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SPORTS IMAGE RIGHTS – A COMPARATIVE OVERVIEW

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The article deals with the different approaches adopted by American, Italian and German systems as to the possible infringement of the personal features of the recognized individuals. It starts with explaining an idea of the “right of publicity” - a doctrine rooted in the American jurisprudence which influenced the European civil law systems which started to recognize an economic value of the image. The approach adopted by the American doctrine moves toward a proprietary right, while the European, except for the UK, still remains within the theory of rights of personality. Although the model is still the same and simply indicates the right to control the commercial exploitation of persona, continental theory based on civil law of intangibles has been facing difficulties and obstacles as to possibility to inherit and transfer this entitlement. It seems, however, that we are on the best way to change our approach and accept that sometimes law should adjust to market reality and not otherwise.

Key words: *image, persona, right to privacy, right of publicity.*

1. INTRODUCTION

We are living in the world where image rules and perception is everything. This simple finding was made first by the marketers who used it in the course of the market battle for consumer’s attention. In the theory of law this phenomenon was recognized for the first time by World Intellectual Property Organization in the report dated 1994 on the character merchandising¹. This term was defined as “adaptation or secondary exploitation, by (...) a real person or by one or several authorized third parties, of the essential personality features (such as the name, image or appearance) of a character in relation to various goods and/or services with a view to creating in prospective customers a desire to acquire those goods and/or to use those services because of the customers’ affinity with that character²”.

Putting distinguishing indicia on the market, however, is not limited to celebrities, who are anxious to project the right kind of personal features, which will

¹ See: World Intellectual Property Organization, report WO/INF/108 “Character merchandising”, available: http://www.wipo.int/copyright/en/activities/pdf/wo_inf_108.pdf.

² Ibidem, p. 6.

maintain their celebrity status and popularity and, in turn, their marketability and bank balances. But the phenomenon also extends to companies and their products, which, if they are to be successful in our consuming and materialistic society, also need to convey a positive image in order to command the attention of consumers and increase sales³. In the theory of law, it is proposed to refer to “*persona*” as to the object matter of protection within claims resulted from infringement of the fame and popularity. This term is defined as all symbols or indicia which identify a unique human being, including: the name, likeness, voice, signature, character and other distinctive features by which a specific person is identified by other people⁴. It seems to be widely accepted by the European doctrine⁵.

The right held by an individual to its “*persona*” is known in different jurisdictions by a variety of names, including ‘*rights of publicity*’ (USA), ‘*rights of privacy*’ (UK) and ‘*rights of personality*’ (Continental Europe), but, for the purposes of this article, I will refer to them collectively as ‘image rights’ using the expression ‘image’ not in its narrowest sense of ‘likeness’ but in its wider sense of ‘*persona*’ or, *a fortiori*, ‘brand’ to use a marketing term. Irrespective of the term used, they are concerned with the extent to which athletes, as human beings, have the legal right to control the commercial use of their identity⁶. Bearing in mind that I will refer to sportsmen, the article is entitled “sports image rights”.

2. COMPARATIVE OVERVIEW

2.1. The American approach

First I wish to present the way it works in an American doctrine. The individual’s right to control and profit from the commercial use of its *persona* is referred to as the right of publicity. It derives from the right to privacy. The doctrine of the latter, as it is generally known, was recognized for the first time by Warren and Brandeis who in 1890 in Harvard Law Review argued that the court should recognize a right of privacy as a way to protect private individuals against the outrageous and unjustifiable infliction of mental distress by the press and advertisers, a growing problem at the time⁷. The judicial opinions from 1890 until 1911 that addressed claims of invasion of the alleged right to privacy almost invariably cited and

³ I. Blackshaw, *Sports Image Rights in Europe*, Hague 2005, p. 2.

⁴ J. C. S. Pinckaers, *From privacy toward a New intellectual property right in persona*, Hague, London, Boston, 1996, p. 265-266.

⁵ See: S. Smith, *Image, Persona and the Law*, London 2001, p. 152, H. Beverley-Smith, *The commercial appropriation of personality*, Cambridge, p. 7, P. Torremans, *Copyright and human rights: Freedom of Expression, Intellectual Property, Privacy*, Hague, p. 183.

⁶ I. Blackshaw, *Sports...*, p. 9.

⁷ Louis D. Brandeis, Samuel Warren, *The Right to Privacy*, Harvard Law Review 1890, vol. 4, no. 5.

discussed Brandeis and Warren's article, and the several opinions recognizing a right to privacy placed substantial reliance on the article as a form of authority⁸.

The right to privacy was recognized by legislature for the first time in an amendment to the Civil Rights Law of New York State passed by the State Legislature in 1903, which established a statutory right to privacy market it illegal for person or corporation to use for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of this person⁹.

The first time the State Supreme Court¹⁰ recognized the right to privacy in *Pavesich v. New England Life Insurance* case¹¹. The defendant, in an advertisement for life insurance, used a photo of the plaintiff without his consent. In recognizing of the conclusion the court stated the following: "thoroughly satisfied are we that the law recognizes within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasingly the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability¹²".

After New York codified the right to privacy¹³ and the Georgia Supreme Court in *Pavesich* case found such a right in common law, it was clear to most courts in the country that private citizens had a legally protected right of privacy. The issue, however, was not as clear for people in the sports and entertainment industry. Since they – referred to as the 'celebrities' – had 'dedicated their life to the public', most courts held that they had thereby waived their right of privacy. The right of privacy therefore, offered them little protection against commercial misappropriation¹⁴. As a good example of this approach the case of Davey O'Brien may be quoted¹⁵. O'Brien was a famous college football player who sued to recover for the use of his persona on a calendar that advertised Pabst beer. O'Brien claimed he would have never lend his name to advertise alcohol, but the court denied relief, stating that he had lost his right to privacy by his prior achievement of fame¹⁶.

⁸ B. Bratman, *Brandeis & Warren's 'The Right to Privacy and the Birth of the Right to Privacy'*, Tennessee Law Review 2002, vol. 69, p. 623.

⁹ J. Wolohan in: I. Blackshaw (Ed.), *Sports...*, p. 350.

¹⁰ It was the Supreme Court of Georgia.

¹¹ *Pavesich v. New England Life Insurance Co. et al.* 122 Ga. 190; 50 S.E. 68; 1905.

¹² *Ibidem*.

¹³ See: New York State Consolidated Laws, Civil Rights, Art. 5.

¹⁴ J. Wolohan in: I. Blackshaw (Ed.), *Sports...*, p. 351.

¹⁵ *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

¹⁶ It seems that O'Brien had permitted his college, Texas Christian University, to include photographs in a press kit in which Pabst gained access to. Pabst, without seeking further permission, placed O'Brien's photograph on the cover of a calendar, which included a beer slogan and photo of a bottle of beer. It should be pointed out that the waiver of the right to privacy, by virtue of the fact that one has achieved fame,

The doctrine of privacy written by W. Prosser may be considered as the cornerstone of recognition of a right of publicity¹⁷. The author describing the “right to be let alone” distinguished the four “rather definite” privacy rights and as the last one he pointed out an “appropriation of one’s likeness for the advantage of another”¹⁸.

The right of publicity was officially recognized by the courts in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁹. The plaintiff - a chewing-gum company entered into various contracts with professional baseball players, which provided the company the exclusive right to use the player’s photograph in connection with the sales of its products. The defendant - a rival manufacturer, being aware of the existing contracts, entered with the players with the similar agreement which allowed to use the player’s image in connection with the sales of Topps’ gum. In the judgment, ruling for Haelan, the judge Jerome Frank explained that “in addition to and independent of that right of privacy ... a man has a right in the publicity value of his photograph ... [and] to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross’.... This right might be called a ‘right of publicity’²⁰”.

These days only about half the states have distinctly recognized the right of publicity. It is usually considered as a post-mortem entitlement which survives beyond the death of the personality entitled to the right during its lifetime. The nature of this right varies from state to state. In Indiana, for example, it lasts for 100 years; in California - only 50 years; whilst in New York this right is not recognized at all²¹. It is defined as a right allowing the person to prevent unauthorized use of its commercial identity and, furthermore, providing the corresponding right to grant exclusive right to exploitation, which could potentially be enforced directly by a licensee²².

The United States, thanks to recognition of the right of publicity has been justifiably called the grand daddy of the sports industry and business and has had and continues to have significant influence on the development of other sports markets around the world²³.

has long since disappeared. In fact it is now recognized that under the right to control publicity, the right becomes more important as the individual’s level of notoriety increases – see: B. M. Rowland, *Athletes Right to Publicity*, Entertainment, Arts and Sports Law 2002.

¹⁷ See: R. J. Frackman, T. C. Bloomfield, *The Right of Publicity, Going to the Dogs?*, 1996.

¹⁸ W. Prosser, *Privacy*, 48 California Law Review 1960, 383.

¹⁹ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.).

²⁰ *Ibidem*.

²¹ J. Thomas McCarthy, *The Rights of Publicity And Privacy*, West Group 1987, p. 35.

²² H. Beverley-Smith, A. Ohly, A. Lucas-Schloetter, *Privacy, Property and Personality*, Cambridge 2005, p. 65.

²³ J. Wolohan in: I. Blackshaw (Ed.), *Sports...*, p. 354.

2.2. Italian regulation

Considering the neighborhood and close connections between Croatia and Italy, also Italian approach must be taken into account.

In Italy, the protection reserved for the image is derived from the joint provisions of Article 10²⁴ of the Italian Civil Code²⁵ and from the Copyright Law²⁶. The first establishes the principle that if an image is disseminated or published except when permitted by law, or its dissemination causes prejudice to the dignity and the reputation of the person concerned, the judicial authorities may order the abuse to cease and award compensation for damages. Whilst the latter completes the discipline stating that a person's likeness cannot be displayed, reproduced or sold without the consent of the portrayed person, apart from the exceptional circumstances listed in the following Article 97²⁷. It provides that the consent of the image holder is not required when reproduction is "justified by the fame or by the public office covered by the latter, for justice and police requirements, for scientific, educational or cultural purposes, when the reproduction is connected to facts, happenings and ceremonies of public interest or, in any case, conducted in public²⁸". However, the second paragraph of Article 97, limits the scope of the first, stating that 'the likeness cannot be displayed or put in sale, when its display or sale might cause prejudice to the honor, reputation or dignity of the person represented²⁹'.

With reference to famous people, including athletes, two prerequisites must be met jointly in order to permit use of their image by third parties without their consent: besides the person being famous, the reproduction of the individual's image must be connected with facts of public interest or which have occurred in public³⁰.

²⁴ „Qualora l'immagine di una persona e dei genitori, del coniuge o dei figli sia stata esposta o pubblicata fuori dei casi in cui l'esposizione o la pubblicazione è dalla legge consentita, ovvero con pregiudizio al decoro o alla reputazione della persona stessa o dei detti congiunti, l'autorità giudiziaria, su richiesta dell'interessato, può disporre che cessi l'abuso, salvo il risarcimento dei danni”.

²⁵ Regio decreto 16 marzo 1942, n. 262 – Approvazione del testo del codice civile.

²⁶ Legge 22 aprile 1941 n. 633 – Protezione del diritto d'autore e di altri diritti connessi al suo esercizio.

²⁷ Il ritratto di una persona non può essere esposto, riprodotto o messo in commercio senza il consenso di questa, salvo le disposizioni dell'articolo seguente.

²⁸ Non occorre il consenso della persona ritrattata quando la riproduzione dell'immagine è giustificata dalla notorietà o dall'ufficio pubblico coperto, da necessità di giustizia o di polizia, da scopi scientifici, didattici o culturali, o quando la riproduzione è collegata a fatti, avvenimenti, cerimonie di interesse pubblico o svoltisi in pubblico.

²⁹ Il ritratto non può tuttavia essere esposto o messo in commercio, quando l'esposizione o messa in commercio rechi pregiudizio all'onore, alla reputazione od anche al decoro della persona ritrattata.

³⁰ See more: S. Martuccelli, *The right of publicity under Italian civil law*, Loyola Los Angeles Entertainment Law Journal, 1998, A. Dogliotti, *Alcune questioni in temat di notorietà, diritto all'immagine e tutela delle personalità*, Giurisprudenza Italiana 1985, I, 2, A. Barengi, *Il danno di sfruttamento dell'immagine e la sua liquidazione*, Riv. Dir. Inf. 1992, 565.

A good example of the way Article 97 of the Copyright Law is applied derives from the judgment of the Court of Milan on 27 July 1999. The plaintiff - Olivier Bierhoff, complained about the abusive use, for purposes of profit and not by way of information, of his name and image and requested for an order prohibiting the production and marketing of objects bearing his own image or name. The opposing party attempted to have the matter fallen into one of the exceptions contemplated by Article 97 of the Copyright Law claiming fame as justification. The Court replied that the "fame which Article 97 referred to consents to the use of a famous person's image only for information purposes and is, certainly indifferent to whether this also happened in the pursuit of profit, in consideration of the fact that the image applied to some objects promoted for sale, but without any news or information being offered³¹".

2.3. The German approach

In Germany the protection of "*persona*" is based on the protection of personality. The "right of personality", based on idea of general and single entitlement, both complements and extends the protection which a legal system offers its citizens by means of "special" intangible rights to personality, such as the right to one's name, the right to one's image, honor and self-esteem³². If the indicia used is a picture, the right to one's image³³, which is considered to be a special form of the general personality right³⁴, will apply. Image rights protection is basically founded on the doctrine of a person's freedom in its highly personal private life, e.g. to be free from unwarranted interference in free and responsible self-determination and personal activities; freedom of individuals to make fundamental choices for themselves³⁵.

However, in addition to the general right of personality, there is a special regulation which principally prevails over the general personality rule. I refer to Article 22 of the Law of Artistic Performance³⁶ which states that exhibition or dissemination of image principally requires the explicit or implied consent of the portrayed individual³⁷. However, as the right of an individual whose image was portrayed must be always balanced with the right of the society to be informed, the following Article 23 (1) of the Law of Artistic Performance provides for exceptions to the general consent requirement. Therefore neither images relating

³¹ L. Ferrari in: I. Blackshaw (Ed.), *Sports...*, p. 194.

³² C. von Bar, *The Common European Law of Torts*, volume 2, Oxford 2002, p. 81.

³³ Recht am eigenen Bild.

³⁴ B. Krüger, Right of Privacy, *Right of Personality and Commercial Advertising*, 13 IIC 183, 1982.

³⁵ M. Gerlinger in: I. Blackshaw (Ed.), *Sports...*, p. 109.

³⁶ Kunsturhebergesetz, Ausfertigungsdatum: 09.01.1907.

³⁷ Bildnisse dürfen nur mit Einwilligung des Abgebildeten verbreitet oder öffentlich zur Schau gestellt werden.

to contemporary history³⁸, nor images on which individuals only appear as part of a landscape and/or locality³⁹, nor images of assemblies, demonstrations and similar events, in which the photographed person took part⁴⁰, nor non-commissioned images, if a dissemination and exhibition meets with the predominant interest of art⁴¹ require the consent for their dissemination and exhibition.

However, the freedom of dissemination and exhibition of the image, defined in Article 23 (1) of the Law of Artistic Performance must be always weighed up with the justified interest of the portrayed person. Therefore, pursuant to Article 23 (2) of the Law of Artistic Performance the exceptions set up in Article 22 (1) do not apply when their application injures the justified interests of the person pictured. Justified interests are, in particular, the protection of privacy, the protection from false statements; or the protection from taking unfair advantage for advertising purposes. Economic interests of the portrayed person can also come into play⁴².

3. CONCLUSION

As it was briefly drafted, the image rights are protected on different legal theories. The approach adopted by the American doctrine moves toward a proprietary right, while the European, except for the UK⁴³, still remains within the theory of rights of personality. Although the model is still the same and simply indicates the right to control the commercial exploitation of persona, continental theory based on civil law of intangibles has been facing difficulties and obstacles as to possibility to inherit and transfer this entitlement. It seems, however, that we are on the best way to change our approach and accept that sometimes law should adjust to market reality and not otherwise⁴⁴.

³⁸ Bildnisse aus dem Bereiche der Zeitgeschichte.

³⁹ Bilder, auf denen die Personen nur als Beiwerk neben einer Landschaft oder sonstigen Örtlichkeit erscheinen.

⁴⁰ Bilder von Versammlungen, Aufzügen und ähnlichen Vorgängen, an denen die dargestellten Personen teilgenommen haben.

⁴¹ Bildnisse, die nicht auf Bestellung angefertigt sind, sofern die Verbreitung oder Schaustellung einem höheren Interesse der Kunst dient.

⁴² M. Gerlinger in: I. Blackshaw (Ed.), *Sports...*, p. 109.

⁴³ See: G. Westkamp, *Celebrity Rights in the UK after the Human Rights Act: Confidentiality, Privacy and Publicity*, in: P. Machnikowski (Ed.), *Prace z prawa cywilnego dla uczczenia pamięci Profesora Jana Kosika/Articles on civil law – A tribute to Professor Jan Kosik*, Wrocław 2009.

⁴⁴ As an example of modification of the European approach the following judgment of the German Supreme Court may be quoted: BGH, U. v. 1.12.1999 – I ZR 49/97, NJW 2000,2195 (Marlene Dietrich).

O PRAVIMA NA SPORTSKI IMIDŽ

U tekstu se raspravlja o različitim pristupima kojima se služi američko, talijansko i njemačko pravosuđe u slučaju mogućih povreda osobnih karakteristika poznatih lica. Tekst započinje s objašnjavanjem prava na publicitet – doktrine koja je nastala u američkoj jurisprudenciji i koja je utjecala na europske kontinentalne civilno-pravne sustave koji su započeli s priznavanjem ekonomske vrijednosti imidža. Pristup kojeg je usvojila američka doktrina kreće se prema imovinskom pravu, dok se europsko pravo - osim UK prava - zadržava unutar teorije prava na osobnost. Iako je model još uvijek isti budući se njime jednostavno indicira pravo na kontrolu komercijalne eksploatacije osobe, kontinentalna teorija utemeljena na civilnom pravu o nematerijalnim stvarima sve se više susreće s poteškoćama i preprekama u nasljeđivanju i preuzimanju takve osnove. Ipak, po svemu sudeći nalazimo se na najboljem putu promjene pristupa i shvaćanja da se s vremena na vrijeme pravo prilagođava tržištu a ne obrnuto.

Ključne riječi: *image, osoba, pravo na privatnost, pravo na publicitet*