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The Existence of Identity Value and Image Protection on Legal Frameworks of United States of America (US) and United Kingdom (UK)

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ABSTRACT

This research aims to examine the existence of identity value and image protection along with their commercialization by comparing legal frameworks between the United States of America (the US) and the United Kingdom (the UK). The applied methodology is socio-legal approach: Primary sources will be utilized to compare the Right of Publicity's legal framework in each chosen country, as well as secondary sources, which will be used to develop this author's understanding of the primary sources, will be crucial to answer the research question. The result of this research stated that The Right of Publicity is a subset of the Right to Privacy specifically guarantee individual to control the commercialization of his identity while providing the remedy for unauthorized commercialization by a third party. English courts and law explicitly dismissed any personality right moreover a general free-standing Right of Publicity. The discussion of the Right of Publicity in the US behaves towards the natural aspect of the right, whether to label the right as property or as personal right. It can be concluded that, The United States approach overprotect the individual's right to control his identity by banning any commercial use of any characteristics which the public can associate with. On the contrary, the UK still refuse to provide a name to protect the appropriation of one's identity.

***Keywords**: Right of Publicity, legal framework, identity value, commercialization*

INTRODUCTION

On January 2019, twitter made Kelly Steinbeich famous overnight by awarding her the title as the infamous 'Fiji Girl'. She was viral because of her constant 'photo-bombing' a list of celebrities at the Golden Globe where she was hired as a promotional model for Fiji Water.[1] Since her photos were widely shared across social media, she has acquired more than 200,000 followers on Instagram, made television appearances and scored endorsement deals of her own. Later on, Steinbach sued Fiji Water's parent company after the image of her holding a tray of Fiji Water at the Golden Globe 2019 was made into cardboard and placed in various supermarkets across California. She claimed Fiji Water "had used her likeness in its advertising campaign without her consent", thus utilizing the unauthorized commercialization of her image as the basis of her claim. The feud between paparazzi selling private images of celebrities to various media is trivial.

Rothman believes the idea of protecting one's image could be one of the tools for private figures to combat a vicious case of revenge porn, mug-shot sites, and cat fishing (impersonating others to lure date).[2] Mass media and social media plays an important role by 'creating' and 'nurturing' the existence of celebrities or any well-known for the public. Thus, since the media is rapidly growing so does celebrity which paving the way for the recognition of identity commercialization and its protection in the legal arena.

The ultimate purpose of the privacy right was implemented to protect a private individual from unwanted publicity, focus on the personal loss and emotional distress from having their private life misappropriated.[3] When the entertainment industry develops, the right to privacy was deemed no longer sufficient to protect Public Figures from misappropriation of their identity and only focus on their economic loss. The main concern for the Public Figures is a commercial misappropriation to their name, photograph, likeness, or other without consent and compensation which leads to believe that the Right of Publicity was caused by the result of Public Figures who losing their rights of privacy by entering the public arena[4] and it was as if they have waived their rights[5] especially if their action is viewed as consequential or a matter of public interest[6]. Nimmer introduces this doctrine of waiver which essentially dictates

[1]BBC News, "Fiji Water Girl: Legal Battle for Golden Globes Model," *BBC News*.
[2]Jennifer E. Rothman, *The Right of Publicity : Privacy Reimagined for a Public World* (Harvard University Press, 2018).
[3]Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (2011).
[4]Rothman, *The Right of Publicity : Privacy Reimagined for a Public World*.
[5]Robert Dunne and Robert Dunne, "The Right of Publicity," *Computers and the Law* 203, no. 2 (2012): 255–267.
[6]Rothman, *The Right of Publicity : Privacy Reimagined for a Public World*.

when a Public Figure status, they must endure with others that using their personality unauthorized since their fame enable such practice 'commercially attractive'.[7] Therefore, as a Public Figure they will dedicate his life to the public and waived his privacy which causing his inability to invoke the right to privacy's claim.[8] However, the US courts adopted this doctrine with a degree of variety: absolute adoption which Public Figures that do not enjoy their privacy since their fame-factor is deemed to surrendering their private life to the public, while a limited adoption means Public Figures professional life, the part of which they chose to waive their right for a fee and not protected by the right yet.[9]

Nimmer explains that the Right of Publicity was born out of need when Right to Privacy was considered failed to protect Public Figures' (and other individual) economic interest. The Right of Publicity become a separate legal category while bearing certain similar aspects with 'neighboring areas of law' such as trademark, copyright or even privacy right. The separation of individual rights to privacy while embracing the commercial value of his identity which considered as a property right, and it was made possible after Right of Publicity was introduced.

This research aims to examine the existence of identity value and image protection along with their commercialization by comparing legal frameworks between the United States of America (the US) and the United Kingdom (the UK). The notion of the value of identity means that it should require certain degree protection which allows an individual to control, protect and manage the exploitation of his identity in commercial setting.

METHODOLOGY

This research used socio-legal approach. Peter Mahmud Marzuki stated that a socio-legal study is not a legal research since it is placing the law as a social phenomenon. Socio-legal study does not research the law, yet, it researches individual behavior and society related to the law.[10] The primary sources used to compare the Right of Publicity's legal framework in each chosen country, as well as secondary sources which will be used to develop the authors' understanding of the primary sources to answer the research question. The research focused in the extent of identity commercialization, the development of the Right of Publicity's legal framework in entertainment-leading countries, the justification of upholding the Right of Publicity in this modern day of age and the possibility of reform for the Right of Publicity. This research was divided into four chapters; chapter 1 will introduce the

[7]Dunne and Dunne, "The Right of Publicity."
[8]Ibid.
[9]Ibid.
[10] Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi* (Jakarta: Kencana, 2016).

background of the Right of Publicity and the commercialization of identity. Chapter 2 will look at how the US and the UK perceive the Right of Publicity and the legal framework protecting such right. Chapter 3 will discuss the legal justification to uphold the Right of Publicity. Chapter 4 is the conclusion which will answer the research questions and suggest how the law could be reformed to balance the interest between the relating parties.

RESULT AND DISCUSSION

Right of Publicity's Legal Framework in US (United States)

As mentioned in the previous chapter, the term "Right of Publicity" was first stated by Judge Jerome Frank in his decision in *Haelan Laboratories v Topps Chewing Gum* by emphasizing that an individual had an acceptable reason to protect his publicity as a separate and distinct reason from the protection of his privacy interests.[11] The indicating of a transformation from privacy right that being a personal right to the Right of Publicity as a property right. Nimmer suggested such transformation was necessary in order to avoid damaging the value of the right since "the publicity value of a prominent person's name and portrait is greatly restricted if this value cannot be assigned to others."[12]

The Right of Publicity is a distinct and free-standing doctrine in its own right, despite the fact of having resemblance to similar intellectual property as trademark, copyright, false advertising, unfair competition, misappropriation, and its predecessor: the right to privacy.[13] In the US, it is state law-created intellectual property right of which infringement is a commercial tort of unfair competition.[14]

The Aspect of individual identity protected by the Right of Publicity is varied between each state, but generally it protects an individual's name, picture, portrait, likeness, voice, signature, gesture and persona. The public figures use the Right of Publicity to protect themselves from others that looking to profit commercially from their image or likeness, rather than the person themselves, which is different from the conventional false endorsement claims used before the Right of Publicity emerged.

The US which puts a high value in the rights of individuals justifying limitation to the Right of Publicity with the principle that "any harm a person suffers is recompensed by the preservation of a greater general freedom".[15] The main highlight

[11]Robert T. III Thompson, "Image as Personal Property: How Privacy Law Has Influenced the Right of Publicity," *UCLA Entertainment Law Review* 155 (2009).
[12]Dunne and Dunne, "The Right of Publicity."
[13]Rick Kurnit, "Right of Publicity - United States," *Getting the Deal Through*.
[14]J. Thomas McCarthy, *The Rights of Publicity and Privacy* (West Group, 2000).
[15]Edward Rubin and Felcherrd Peter L., "Privacy, Publicity, and the Portrayal of Real People by the Media," *Yale Law Journal* 88 (1979).

of the Right of Publicity in the US is considered as a property right in the individual's personality. McCarthy suggest that giving the Right of Publicity as a property right status was only because the demand wants to enable transfer of right, and the "property" is deemed to be the right term to achieve that result.

Since it is labeled as property and transferability, whether is through license or trade or even inheritance,[16] is considered to be one of the key and main advantages of the shift by the Right of Publicity from using the previous framework: right to privacy. The Right to Privacy is labeled as a personal right, protecting an individual against invasion of human dignity which may cause in mental and physical suffering.[17] Thus, privacy right as a personal right will end upon an individual's death.

There is an example of case on right of publicity. In 1977, Hugo Zacchini performed a 15-second act as a "'human cannonball" at state fairgrounds in Ohio. His whole performance was videotaped by a local television channel and aired at the news segment. Zacchini objected his whole performance being broadcasted on the local news in addition to having a reporter recorded his act without his consent. The Supreme Court of Ohio rested its findings on the state's Right of Publicity statute, and the news station appealed through the First Amendments as one of the defenses. Nevertheless, the US Supreme Court rejected these defenses and wrote its first (and the only) opinion recognizing the Right of Publicity.

The Recognition of the Right of Publicity in UK (United Kingdom)

As explained above, the US provides the remedies against the infringement of the Right of Publicity. Such right, however, has not been clearly recognized in the English law.[18] Even UK courts dismiss recognizing any common law right to privacy, and making it the only country which undertake a minimalist approach to the protection of both privacy and publicity than the UK in the European Community.[19] Recently, English law has started to consider shifting from the traditional casuistic approach to protecting personal dignity towards a more principled approach – in particular, through the recognition of a general right of privacy. Therefore, the individuals aim to control his publicity that "have been forced to improvise" with the closest legal provision provided by Parliament or the common law, leaving claimants

[16]Kurnit, "Right of Publicity - United States."
[17]McCarthy, *The Rights of Publicity and Privacy*.
[18]"Encyclopedia of Data Protection and Privacy" (Sweet&Maxwell, 2019).
[19]Marshall Leaffer, "The Right of Publicity: A Comparative Perspective," *Albany Law Review* 70 (2007): 1357.

in the UK with three main cause of action; passing off, privacy and trademark law which will be explain below.

To this day, English law still relies upon an assorted mix of torts and intellectual property rights, such as copyright and trademark law to protect unauthorized identity appropriation. The protection has been given through casuistic application which may or may not directly under 'privacy' sector.

Traditionally, the common law tort of passing off was aimed to protect against competitors in the same business sector that passing off their products in order to be seen as the products from another competitor, as an effort to prevent commercial dishonesty.[20] The passing off requires three main elements; goodwill or reputation, misrepresentation leading to confusion or deception among consumers and such misrepresentation must harm the claimant's goodwill which is known as the classical trinity of passing off.

The need for right to privacy is needed since the requirement of false information in defamation claims need to be fulfilled. The truth of a publication prevails regardless the information quality, whether it is humiliating, confidential or even lacking of public interest. The privacy consists of Defamation and Breach of Confidence. The defamation linked closely and stands in the middle between the right to privacy, aiming to keep private information of public domain, and the Right of Publicity, and to control how to exploit an individual's information. Traditional breach of confidence requires a confidential relationship between the parties resulting in the duty to keep the particular information or the specific graphic material secret.[21]

There is an example of legal case regarding the right of publicity in UK, Edmund Irvine, a Formula 1 racing driver, filed a claim against Talk sport Limited which broadcast a radio station.[22] The radio station shifted their focus from news and general talk programs towards sports, thus they set up campaign aimed at potential advertisers. One of the campaigns used a brochure with a doctored photograph of Irvine appeared to be holding a radio bearing the defendant's name, TALK RADIO. As the defendant use the unauthorized photograph, the claimants brought the proceedings for passing off. Laddie J gave judgment on liability favoring the claimants. This decision was considered a dramatic improvement since the court extended the tort of passing off in the endorsement cases to acknowledge an individual to protect their image and other characteristic of his personality from unauthorized exploitation by third parties for commercial purposes.

[20]David Tan, *The Commercial Appropriation of Fame: A Cultural Analysis of the Right of Publicity and Passing Off, The Commercial Appropriation of Fame: A Cultural Analysis of the Right of Publicity and Passing Off* (Cambridge: Cambridge University Press, 2017).
[21]Jurgen Kroher, "Intellectual Property Protection for Celebrities in Europe - a Spotlight on German and UK Law," *IP Litigator* (2010): 8.
[22] [2002] EWHC 539 High Court and [2003] E.M.L.R. 6, *Irvine v Talksport Ltd* (2002).

The Right of Publicity Exist for the Benefit of the Public

Incentive Rationale

The incentive rationale is frequently proclaim that the purpose of the right of publicity claims to have the same objective as copyright as to provide an economic incentive for enterprise, creativity, and achievement.[23] The theory persuades that the Right of Publicity 'encourages individual to spend the time, effort, and resources required to develop talents and produce works that ultimately benefit society as a whole.'[24] The assumption is without the certainties of having adequate control over the assets, in this case identity, an entrepreneur would not have the incentive to accumulate and innovate their product.[25] However, it is criticizes that the rationale potentially justifies a broad right of publicity, protection for the mere evocation of a person's identity and post-mortem rights.[26] However, relying on copyright analogy is severely flawed. Black emphasizes that the incentive theory focusing on the value of persona, not the persona itself which is the subject of the Right of Publicity.[27] Unlike copyright in which value of the work is relevant as to evaluate remedies, the value is a separate notion thus it does not affect both existence and justification of the right.[28]

Consumer Protection

This is a less common justification than other proposed justifications, claiming that the Right of Publicity protects consumers from being deceived into believing that a Public Figure has endorsed a specific product or service meanwhile such endorsement was conducted without permission.[29] Such confusion harms both the public that is deceived and the identity owner that caused their reputation is damaged and causing both dignitary and economic harms. The flaw in this rationale is to invoke the Right of Publicity that has no signs of deception or confusion is required thus the cause of action applies regardless consumers are confused.[30] Madow introduces another point of view which is to protect consumers from the danger of

[23]M Madow, "Private Ownership of Public Image - Popular Culture and Publicity Rights," *Calif. Law Rev.* 81, no. 1 (1993): 125-.
[24]Ibid.
[25]Michael A. Cooper, "Publicity Rights, False Endorsement, and the Effective Protection of Private Property," *Harvard Journal of Law & Public Policy* 33, no. 2 (2010): 841.
[26]Rothman, *The Right of Publicity : Privacy Reimagined for a Public World*.
[27]Gillian. Black, *Publicity Rights and Image : Exploitation and Legal Control* (Hart, 2011).
[28]Ibid.
[29]Rothman, *The Right of Publicity : Privacy Reimagined for a Public World*.
[30]Ibid.

bad products or services which exploit powerful Public Figures' image in advertisement to attract consumers' attention or motivate them to buy the products or the services.[31] However, although the rationale sounded more plausible than the first, Madow realizes it relies on faulty assumptions.[32] Customer Protection concern is a weak rationale to justify the existence of the right of publicity, nevertheless it may be seen as an additional advantage which can be deemed as an incidental benefit instead of a "driver for the right".[33]

The Right of Publicity Exist for the Benefit of the Individual

Labor Theory

The labor theory mainly justifies property rights or in other words, a natural right justification.[34] According to John Locke's theory, every individual has property in their intellectual labor when the individual combine his intellectual labor with ideas, theories or raw material. The right to property serves as a reward for the author's individual labor. Another point of view stated that property right is given to the author as a reward for his contribution to society.[35] Nimmer claimed inadequate traditional legal theories on the right of an individual to reap his labor deprived individual who have long and laboriously nurtured the publicity values.[36] The importance of judicial recognition of the right of publicity was to guarantee individual the right to control and profit from the publicity values which he has created or purchased.

Unjust Enrichment

Unjust enrichment is the most prominent traditional argument that protecting the right of publicity,[37] derived from rationale for the right to privacy which is generally to prevent unjust enrichment by the 'theft of goodwill'.[38] When the third party freely acquired, which he typically have to pay some aspects of an individual identity which have a commercial value, thus the social purpose of the law cannot

[31]Madow, "Private Ownership of Public Image - Popular Culture and Publicity Rights."
[32]Ibid.
[33]Black, *Publicity Rights and Image : Exploitation and Legal Control*.
[34]Tanya Aplin and Jennifer Davis, *Intellectual Property Law ; Text, Cases and Materials*, Third. (Oxford University Press, 2017).
[35]Ibid.
[36]Melville B. Nimmer, "The Right of Publicity," *Law and Contemporary Problem* 19, no. 2 (1954): 203.
[37]H. Lee Hetherington, "Direct Commercial Exploitation of Identity : A New Age for the Right of Publicity," *Columbia-VLA Journal of Law & the Arts* 17 (1993).
[38]Huw Beverley- Smith, *Commercial Appropriation of Personality* (Cambridge University Press, 2002).

function.[39] Spence explains the justification as 'reaping without sowing' since a third party is exploiting someone else's work without authorization, yet this justification cannot stand alone.[40]

The argument is not compelling since it cannot justify the essence of authorship on someone's work without relying on labor theory.[41] Beverly Smith regarded unjust enrichment as an abstract preposition of justice which is both an aspiration and a standard for judgement.[42] Rothman added, although this rationale may justify individual entitlement to monetary rewards for identity appropriation yet, there is no guidance has been provided as to define the boundaries of the right of publicity or to decide whether an appropriation is just or unjust.[43] The competition is encouraged by the law justifying the 'free-riding' concept of using somebody's idea or work to without permission or payment. The utilizing an individual identity especially Public Figures is deemed necessary and appropriate, therefore the limitation to what constitutes unjust utilization must be drawn the protection against Injury to Personal Dignity

According to Kantian theory, an individual must be viewed as an autonomous and moral being.[44] Kant argues that freedom is an inherent right in every human being by the virtue of his humanity comprising "the attribute of a human being's being his own master".[45] Autonomy means an individual is free to control his identity while dignity acknowledges identity as a fundamental part of each individual[46]. Indicia of identity like names, likenesses or images is personal, thus appropriating such indicia without authorization is considered offensive to personal autonomy and human dignity, in particularly when the representation injures an individual personal believes or principle, or being turned into 'commodities' in contrary to individual's aspiration.[47]

The Right of Publicity is about freedom to control personal identity which is translated in the idea of autonomy and dignity.[48] Therefore, without recognition of the

[39]Ibid.
[40]Daniel McClean and Karsten Schubert, *Dear Images : Art, Copyright and Culture* (Ridinghouse, 2003).
[41]Aplin and Davis, *Intellectual Property Law ; Text, Cases and Materials*.
[42]Beverley- Smith, *Commercial Appropriation of Personality*.
[43]Rothman, *The Right of Publicity : Privacy Reimagined for a Public World*.
[44]Mark P Mckenna, "The Right of Publicity and Autonomous Self-Definition," *University of Pittsburgh Law Review* 67, no. 1 (2005): 225.
[45]Ibid.
[46]Black, *Publicity Rights and Image : Exploitation and Legal Control*; McCarthy, *The Rights of Publicity and Privacy*.
[47]Leslie A Kurtz, "Fictional Characters and Real People," *University of Louisville Law Review* 51 (2013): 435–647.
[48]Gillian Black, "Exploiting Image: Making a Case for the Legal Regulation of Publicity Rights in the United Kingdom," *EIPR: European Intellectual Property Review* 33, no. 7 (2011): 413–418.

right of publicity, an individual is able attempt to control the appropriation of their act.[49] McCarthy insists the existence of a legal right to control identity is crucial to any civilized society as the natural right of property justification.[50] The first principles of justice are to guarantee every human being and control over the commercial use of his identity. The introducing of innate notion 'my identity is mine -- it is my property, to control as I see fit.'[51] Correspond with Mccarthy's, Black proclaims by protecting autonomy and dignity of an individual validates the existence of the right of publicity: 'a right for each individual to control the use of his image and identity'.

CONCLUSION

In the UK, English courts and law explicitly refused a general free-standing Right of Publicity which provides individual to have right to commercially control exploitation of his identity. English court does not even recognize the right to privacy before the ECHR was introduced. The convention, an EU level convention requires the UK to follow through thus introducing the UK Human Rights Act which guarantees a right to have private life. Since there is no general right to publicity, individual resorts to a combination of intellectual property law and tort law, passing off, breach of confidence or trade mark law (which has not been proven successful for Public Figures). There are limited case laws regarding identity protection, however as Irvine and Douglas cases demonstrate that English courts acknowledge the commercial value in individual's identity. The problem is just a matter of reluctance of giving the protection a name and a place in the legal framework.

[49]Ibid.
[50]J. Thomas McCarthy, "Public Personas and Private Property: The Commercialization of Human Identity," *The Trademark Reporter* 79 (1989).
[51]Ibid.

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