in a newspaper to cover the festival or if a picture capturing a bigger crowd of the audience was used in the advertisement, it would fall under the exception. Consequently, the main rule will in most cases of commercial

183 RG-1999-1009 (159-99).
184 Rt. 1952 s.1217.
185 Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) at 463.
186 White v. Samsung Electronics America, Inc., 971 F 2d 1395 (9th Cir 1991).
187 Copyright Act § 104 a-f.
188 Rt. 2009 s.265. Emphasised the ECtHR demand for strong reasons to intervene in the right to freedom of expression granted in article 10. Thus, the picture to cover a demonstration was not an infringement of Copyright Act §104.
189 Appendix I.

exploitation apply. For these reasons, the image right offers greater protection of a person`s image.

3.3.3. Unfair competition

Additional to the image rights, Marketing Practice Act §25 ("MPA") gives celebrities the ability to object to commercial exploitation. The provision has a broad scope that covers various aspects of marketing, including the exploitation of identity. As noted by Lund,[190] "the standard of good business practice [in MPA §25] is broad enough and should include the protection of the interests a proprietor of "characters" may have in exploiting these" (PTN).

Private individuals will not be protected due to the request for both parties to be in business activity. Owing to the broad interpretation of the term,[191] celebrities will, however, be included. The exclusion of non-celebrities is not as significant as it first appears. Sufficient protection is already granted through the image right and the juridical developed law. In contrast, non-celebrities will in several cases be left unprotected in the UK.

The law supplements the more specific intellectual property rights. As specified in the *Rt. 1998 s.1315* "the consideration should be given protection that goes beyond what follows from the special provision"[192] (PTN). Thus, the law will mainly be actionable if the use is not covered by the general IPR. This ruling helps ensure less conflict between different laws and make the legal position more foreseeable.

The law is set out to protect the interest of consumers of getting true and correct information in marketing. Furthermore, the purpose of the law is to achieve fair play in business independent of the business area. Generally, the overall impression is that taking unfair advantage and getting undue gain from other`s effort, here the use of a celebrity`s reputation or personal aspect, is wrong and should be prevented.

Liability under MPA §25 relies on misappropriation. The use of a celebrity`s likeliness might, therefore, violate "good business practice" even in the absence of any deception. In *RG-1995-*

[190] Tore Lunde (2001). *God forretningsskikk næringsdrivende imellom.* Fagbokforlaget Vigmotstad & Bjørke AS. p.313.
[191] RG-1995-151 p. 155; See also the minority of Rt. 2009 s.1568 [69] "It is not doubtful that Finch, which lives of selling his personal character (as a snowboarder), is encompassed of the term business activity" (PTN).
[192] Rt. 1998 s.1315 p.1322.

151, the use of the name of the well-known artist Bjørgo Håland and the associated song title "I love Norwegian Country" in a cheese advertisement, was a violation of MPA §25. The cheese factory took unjustified economic benefits of Bjøro Håland's name and goodwill.[193] Thus, Bjørgo was able to object to the use, even if the public was unlikely to believe that he had anything to do with the cheese or endorsed it.[194] The court emphasised the lack of a separate regulation of a person`s name similar to the image right under copyright law.[195] Thus, the use of celebrities to get the public`s attention will in many situations lead to an infringement of MPA §25. The provision grants celebrities the control of their identity.

The flexibility of the legal standard of "good business practice"[196] makes the provision able to cover actions that do not fall under general IPR. The legal standard will, furthermore, make the provision able to develop with the society and new commercial practice. The assessment done by case-to-case will nevertheless potentially make the outcome less predictive. The assessment will, however, normally be whether the use of the name, voice or likeliness of the individual is considered as "unfair exploitation" which provides some guidelines.

Accordingly, all aspects of a celebrity`s identity appear to be cover under this provision. Celebrities are, therefore, given broad publicity protection.

3.3.4. Summary of the Norwegian approach

There are two potential pathways in Norway. Combined with the judge-made law provide wide protection of the exploitation of a person. While the provision given in MPA §25 is limited to business activities, the image right will afford every person protection against unpermitted use of images. Consequently, the exploitation of a person`s image is particularly protected in Norway. As one of "the chief attributions of a personality",[197] this is an essential aspect of a person`s identity to protect. Furthermore, celebrities will additionally be provided broad protection through the MPA. With no restrictions to a special aspect of the identity, it has the potential to protect all essential features linked to a person as long as it is used in marketing.

[193] RG-1995-151 at 155.
[194] Ibid 156.
[195] RG-1995-151 at 155.
[196] MPA §25.
[197] ECtHR Von Hannover v. Germany (no. 2) (2012) 55 EHRR 15 [96].

The juridical developed protection makes the Norwegian approach closer to the right of publicity by providing broad protection to all individuals. However, in contrast to California, it is unlikely that the courts would go as far as to protect all kinds of identifiable aspects of a person. The scope of protection is, therefore, more advantageous restricted to the most essential aspects of the identity.

Similar to the US the provision protects against misappropriation of other's identity. The fact that the public does not need to be misled in believing that the celebrity used actually has a connection to the particular business expands the potential protection. This wide scope will especially be to assistance to individuals used to promote a completely unrelated product where it is unlikely to assume a connection. A requirement for misappropriation will, therefore, be beneficial.

The dualistic system will, however, make the legal position less predicted. It seems more beneficial to have one overreaching right similar to the right of publicity instead of having various laws regulating the same area.

4. Introducing publicity rights in the UK

4.1. Fundamental points

Generally, the protection of a person`s identity engages two fundamental interests. While the exploited person seeks to protect and get control over its identity, the right of others to free expression stands as a conflicting interest.[198] Central to the efficient application of freedom of expression is the unencumbered flow of information occurring through various channels. Thus, too broad identity protection will be at the cost of the public interest.

Consequently, it is essential to strike an expedient balance between sufficient protection of a person`s identity and freedom of expression. Hence, it comes as no surprise that among the scholars' important arguments against publicity rights, is the right`s negative effect on free expression.[199] The disparity in the protection of identity in the different jurisdictions is a natural consequence of where the respective lines are drawn.

4.2.Balancing act – the position of each jurisdiction

To visualise how the described balancing act is preformed, a figurative illustration is created. The selected jurisdictions are placed on a relative scale along two dimensions: the level of identity protection and the level of freedom of expression. Each area is subjectively rated on a scale from one (low) to ten (full). The resulting values are illustrated in a figure below and thereafter discussed in regard to each jurisdiction.

[198] Jongers (n 176) 15; Thomas E Kadri (2014). Fumbling the First Amendment: The Right of Publicity Goes 2-0 Against Freedom of Expression. *Michigan Law Review*, 1519-1530 p.1521; Gervais & Holmes (n 169) 211; McCarthy, & Schechter (n 3) preliminary material.
[199] Gervais & Holmes (n 59) 212.

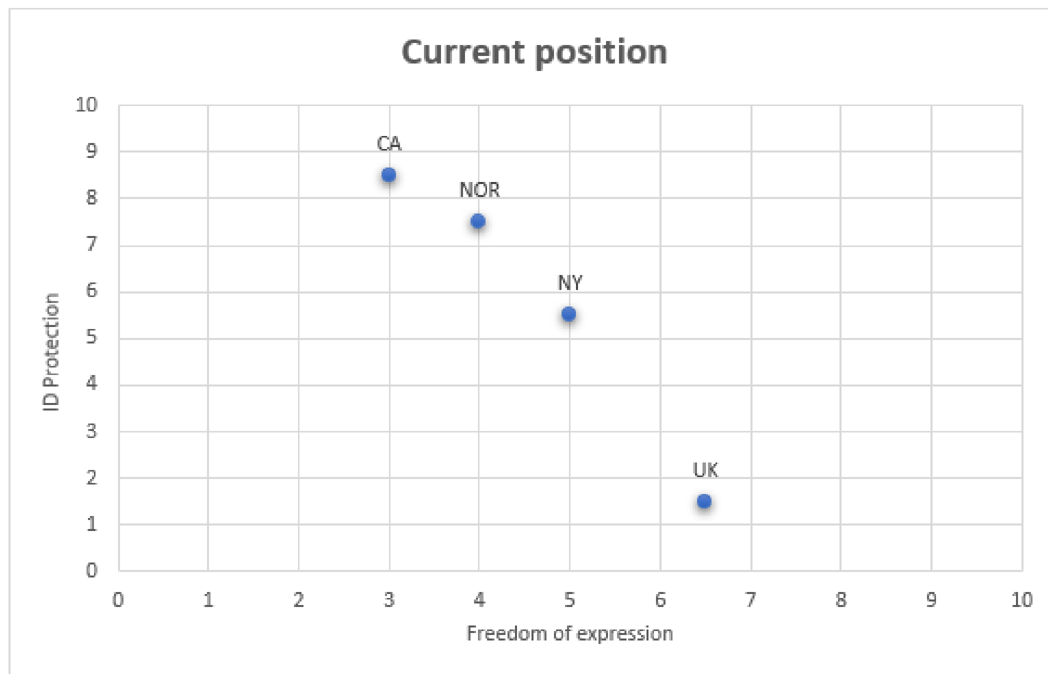

Figure 1 Relative relationship between selected jurisdictions

In the figure, the horizontal axis depicts relatively scaled freedom of expression, while the vertical axis covers identity protection.

As earlier discussed, all individuals are provided protection of all aspects of their identity including recognisable characteristics in California. Accordingly, the interest of the exploited person appears to be the emphasised interest in the balancing act. The fact that all identifiable aspects of a person are protected places California high on the scale of identity protection with 8,5. As noted the constitutional limitation under the First Amendment might be given precedence. Nevertheless, freedom of speech for commercial purposes results in a low degree of protection and score 3. The needs of the celebrities are usually given higher regard than the public interest at stake.[200] California is depicted as (CA) in the figure.

Protection is also provided to all individuals in New York. However, the restriction of protection to a name, portrait, pictures, or voice and the rejection of common law gives less protection. Furthermore, imitation is only in special circumstances protected. Moreover, protection is not provided post-mortem. These factors decrease the level of identity protection Resulting score is 5,5. The right to freedom of speech will restrict the right of publicity in some cases. However, similar to in California, the defense in freedom of speech will not

[200] Eastwood v. Superior Court, 149 Cal. App. 3d 409, 425 (Cal. Ct. App. 1983); McCarthy (n 3) §6:25.

prevail if it is purely commercial. The combination of the interrelationship with privacy and the "Roger-test" gives a stronger defense of free speech compared to California. Score 5. New York is depicted as (NY) in the figure.

The Norwegian approach provides broad protection. While both the image right[201] and the judge-made law is provided to all individuals, MPA §25 is only applicable for celebrities or people engaged in businesses. The two regimes combined with juridical developed law demonstrated the increased focus on the protection of identity. Protection is not limited to name, picture or voice like New York, but might also protect other aspects. However, unlike California, not every object associated with the individual will be protected in Norway. The identity protection is, therefore, broad, but has some restrictions resulting in a score of 7,5. Similar to the US, exceptions in the protection is granted in situations where the freedom of expression is considered more essential. However, commercial exploitation in advertisements is not the most protectable subject matter, illustrated by the score 4. Norway is depicted as (NOR) in the figure.

Conversely, the UK does not provide any specific protection of a person`s identity. Identity is not considered as a protectable aspect of its own. Although both passing off and the breach of confidence have developed to protect some personality aspects, the individuals are still provided a low level of protection of identity reflected by the score of 1,5. However, freedom of expression is generally given a high degree of protection in the UK. Score 6,5 is given. Courts tend to favour the freedom of speech at the cost of the individual's right to control the commercial exploitation of their identity.[202] The UK is placed in the figure according to the scores.

The finding of the optimal placement for the future UK will be central. While celebrities would argue for full protection of identity, this is not necessarily the ultimate solution for every party involved. In the following, it will be discussed how the protection of identity in the UK should be in the future and how it can be achieved.

201 Copyright Act § 104.
202 Amin (n 41) 118.

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4.3. The quest for creating sufficient protection

The study illustrates the striking difference in the level of protection against commercial exploitation between jurisdictions which recognise publicity rights and the UK where such regulations are absent. The level of protection of identity is clearly affected by the different approaches. Consequently, the identity will in various situations be unprotected in the UK. As highlighted by Gervais and Holmes[203] publicity rights exist because there are instances where a person`s identity is not adequately protected through laws based on deception or privacy. They exemplify this by the use of *Jordan v. Jewel Food Stores*.[204] Neither passing off nor the breach of confidence would provide Jordan protection under the current law in the UK. The congratulatory message of the basketball player Michael Jordan into the NBA hall of fall was not a protected private manner. The public was, furthermore, unlikely to be deceived to mistakenly believe that Jordan supported or endorsed the food store. However, as the study demonstrates, Jordan has the better right to control his identity and should be able to prevent others from making use of his fame. It is exactly these interest publicity rights serve to protect. The need for a special regulation addressed to regulate such exploitation in the UK is, therefore, evident.

As demonstrated, both the US and Norway acknowledge protection against misappropriation of a person, whether famous or not. Thus, protection is provided even if the public is not misled by the particular use. The protection under passing off is, on the other hand, restricted to misrepresentation. Non-celebrities are, furthermore, exclude from protection due to the lack of goodwill. While the breach of confidence might better protect non-celebrities, it will not provide sufficient protection. The protection of the identity is, notably less in the UK than in the other jurisdictions. Thus, adjustments are required.

For these reasons, when identifying the best model for future protection in the UK two central questions occur. First, if non-celebrities should be equally protected as celebrities. Second, if a person`s identity should be protected, even if nobody is deceived and everyone is aware that the product does not originate from the particular person.

[203] Gervais & Holmes (n 59) 222.
[204] 743 F.3d 509 (7th Cir. 2014), 83 F. Supp. 3d 761 (N.D. Ill. 2015).

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4.3.1. Celebrities and non-celebrities

Publicity rights will have the most significance for celebrities with their commercial magnetism. However, due to technological developments, non-celebrities are more frequently exploited. As noted in *Fraley v. Facebook Inc*.[205] today's society dominated by Facebook, Twitter, and social media makes the distinction between celebrities and non-celebrities more arbitrary than before. The court continues by stating that "in essence, the [otherwise uncelebrated] plaintiffs are celebrities – to their friends".[206] The commercial value inherent in the identity of regular Facebook users was, therefore, recognised.[207] Thus, the argument that publicity right only has practical significance for celebrities due to the lack of economic value linked to non-celebrities are no longer valid.[208] The economic value of non-celebrities is evident by the very fact that promoters and advertisers make use of regular persons. Thus, although the commercial value of non-celebrities is less, every person will have legitim interest in the ability to control the identity.

Moreover, as demonstrated it is not the economic value of the identity alone which justifies publicity protection. It is an individual's ability to maintain control of the use of its identity. The principle of personal autonomy in this regard.[209]Accordingly, the particular person should decide whether her identity should be used for commercial purposes. The possibility to control the use might even be more important for non-celebrities. Opposite to most celebrities, they have not put themselves in the spotlight and should be protected against unwanted fame.

Thus, in my view and as has been argued by Nimmer,[210] rather than limit the access of such publicity right to celebrities, the different economic value should rather be taken into consideration in the injunctions. The economic value should, therefore, not exclude such rights, but affect the potential remedies. The legitim interest is equal for celebrity as non-celebrities and should, therefore, include everyone. The main focus should be on the ability to control the identity.

205 830 F, Supp 2d 785 (ND Cal. 2011) 808.
206 Ibid 809.
207 Jaszi (n 157) 394.
208 Lapter (n 100) 278-312.
209 Black (n 114) 415.
210 Nimmer (n 3) 217.

Hence, it is evident that publicity rights should be given both celebrities and non-celebrities. As the study demonstrates, the current situation in the UK is far from providing such rights to non-celebrities and adjustments are required.

4.3.2. Should the right be restricted to misrepresentation?

As already noted, the most common way to protect a person`s identity in the UK is through passing off. This regime would, however, offer limited protection due to the requirement of a misrepresentation. The protection is based on a consumer perspective. If the particular use of the person`s identity does not mislead the public to assume that the celebrity endorses or has some kind of control of the goods promoted, it is not considered protectable.

Based on the commercial practice of exploitation of identity, it will in many situations be difficult to establish such misrepresentation. It will especially be a hurdle when an individual`s name, voice or likeliness is used to advertise unrelated goods that are unlikely to get the necessary impression of a link with the celebrity. Since such use would not be protected in the UK, anyone would be free to make use of the identity.

The consumer perspective, support a requirement of deceived. If no one believes that Rihanna has authorised the T-shirt, but purchase the T-shirt for some other reason, it would not affect the consumers. The potential negative effect from the commercial or the sale will furthermore not lead back to Rihanna.

However, as already mentioned, the personal autonomy indicates that both celebrity and non-celebrities should be able to control the use of their personal aspects. It should be the individual itself, as the owner of assets, that determine the use, despite any deception. Moreover, both effort and time might be spent in the building of identity. The use of another`s identity without permission will, despite any misrepresentation, be riding on others' effort. As Nimmer[211] argues, individuals should be able to prevent others from reaping what they have not sown. It should, therefore, not be a requirement for others to be misled. Each individual should have control over their features.

[211] Nimmer (n 3) 216.

Furthermore, the assessment of whether the public is misled is a difficult and subjective assessment. To determine liability based on appropriation is on the other hand easily utilised. The requirement for the person to be identifiable is not as demanding to establish. The protection of non-celebrities will in a bigger extent be restricted by a criterion of misrepresentation. Misappropriation will, therefore, better ensure the protection of all individuals, which is preferable.

In many situations, the use of the identity will not result in misrepresentation of any kind of commercial link between the exploited person and the promoter.[212] Rather it will often be a taking of another`s identity to grab the attention of the public based on a loose connection or association.[213] Thus, instead of being a misrepresentation, it will rather be a matter of misappropriation.[214] Thus, a better view would be to protect individuals from any exploitation of their identity in commercial products similar to the protected provided publicity rights.[215] This approach would better provide sufficient protection and prevent commercial use. The removal of a requirement for the public to be misled by the use will ensure a better position of the UK in the identity protection on the scale discussed above.

If a tort was created to protect against the appropriation of a person`s identity, it would provide broad protection and give the individual monopoly of the use of its identity. Accordingly, the right of free expression will be equally restricted. Hence the regulation would need to be balanced with the competing interests to avoid an overly broad monopoly granted to the particular individual.[216] However, this balancing has failed under passing off by laying too much emphasis on the free expression on the expense of the individual`s control over their identity. Today's society requires a higher level of identity protection. A new sui generis right based on appropriation of another`s identity[217] would be better equipped to deal with commercial exploitation of persons which has increased over the last decades. The need for a change is evident by the extension of passing off and the breach of confidence in an attempt to prevent such exploitation, which unfortunately has failed. For these reasons, the protection of identity should, not be limited to misrepresentation.

212 Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 25.
213 Beverley-Smith (n 5) 5.
214 Ibid.
215 Amin (n 41) 95.
216 Blum & Ohta (n 18) 147.
217 Beverley-Smith, Ohly & Lucas-Schloetter (n 22) 14.

4.3.3. Aspects to consider

Given the commercial importance of the use of identity in endorsement and merchandising, it has become a clear and obvious need for the creation of a new distinct right addressed for publicity rights into UK law. The new right should ensure all individuals control of their identity and prevent it from being unauthorised exploited commercially by third parties, without the need to prove deception.[218]

However, as already noted the courts have rejected an expansion of passing off to cover misappropriation. Nevertheless, as the US approach demonstrates, it is possible to introduce a tort of misappropriation limited to the subject matter of an individual`s identity. Thus, the UK is not required to adopt a broad and general misappropriation tort akin the one acknowledged in Norway[219] or other jurisdictions in Continental Europe. A more limited misappropriation tort appears beneficial for the UK.

As Bently[220] has expressed in his concerns, the term "identity" is inconsistent and potentially a problematic concept to build a law upon. Hence, this broad term combined with a broad misappropriation requirement might provide too broad protection. The introduction of protection against misappropriation of the identity would need to be restricted to prescribed elements of the identity. Clear and consistence guidelines would remove the risk for the right to increase beyond this intentional purpose, as is the case under common law in California. The scope of identity provided in Norway through the judge-made developed laws seems preferable. Personal and well-recognisable aspects of an individual such as the name, image voice, and imitation of a person`s voice or appearance will be protected. However, protection will not go as far as to protect a person`s dressing style[221] or objects[222] associated with the person. Thus, protection will be limited to aspects with a closer link to the particular individual`s identity, but still, provide more protection than New York.

[218] Hayley Stallard (1998). The Right of Publicity in the United Kingdom, 18. *Loyola of Los Angeles Entertainment Law Review*, 565-588, p.587.
[219] MPA §25.
[220] Bently, Identity and the Law (n 26) 26-27.
[221] White v. Samsung Electronics of America, Inc., 971 F 2d 1395 (9th Cir, 1992).
[222] Motschenbacher v. R.J Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

As discussed there are compelling arguments for the legislators to introduce stronger identity protection. The court should no longer be forced to rely on the fragmented and insufficient current legislations. It is a pressing need for adjustments to be implemented.
The Norwegian approach to the protection of different aspects of identity is preferable. However, the right of publicity as an overreaching right seems beneficial. Thereby avoiding several laws regulating publicity protection. Different legal structures make an introduction of one regime for publicity rights more likely to succeed in the UK.[223]

By creating a coherent and clearly defined definition of identity, the risk of expanding to a right granting overly broad monopoly is avoided. The law will then be restricted to what is required, at the same time provide sufficient protection. The new publicity right will ensure that the UK finally reaches a sufficient level of protection of identity. My suggested balance point is depicted in the figure below.

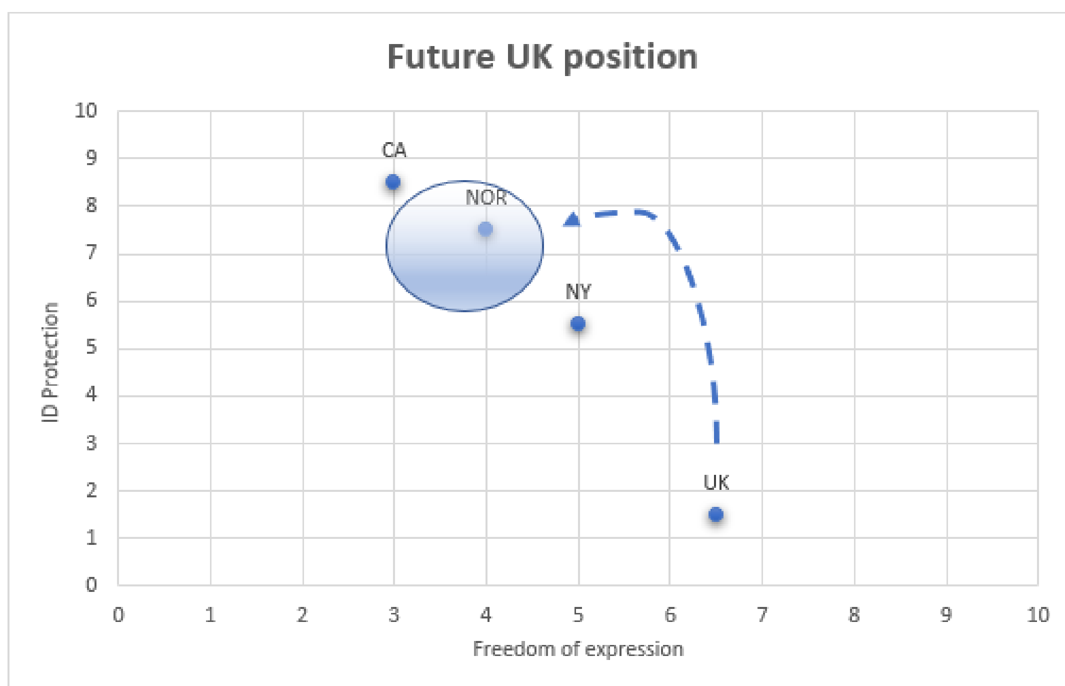

Figure 2 Suggested position for the future UK

As argued, the optimal placement for the UK is close to the position of Norway where the balancing act seems most beneficial. The ideal area for the future position of the UK is illustrated by the blue area in figure 2. The depicted area is leaning more towards California than New York. This is to visualise a suggested emphasis on identity protection rather than freedom of expression.

223 Nicoleta Medrea (2010) The court systems in the USA, the UK and Romania-translation issues, Researchgate.

5. Conclusion

Passing off was once described by Laddie J[224] as being capable of "respond[ing] to the changes in the nature of trade".[225] However, the tort is no longer capable of keeping up to date with the new methods of exploitation which both celebrities and non-celebrities may be exposed to. Although a struggle has been exhibited by the UK courts to stretch the existing framework, the limitations of the protection must be acknowledged.

The comparative analysis makes it evident that the UK should introduce additional concepts into their domestic law. Based on the experience from the other jurisdictions, a separate and overreaching publicity right will better cope with issues related to commercial exploitation. With the pressing need for protection cause by the increased exploitation of identity in a commercial context the control of the use of the name, image and likeliness should be granted the particular individual.

The technological development of, among others, online and digital platforms poses new challenges and increased the need for regulation.[226] The availability on the internet has created a new digital arena for exploitation for commercial gain by advertisers.
Thus, other forms of merchandising and commercial exploitation distinct from the traditional one have occurred. Furthermore, the easier the exploitation becomes, the more difficult will it be for the individual to maintain control of the use of its identity.[227] For example, Katherine Heigle`s suited Duane Reade for misappropriation of her identity by their tweet of a picture of her. The scenario illustrates how easy issues related to publicity right can arise in today`s society.[228] The risk for exploitation is, moreover, no longer restricted to celebrities but occurs for everyone. To protect individuals from the increases commercial exploitation online and in social media, it is no longer sufficient to restrict protection to misrepresentation. Rather liability based on misappropriation would better protect individuals against all the various methods for commercial exploitation. This would ensure that the particular individual maintains the control of its own identity.

[224] Irvine v Talksport Ltd (2002) 32 HC (Laddie J) para. 14.
[225] Aplin & Davis (n 22) 575.
[226] Walsh (n 4) 260.
[227] Rt. 2001 s.1691.
[228] David Tan (2017). The Commercial Appropriation of Fame: A Cultural Analysis of the Right of Publicity and Passing off. Cambridge: Cambridge University Press.

Accordingly, a legal regime created to allow all individuals to prevent commercial exploitation of their identity should be introduced in the UK. A new distinct publicity right should be based on the sentiments inherent in the right of publicity or image rights of misappropriation. This approach would afford an appropriate level of protection against unauthorised commercial exploitation of an individual`s identity. The introduction of such a right would finally ensure that the courts would no longer need to adapting and stretching existing laws in an attempt to protect the identity.[229] The UK should acknowledge the pressing need for protection caused by the digital society.

The study demonstrates that the current law in the UK does not provide a sufficient level of protection against unauthorised commercial exploitation of an individual`s identity. As noted by Frederick Mostert "the laws tend to lag behind commercial and technological development and the courts are playing catch-up as they try to deal with the rapid pace of digital deployment".[230]

It is time for the UK to catch-up.

229Stallard (n 218) 587.

230 Frederick W. Mostert (2019). The internet: regulators struggle to balance freedom with risk. *Special Report Europe`s Leading Patent law Firms*, 1-3. p.2

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