

THE CONVERSATION

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Celebrities are grabbing more control over how they are portrayed in the media

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Robin Williams wanted to control use of his persona after his death. EPA

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According to the will of the late actor Robin Williams, no one can exploit his persona for 25 years after his death. This revelation has furthered the debate in the UK around the right of publicity, meaning the right not to have personal attributes such as your name, likeness, image and voice appropriated for someone else's advantage.

The right challenges not only the concept of property rights but also, more broadly, the right to free expression. It may yet prove Karl Marx's assertion that in modern societies everything has a price tag, even the body of a person. It raises many important legal questions that are yet to be answered in this country. If the right is recognised, can it be transferred? Can it then be used as collateral for a loan? Can it be inherited?

There are serious implications for the media. If celebrities and other individuals are allowed to control the use of their image, do broadcasters have to ask their permission before using them in programmes in which they might prefer not to appear? Do they need to give their permission for the media to

report news about their private activities? Would it matter whether it was incidental or intentional? Would it matter if it was the BBC or a commercial outlet such as The Sun?

The law varies between different countries. In most states of the US and many continental European countries such as France and Germany, the right of publicity has been firmly recognised – including even after the death of a person in California, hence Williams was able to bequeath it in his will like any other item of property.

The good news for the media in the UK and some other countries such as Australia is that no publicity right has been recognised by the courts – yet. Instead UK celebrities' personal attributes are protected in a more limited way by different areas of the law.

One example is breach of confidence, which prevents the unauthorised and unjustified disclosure of confidential information – subject to a public-interest defence. This defence enabled the Sunday Mirror to report on the extra-marital affairs of the former England football captain Rio Ferdinand, for instance.

Then there is the law of defamation, which enables individuals to raise legal actions against intentional damage to their reputation. A good example for our purposes is the 1931 case of *Tolley v JS Fry*, in which the well-known amateur golfer Cyril Tolley used defamation to sue chocolate manufacturer Fry for using his image in its advertising without his knowledge and making readers believe that he endorsed the advert. He was able to argue that advertising for chocolate companies damaged his reputation as an amateur golfer.

There is also the law of passing off, which traditionally concerns misrepresenting the goods of a company as either being yours or being associated with yours. As well as goods, this can be applied to a person's image or name – in the name of protecting their business interests.

But none of these rights were traditionally able to be transferred and they all disappeared once the person was dead. And unlike in the US, any action using these arguments has always had to show that the victim's dignity or reputation has been damaged. Otherwise there would be no case, even if the person's attributes had been commercially exploited.

The Human Rights Act

Yet recent developments suggest that a UK law of publicity more akin to the US is now knocking on the back door. This has been thanks to the Human Rights Act 1998, which requires the UK courts to recognise the right of an individual to a private life. This has broadened the way in which the relevant



His name is Rio. Wikimedia

legal principles have been interpreted by the courts in recent years.

In the 2005 case of *Douglas v Hello!*, Michael Douglas and Catherine Zeta-Jones sued *Hello!* magazine for taking and publishing photos of their wedding without permission. The court granted damages both to the newlywed couple and also *OK!* Magazine, which had acquired the exclusive right to cover the wedding. The action was based on the law of breach of confidence, but the court effectively expanded its scope to include private information which was not necessarily confidential. In doing so, it emphasised the commercial interests of the information about the wedding.



Catherine Zeta Jones and Michael Douglas fighting for wedding photo rights in 2003. Yui Mok/PA

Another important case was *Irvine v Talksport* (2003), in which the radio company was forced to pay damages to racing driver Eddie Irvine for modifying his picture in a brochure promoting Talksport in a way that made readers believe that Irvine specifically endorsed the radio station. It was about passing off, but the court expanded the traditional doctrine to say that you couldn't just protect your business interests from misrepresentation but also your celebrity. In other words, Irvine didn't need to show that his business interests had been harmed.

The net result is we seem to be moving well beyond only allowing individuals to protect their dignity and autonomy towards protecting their personalities as if they were an item of property. Like in the US, it may now be that UK courts would uphold the idea that these rights could be transferred or like in the case of Robin Williams, inherited. And, as we saw from *Douglas*, broadcasters theoretically now need permission to use anything to do with a celebrity's personality if there is an element of commercial gain, such as adverts during an interval. This could also apply to commercial news,

though celebrities have yet to go down this route even in the US.

What is still unclear is the extent to which an individual's rights can be trumped by the right of free speech, though the act suggests that free-speech justifications will be strictly scrutinised. But while we are in a situation where, in the UK, the law remains ambiguous, no one who publishes online should feel secure. So long as their material can be read by a reasonable number of people in a country with more extensive laws, litigators can pursue them there if the right of publicity is breached. Welcome to the world of forum shopping, which helps to bring the laws that afford celebrities the most protection right to your front door.



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