

## IS MY FACE REALLY MINE?

By face I mean image. Does it depend on whether you are a celebrity or on whether your face has value that can be exploited? These two questions seem to address the same issue but I submit that they are different. In the first case, the person would have already made a name for himself and his image. It is known that his image can be commercially exploited for profit. In the second case, I am thinking of a person who is unknown but may be discovered. I am trying to conjure up the image of an uninitiated person as against an experienced agent who knows that the image can be exploited or the value of the image if it were exploited. The tort of misappropriation of personality is the relevant area of law. As applied it is restricted to the first case although the definition given has no such restriction. In broad terms the definition is taken to mean the right commercially exploit one's image.

This definition of misappropriation of personality has so far not taken into account liability in the second case generally or at all. Whose right is it to exploit the image in these circumstances? If it is the 'owner' of the face then the issue is in what circumstances can he lawfully deprive himself of that right? Or if it is the owner what factors delimit that right? I have not seen the law developing in this way. I have so far seen a lopsided approach favouring celebrities. If it is a property right then why should it be restricted to some one who is already

famous? The problem of a legal definition also exists in relation to a famous face. I have seen a conflating of two issues first whether it is a property right and second what factors limit the right. This has resulted in the analysis beginning in the middle. The middle in the sense that there is no precise definition of what constitutes the tort. Is it a property right or is it a substitute or alternate claim to copyright? Or is a privacy right? The five considerations that can be summarised from the case law do not adequately address these issues. The case law is also unsettled in terms of the juridical basis for the tort. The summary of the Canadian case law to establish the tort is as follow:

1. The Plaintiff must be identifiable;
2. Specific use must be made of the Plaintiff's personality as opposed to use of a more general part of his image;
3. The Plaintiff's personality must be in accordance with sales or advertisements rather than as the subject of a work;
4. Public policy considerations or issues of freedom of expression may delimit the right;
5. The Plaintiff has to prove that damage resulted from the misappropriation or alternatively whether a fee would have been paid if the Plaintiff granted a right to use his or her personality.

This is what I refer to as starting in the middle because it does not establish the

basis on which the right can be invoked. This seems to be an admixture of assessment of damages and the circumstances that can bring an action within the tort. In other words what is the juridical basis of the tort misappropriation of personality. Is it the same thing as the publicity right in the United States of America and if not should it be? At the very least should some of the principles in the United States jurisdiction be used to guide us to a more settled position in Canada?

The Canadian jurisprudence was made the poorer in 1998 when the Ontario Court of Appeal failed to address the issue of misappropriation of property in the *Gould Estate v. Stoddart Publishing Company* case.<sup>[1]</sup> In the first instance decision the tort was defined as a property right. The right conferred on its owner the exclusive authority to commercially exploit his personality. The Appeal Court did not analyse the case on this basis. By doing so it failed to clearly establish a juridical basis for the tort and further set up confusion when it decided the case on the basis of copyright principles. The lower court raised issues, which did not seem to follow from earlier case law that was cited in the case. In *Joseph v. Daniels* for example it is stated that “[t]he cause of action is *proprietary in nature* and the *interest protected is that of the individual in the exclusive use* of his own identity in so far as it is represented by his name, reputation, likeness or other value.” [emphasis added]. The first instance Court presided over by Lederman J.

asked “did Gould *in fact have any proprietary rights* in his image, likeness or personality which have been appropriated by the publication of the photographs in the book?” It did not take as a given that the Plaintiff had a proprietary interest in his image. This raises the issue of whether the fact of a proprietary interest depends on the circumstances of the case? The *Daniels* case did not suggest this but the learned Mr. Justice Lederman went on to conclude citing the Athans case that the tort is to be restricted to endorsement type situations. This confuses two issues:

1. The factors that give right to the tort of misappropriation and;
2. The factors that limit the exercise of that right or the circumstances in which the right can successfully be asserted.

In other words you either have a proprietary interest in your image or you do not. If you do then the next consideration is whether there are any factors that limit the exercise of this right on the particular circumstances of each case. The existence of the proprietary interest is different from the limiting factors. The Court having asked whether Gould had a proprietary interest in his image did not answer this question save what it said about endorsement situations but went on to consider factors that limit the right such as public policy. In considering limiting factors the Court then went on to make the “sales vs. subject” distinction whereby sales constitute the commercial exploitation of the image whereas subject is in the

nature of giving information about the person such as in the case of biographies. It is on the basis of this distinction that the Court found that the book in issue fell into the latter category and that “there cannot be said to be any *right of personality* in Gould which has been unlawfully appropriated by the defendants.”<sup>[2]</sup> Clearly this is wrong, as the existence of the right of personality is separate and distinct from the circumstances in which it can be enforced. The “sales v. subject” distinction if it is to be persisted in must be confined to limiting or restricting factors.

It is for this reason that I am of the view that the Court of Appeal missed an opportunity to formulate a precise legal definition for the tort. If they had maybe different considerations would have been made in relation to the issue of who had a copyright in the image that was used in the “coffee table book”. This is because Gould would have if he had a proprietary interest in his face would have owned the copyright to his image as well. This would then be subject to the same rights of alienation as any other copyrighted material. In other words had they addressed the issue that was not in mind conclusively addressed in the Court below then copyright would provide an alternative basis for relief. The underlying philosophy of the property right is based on the Lockean analysis that the fruits of production must go to its creator. It is in this context a possessory right. The creator of the work in this context the image would be the owner of the

copyright. This is different from someone who took the image and arranged it into a work which is in effect a different right that does not affect the owner's copyright in the image but which subjects the arranger to the payment of royalties. The manner in which the law was applied in Gould without reference to a legal definition or at least the accepting of a juridical basis has the effect of extinguishing the tort when set up against say copyright law as in that case. It is in this context that the original question becomes relevant, is my face really mine? The answer is yes if you can somehow fit your self into the tort of misappropriation and no if someone somehow creates a copyrighted work with your image. If the tort must make sense the jurisprudence must take care to plug loopholes such as I think exist in this case where the offending litigant can escape into the realm of copyright. In these circumstances it might be better to supplement the proprietary right with copyright law as has been suggested in the United States. So that where there are gaps in copyright such as where copyright does not recognise a right in fictional characters created by persons the proprietary nature of the interest in misappropriation of personality can fill this gap. In cases such as the Gould case if the proprietary right is stated clearly to exist in your image then the offending litigant would not be able to escape into the realm of copyright law.

Four models including the proprietary model and the copyright model were

considered in the United States in the *Lugosi*<sup>[3]</sup> case as being capable of forming the juridical basis of this tort. The proprietary interest was at one time considered to be distinct from a privacy right. In the United States however the *Lugosi* case shattered that distinction by where they accepted that the appropriation of the Plaintiff's personality for the Defendant's advantage could be construed as an intrusion of the Plaintiff's privacy. The advantage of this model has been that it allows for more damages to be awarded, for example, punitive and damages for mental distress that certainly is not available in contract. However, unlike the property model the privacy rights are neither assignable nor descendible. This is important especially in the latter case as most suits are on behalf of the estates of the person whose image is being exploited. The issue is at what point is the line to be drawn between the celebrities who need to be in the public eye and when they do not. This raises the issue of waiver, in terms of when the celebrity might be taken to have waived his or her right to privacy. This model therefore sets up a contradiction or conflict between the personal interest of the prospective plaintiff, which would take into account a person's mental and emotional well being and that person's right to be economically viable by being able to take advantage of the right to commercially exploit his or her image.

A third category is the "work product" model. This means that an employee is not entitled to the fruits of his labour in the course of his employment. This

model is however, dubious in the sense that there are circumstances in which the employee such as an actor can create an inheritable right in this property.

I think that the Canadian jurisprudence would best benefit from the defining of the juridical basis of this tort. That of the four models suggested the approach best suited for now at least is the combination of the proprietary interest, in the image with factors delimiting it such as whether or not the image has value and solely in terms of whether the person is a celebrity or not, and the copyright model.

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[1] [1998] O. J. No. 1894

[2] *Ibid* at 527

[3] *Lugosi v. Universal Pictures* 603 P. 2d. 425