

GUIDO WESTKAMP¹
Queen Mary College, London

Celebrity Rights in the UK after the Human Rights Acts: Confidentiality, Privacy and Publicity

A. Introduction

In 2007, the UK House of Lords rendered a decision that many commentators believe will drastically change the approaches taken by UK courts to protecting aspects of privacy and publicity rights under established common law causes of action.

The decision concerned unauthorised photographs taken at the wedding of Hollywood actors Michael Douglas and Catherine Zeta-Jones, and an accompanying report bearing those images in the English gossip weekly “Hello!”. The convoluted case history commenced in 2001.

The case before the UK courts was brought by both Douglas and Zeta-Jones, as well as by the publishers of “OK” magazine, who had previously entered into an exclusive contract according to which they had the exclusive right to report on the wedding.² During the event, for which rigid access control measures had been put in place, an independent photographer managed to enter the facilities of the Ritz Hotel in New York, and subsequently sold taken pictures to “Hello!” magazine. The claims were, eventually, successful. In the Court of Appeals, it was decided that Michael Douglas and Catherine Zeta-Jones were able to rely on the action of breach of confidence, as applied to instances of invasions of privacy. Conversely, the Court of Appeals refused to uphold the award of damages

¹ Dr Guido Westkamp, LL.M., Queen Mary College, University of London.

² For a discussion see Aplin, *The Development of the Action for Breach of Confidence in a Post-HRA ERA* [2007] IPQ 19; Arnold, *Confidence in Exclusives: Douglas v. Hello! in the House of Lords* [2007] EIPR 339.

of 1 Mio in favour of the exclusive licensee. The Court rejected any obligation of confidentiality owed by „OK”. The House of Lords, in its majority opinion, found again for the licensee, yet this time on the basis of a claim based on commercial secrecy.

The decision is important in two respects, and it is those aspects that will principally be discussed in this article. First, it maintains – as far as the claims by the Douglas couple are concerned – the general applicability of the breach of confidence to instances of invasions of privacy. In addition, the decision clarifies that contractual relationships may be protected by virtue of the breach of confidence action, but under the different strand of commercial secrecy. The latter aspect raises issues of how far celebrities may be able to protect themselves not merely against the commercial appropriation of aspects of their personality, but likewise affects the scope to which celebrities can factually grant licenses that have a quasi-proprietary effect. Here, a brief comparison with a similar action – passing off – will assist in evaluating the future impact of an emerging publicity right.³

Likewise, the position of the press and the conflicting rights under press and information freedom are in need of clarification. In general, as will be seen, English law had developed a general rationale for a public interest defence that applies to press reports. However, the defence – although it is fundamentally applicable to virtually all causes of action that affect instances of personality rights – applies differently as regards the different causes of action.

B. Personality Rights in the UK: A Brief Overview

As is well known, English law never accepted a general cause of action based on violations of privacy or personality rights.⁴ Largely, this appears attributable to the previous absence of a human rights foundation in English law, which led to several complaints brought against the United Kingdom in the European Court of Human Rights.⁵ Consequentially, and in contrast to US law,⁶ no general right of

³ See *infra*, 3.b, 2, p. 12 et seq.

⁴ Expressly so in *In Re X (A Minor)* [1975] Family Law Reports 47, 58 per Denning J.; *Malone v. Metropolitan Police Officer* [1979] Ch. 344, 372; *Kaye v. Robertson* [1991] FSR 62; *Wainwright v. Home Office* [2003] UKHL 53. For a general explanation see Wacks, 'The Poverty of Privacy' [1980] 96 Law Quarterly Review 73, 85–87.

⁵ *Winer v. United Kingdom* [1986] 48 D. & R. 154, 170 ET SEQ.; *Earl and Countess Spencer v. United Kingdom* [1998] 25 EHRR CD 105; *Steward-Brady v. United Kingdom* [1998] 27 EHRR CD 284. see further *Clayton/Tomlinson*, Privacy and Freedom of Expression, 64; *Bingham* [1996] EHRLR 450.

⁶ The foundation for a development of a privacy right in the United States is largely considered to be Warren and Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Rev. 193.

publicity – which in the US allows celebrities to protect aspects of their personality from unauthorised commercial uses⁷ – exists. The only cause of action directly protecting personality rights is the – rather ancient – defamation claim which protects the honour of an individual.⁸

As such, the position in the UK was indeed unambiguous in rejecting personality protection as such⁹ until the Human Rights Act 1998 came into force. Before that, UK courts expressly rejected claims based on privacy. Following the Human Rights Act, things started to change, albeit incrementally and tentatively.

The Human Rights Act 1998 fully incorporates the provisions on human rights under the European Convention on Human Rights,¹⁰ and thus provides for both personality protection under Article 8 and freedom of information, including the freedom of reporting, under Article 10 ECHR.¹¹ The Human Rights Act 1998 further limits the ability of preventing the publication of press reports affecting personality rights under Article 8 in case interlocutory injunctions are sought, which factually significantly limits the abilities to prevent publications. An injunction may only be sought where the judge is convinced that the claimant would, in the main proceedings, succeed. Practically, this means that celebrities must try to seek damages rather than being able to prevent press reporting as such.

The impact of the Human Rights Act, as far as a positive recognition of personality rights is concerned, was limited, although courts have consistently referred to its provisions. Importantly, the Human Rights Act did not effect a judicial recognition of a unitary personality right.¹² It seems fair to state that, where personality rights were at issue, courts were influenced by the Human Rights Act, albeit that such influence was constrained to altering specific elements of pre-

⁷ See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* 202 F.2d 866 (2nd Cir. 1953); *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977). Liability under the publicity right arises where the defendant uses the name, likeness or other indicia⁷ of another's personality for commercial purposes, see Restatement, Third, Unfair Competition, § 46 (1995).

⁸ The action for defamation requires the publication of a false statement to the detriment of the defendant, see has deeply dignitary roots: see Baker, *An Introduction to English Legal History* (London 1990), 510.

⁹ On legislative attempts to introduce personality rights prior to the Human Rights Act see Calcutt Committee, *Report of the Committee on Privacy and Related Matters*, London 1990, Cmd. 1102. See also the assertions made by Lord *Irvine* in the House of Lords on the Human Rights Bill, *Hansard*, HL cols. 771–787, 24.11.1997.

¹⁰ Available from <http://www.opsi.gov.uk/acts/acts1998/80042--d.htm#sch1>.

¹¹ The European Convention on Human Rights had been ratified, as an instrument binding the state at the international level, in 1951. The Human Rights Act came into force as national legislation in 2000. see further Fenwick/Phillipson, *Media Freedom and the Human Rights* (Oxford 2006), p. 3.

¹² *Campbell v. MGN* [2004] UKHL 22; *Wainwright v. Home Office* [2003] UKHL 53.

existing causes of action.¹³ The most important decision that – as many believe – has factually introduced a right to privacy clad in a successful action for breach of confidence was rendered in 2004 in *Campbell v. MGN*.¹⁴ Here, the Court of Appeals recognised that the claimant – supermodel Naomi Campbell – could rely on a reasonable expectation of privacy where photographs had been taken of her leaving a meeting of Narcotics Anonymous; however, the court likewise found for the defendant newspaper in relation to a press report concerning the claimant’s previous statement not to suffer from an addiction. At this point, the court contended that the press, following a balancing test between Articles 8 and 10 (2) ECHR, had the right to ‘put things straight.’ The decision resonates with the position taken by the European court of Human Right in the Caroline decision,¹⁵ where the Court of Human Rights extended personality rights to any situation where a celebrity can have such reasonable expectation even though what is shown occurs in a public place.¹⁶

In general, therefore, the interaction between privacy or personality rights and the corresponding freedom of the press is far from clear, and outside the scope of this contribution. In contrast to the German position, where the relationship between press freedom and personality protection is in general governed by a staged test,¹⁷ English law is still in search of workable parameters, the details of which shall not further be discussed here.¹⁸ It should suffice to say, however, that several recent decisions indicate that courts are more willing to conduct a balancing test, whereas previously the fact that a celebrity had actively sought media attention would have foreclosed any successful action. The parameters to be taken into account under such test are highly dependent on the cause of action, and it is clear today that neither is the press immune from considerations on personality rights, nor has the Human Rights Act entirely modified the applicability of different parameters that have traditionally been applied in favour of media freedom. This is particularly so where a celebrity has acted in a manner contrary to public moral values.¹⁹ Whether that approach is compliant with the jurisprudence of the European Court of Human Rights is highly debatable.

¹³ See Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act’ [2003] 66 *Modern Law Rev.* 726.

¹⁴ *Campbell v. MGN* [2004] UKHL 22, paras. 18, 123 et seq.

¹⁵ *Hannover v. Germany*, Application No. 59320, 24.6.2003 = [2005] EHRR 1; see further Phillipson, ‘The Right of Privacy in England and Strasbourg Compared,’ in: Kenyon/Richardson, *New Dimensions in Privacy Law*, pp. 184 et seq.

¹⁶ See Ohly, *Harmonisierung des Persönlichkeitsrechts durch den Europäischen Gerichtshof für Menschenrechte* [2004] GRUR Int. 902.

¹⁷ Götting, in: Schrickler, *Urheberrecht, Kommentar*, § 22 KUG, annotation 11.

¹⁸ Phillipson/Fenwick, *Media Freedom and the Human Rights Act* (Oxford 2007), pp. 717 et seq.

¹⁹ Wacks, in: Kenyon/Richardson, *New Dimensions of Privacy Law*, 154, 180.

C. The Starting Point Today: Breach of Confidence as a General Personality Rights Clause

Claims based on breach of confidence have, since the decision in *Campbell*, begun to alter the contours of English approaches to personality protection. In order to fully understand the current debate, it is necessary to briefly explain the historical roots and subsequent development of confidentiality claims, and to later place the current position into the context of other causes of action – in particular, passing off – that affect the commercial scope of personality rights. In general, a claim for breach of confidence requires a claimant to establish that three elements are present.²⁰ Firstly, there must be information that has the necessary quality of confidentiality to it; secondly, that information must have been disclosed to a third party under circumstances where a specific obligation not to do so can be established, which may arise from either an express agreement or from the circumstances of the specific case. Thirdly, the person to whom such confidentiality is owed must have suffered a detriment.²¹ Where information is disclosed that was – for whichever reason – already part of the public domain the cause of action is initially foreclosed.²² It was sufficient to show that the public has the ability to access the information without further impediment, and thereby the condition that the information was in the public domain did not impose too high a hurdle for the defendant.²³ In general, as long as a relationship out of which an obligation to keep information secret arises can be established, the cause of action does not present too many problems. Such relationships have, for example, been identified by courts as existing between doctor and patient, but also as regards intimate relationships in general. The reason for successful confidentiality claims here is that the ‘air of confidentiality’ was clearly perceptible to the defendant and could be deduced from the very nature of details divulged.

The most significant problems the current debate is facing concern the first and second element. This is (1) because in cases such as *Douglas v. Hello!* it is difficult to see how information that is meant to be published can be confidential, and

²⁰ *Prince Albert v. Strange* [1848] Mac. & G. 25. This case – in which etchings by Queen Victoria and Prince Albert had been sold without consent – is the first case on breach of confidence. For a comparison with the position today see Richardson/Hitchens, ‘Celebrity Privacy and Benefits of Simple History,’ in: Kenyon/Richardson, *New Dimensions in Privacy Law*, pp. 250, 252 et seq.

²¹ *Prince Albert v. Strange* [1848] Mac & G. 25; *Coco v. A N Clarke* [1969] RPC 41; *Saltman Engineering v. Campbell Engineering* [1948] RPC 203.

²² For example, where instances of a celebrities marriage had already been discussed in the press: *Lennon v. News Group Newspapers* [1978] FSR 573 (CA).

²³ *Saltman Engineering v. Campbell Engineering* [1969] RPC 41, 48; *Coco v. A N Clarke* [1948] RPC 203, 215.

(2) how an obligation between, for instance, a press reporter and a celebrity can be construed under which a quasi-contractual obligation to keep such information, for the time being, secret may be said to exist.

Background of the Breach of Confidence Action

Over time, two main areas of application emerged. The first concerns the treatment of information that is said to have a specific commercial value. These cases typically involve the use of information that after publication would cause a loss, such as in the case of a disclosure of a patent application or of secret know-how. Here, the confidentiality actions very much operates equivalent to the prohibition to disclose secret commercial information under unfair competition or general trade secret law such as in Germany or the United States.

The second concerns information that does not necessarily have a commercial value but that may be said to be important for other reasons, and it is this strand of the action that has recently been considered in claims relating to invasion of privacy. In general, where there is no specific relationship between the claimant and defendant, the position today is that what is decisive is that private information should be considered as being *prima facie* confidential, which is a direct effect of the Human Rights Act 1998.²⁴ At this juncture, it now becomes necessary to distinguish between information that is private and information that is public.

The Meaning of ‘Private’ Information

The approach towards that distinction is conducted by looking at the elements that would render the information as being part of the public domain. As far as claims for privacy are concerned, the recent judicature is not entirely consistent. Partially, it was held to be sufficient if the information in question was ‘obviously’ of a private nature.²⁵ Other decisions have maintained that the claimant had to show that, from the perspective of an objective bystander, the divulgence of the information would be highly detrimental or defamatory.²⁶ Finally, it was asserted that the distinction should rely upon a ‘reasonable expectation of privacy’ test conducted likewise as an objective assessment.²⁷ These inconsistencies have

²⁴ A and B v. C [2002] EMLR 7, 11; Campbell v. MGN [2004] 2 AC 457.

²⁵ Campbell v. MGN [2004] 2 AC 457 (House of Lords).

²⁶ A and B v. C [2002] EMLR 7, per Jack J. The approach is interesting in that the judge relied on the Australian decision in *Australian Broadcasting Corporation v. Lenah Game Meats Pty.* [2001] 208 CLR 199 which in turn refers to the US-American privacy doctrine, according to which it is a condition that the defendant is presented in a ‘false light,’ such as where embarrassing details are disclosed.

²⁷ Thus in *Douglas v. Hello! # 3* [2006] QB 275.

been criticised, and the reason for such criticism in general is the fact that the breach of confidence claim has to be radically modified so as to fully accommodate the apparently required recognition of the Strasbourg Convention. Indeed, as far as claims based on invasions of privacy are concerned, the recent judicature has effectively abandoned the traditional condition of a specific relationship of confidentiality, which it schematically substituted with a mere assertion of privacy rights. All decisions have rejected a direct application of Article 8 ECHR. Thereby, the confidentiality claim becomes devoid of its traditional contours, which is perceived as detrimentally impacting, concurrently, on the applicability of the confidentiality claim as far as commercial secrecy is concerned. Therefore, the judicial response to twist established causes of action in order to accommodate privacy situations – rather than to recognise a new cause of action – may be said to cause further inconsistencies effectively creating quasi-proprietary rights in information because the degree of trust between claimant and defendant is necessarily no longer decisive. Indeed, courts have asserted that the requisite relationship between claimant and defendant would follow from the very nature of the information as being private, yet given the uncertainties surrounding the meaning of ‘private’ or ‘public’ in that context it seems apparent that the requirement of a specific relationship then becomes largely irrelevant. The general taxonomy of the approach taken can, simplified be described and summarised as follows: there is, first, a general distinction between scenarios falling within Article 8 ECHR and scenarios which do not. In the former case, Article 8 ECHR is given horizontal effect via Sec. 12 (3) of the Human Rights Act 1998, which in turn incorporates the European Convention on Human Rights by binding the state, including courts, to recognise its provisions.²⁸ Article 8 ECHR is thus rendered applicable on the basis of an *extended* action for breach of confidence. The reason why the action is extended lies in the fact that it is only in relation to privacy claims that a specific relationship out of which an obligation to maintain confidentiality arises is abandoned in the realm of Article 8 ECHR. For different types of information, the conventional requirements shall apply,²⁹ that is, where the defendant knew or had reason to know that disclosure would detrimentally affect the commercial usability of the information.

Residual Problems

However, the position has become convoluted: either, the traditional contours of the breach of confidence claim are left intact. In that case, it will become difficult to fully recognise the Strasbourg obligations because the conventional approach relies on the degree of trust that was created, either express or implied,

²⁸ Campbell v. MGN [2004] UKHL 22; Douglas v. Hello! [2006] QB 275, 277.

²⁹ Douglas v. Hello! [2007] UKHL 21.

between claimant and defendant. In privacy cases, such trust is necessarily absent and the requirement of a specific relationship indeed is a concept alien to the degree of personality protection under the Strasbourg principles. The alternative likewise poses potential problems. Where the breach of confidence claim is effectively restructured in or to accommodate more situations outside the ambit of a specific relation between claimant and defendant, such extension of principles would work towards creating a novel perception of the meaning of confidentiality. This approach does not easily agree with cases where privacy concerns are not at issue. In accordance with general principles of common law, extending the breach of confidence action to all general types of commercially valuable information would effectively create quasi-proprietary rights very much bordering on, and indeed critically overlapping with Intellectual Property rights such as copyright and patent law. The solution adopted by UK courts in response to the Human Rights Act thus attempts to create privacy rights under the umbrella solution of a confidentiality claim so as to maintain the previous law,³⁰ albeit at the cost of being potentially unable to reject stronger information protection in cases where privacy or personality rights are not at issue. Why, then, has the recent judicature shied away from creating a general privacy right as a sole standing action? It was said that the creation of a such new cause of action – and, indeed, a new type of tort – should better be left to the legislator,³¹ and for this there is also a subtle underlying rationale in the overall concept of common law rejecting general clauses as such.³²

Douglas v. Hello! and the Concept of Commercial Privacy Rights

At this juncture, the House of Lords decision in *Douglas v. Hello!* will potentially become decisive in further allowing courts to find a workable distinction between Article 8 ECHR claims and general commercial torts. The situation in *Douglas* was entirely different from the situation in, for instance, *Campbell*. Here, it was clear that the claimants – that is, both the Douglas couple and their licensee – could not rely as such on an invasion of privacy because the photographs and accompanying press reports were expressly intended to come into the public domain, albeit at a point in time to be decided by the exclusive licensee. As noted, as far as the claim for damages brought by the Douglas couple was concerned, it seems difficult to reconcile the decision in the Court of Appeals – which ended the case as far as the claim by the Douglas couple is concerned – with general notions of an invasion of privacy. Here, the fundamental issue was whether the couple should be able to exert control over any subsequent use of information concerning

³⁰ *Douglas v. Hello!* #3 [2006] Q.B. 125, 157, (Lord Phillips M.R.); *Douglas v. Hello!* # 1 [2001] Q.B. 967, 1012 (Keene L.J.).

³¹ Morgan, 'Privacy in the House of Lords, Again' [2004] LQR 563.

³² Wacks, 'The Poverty of Privacy' [1980] 96 LQR 73, 86.

the event. Such quasi-proprietary right exists, as noted, according to the publicity right in the United States but do not exist under English law. Nevertheless, the couple was successful in claiming breach of confidence. The evaluation is different as far as the position of the exclusive licensee was concerned, since the licensee simply cannot rely on a third parties' personality right. The licensees' interests were geared towards protection of their commercial expectations in being able to exclusively commercially exploit the event, which leads to a different positions where the action of breach of confidence is to be considered as a subset of commercial torts, and where further intricate problems of distinguishing the 'commercial' strand of the confidence claim with narrower commercial torts, in particular as regards the action for inducing a breach of contract.

Eventually, both claimants were successful in asserting breach of confidence. The following will concentrate first on the position of the Douglas couple before turning to the implications of the confidentially claim as regards the exclusively licensed publisher.

a) The First Instalment – A New Celebrity Right?

The previous establishment of a general personality rights through the medium of the breach of confidence has, in *Douglas v. Hello!*, immediately led to the question of the scope of protection for information that is commercially exploitable but which is intended to be published by the persons claiming the right. Whether English law would accept, under the umbrella of the confidentiality claim, a right to control one's publicity is currently an unresolved issue. It is certain that Article 8 ECHR does not grant a right for controlling the commercial exploitability of personality aspects by and large, and that the novel constructions of the breach of confidence – as was rendered in *Campbell* – does not alter that position. However, as was noted, the breach of confidence action was, historically, a response to unauthorised commercial uses of information and thus allowed protection where the quality of the information showed its commercial exploitability, albeit only where its traditional requirements were met. Unfortunately, as far as the unauthorised photographs taken at the wedding are concerned, the courts have not asserted whether the position of the Douglas couple was protectable as a matter of an invasion of privacy or following the traditional interpretation of the confidentiality action as a tort protecting commercial interests. In a first decision, the Court, rejecting the claim to prevent publication, asserted that there was no confidentiality given that the photographs – as general information on the wedding – had been intended for publication, and indeed considered that there was no intention to keep that information secret.

In the first instance decision regarding the claim for damages, the High Court relied on Article 8 ECHR as such. It maintained that what was decisive was the obvious will of the claimants to keep the event 'private,' a position that was largely

based on the rigid security measures that had been put in place.³³ However, it felt unable to find for the claimants on the basis of the ‘classic’ breach of confidence action. Instead, the court directly applied Article 8 ECHR as a novel element of the confidentiality claim, which it gave a general right to control the publication of photographs notwithstanding the fact that the claimants wished to have such photographs, albeit not identical ones, published. In general, the court deduced the applicability of Article 8 ECHR from general principles of personal autonomy, and therefore issues of the character of the information as confidential were more effortlessly evaded. Assumingly, this was influenced by an earlier decision where it was held that *prima facie* photographs taken by CCTV cameras constituted a breach of confidence.³⁴ The court finally maintained that a clear dichotomy should be established so as to create workable distinctions between privacy claims and commercial secrecy claims under the breach of confidence heading, and particularly rejected the need to establish a specific relationship giving rise to an obligation to keep such information confidential. The consequences of that view are critical: the scope to which the breach of confidence claims is available no longer depends on the nature of the information but on the discernible intention to restrict access to it, which in general would have created a rather wide notion of ‘celebrity rights.’ Confusingly, the court explained that position by relying – and possibly misunderstanding – the ‘reasonable expectation of privacy’ predicament previously asserted in both the Campbell and the ECHR Caroline decisions. In contrast to these cases, however, the court also referred to the photographers ‘tainted conscience’ and held that, in addition, the photographers knowledge of the security measures would have given rise to an obligation to protect the commercial interests of the claimants to be able to sell such photographs. Therefore, the defendants could not be stopped from generally reporting on the event. The eventual decision in the Court of Appeals confirmed the position taken by the High Court as far as the position of the Douglas couple was concerned. The Court of Appeals deviated, however, on the point of the direct applicability of Article 8 ECHR and concluded that the requirements of a reasonable expectation of privacy were met in the same way as in the Campbell decision.

b) Exclusive Licensees

The more critical aspect concerned the claim of the exclusive licensee for an amount of more than £ 1 Mio. The High Court had initially taken the view that confidentiality was similarly owed to the licensee, and that therefore the claim for damages was justified on the grounds of appropriating private information having

³³ Douglas v. Hello! #1 [2001] FSR 732.

³⁴ Helewell v. Chief Constable of Derbyshire [1995] 1 WLR 804. See further Fenwick/Phillipson, ‘Confidence and Privacy: A Re-Examination’ [1996] Cambridge LJ 447; Carty, ‘Advertising, Publicity Rights and English Law’ [2004] IPQ 209, 248.

a specific commercial value. The Court of Appeals, however, deviated entirely and concluded that no relationship of confidence could be established between the licensed publisher and Hello! magazine.³⁵ The court further contended that, even though the information had a commercial value, the rights to that information as a whole could not have been licensed because the license only concerned authorised photographs. In the House of Lords,³⁶ to which the claimant appealed, it was precisely the issue of whether the information surrounding the event had to be treated as commercially protectable information and, if so, whether the defendant owed a duty of confidence. Eventually, the law lords and ladies were divided, with five opinions rejecting and the majority allowing the claim. In short, the House of Lords referred predominantly to the commercial value of the information.³⁷ It was clarified – in contrast to the first High Court decision – that the degree to which personality rights were applicable was irrelevant, and that the decision was based on the conventional scope of breach of confidence. It therefore, according to the House of Lords, remained within the fence posts established under traditional law. Hence, what was decisive was that the value of the license fee paid had been lost through the premature publication of the photographs.³⁸ The licensee had the right to be protected in its expectations. The question of the confidentiality of the information ‘as such’ – which of course was not secret in a narrow sense but precisely intended for publication – was similarly considered as largely irrelevant.³⁹ This was because the majority votes placed their emphasis – necessarily – on the commercial value that was known to the defendant, and therefore it would have appeared artificial to distinguish between the authorised and the unauthorised photographs, although such distinction was found necessary in the minority opinions.⁴⁰ In conclusion, what was decisive remained the commercial value rather than the nature of the information in question.

The decision in the House of Lords will in future create potential difficulties in finding the contours of the breach of confidence claim. Given the breadth of scope attributed to commercial values, the court recognised the breach of confidence claim as virtually protecting any value attributable to information as long as that value can be recognised by the person to whom the information is com-

³⁵ Douglas v. Hello! [2005] EWCA Civ 595, paras. 97 et seq.

³⁶ Douglas v. Hello! [2007] UKHL 21.

³⁷ *Ibidem*, paras. 17 et seq. (Lord Hoffmann).

³⁸ At this stage, it becomes apparent that the action for breach of confidence in such cases is an action based on unjust enrichment, which under UK law falls into the category of an unjust enrichment for wrongful acts. In such cases, courts have the discretion to award not merely damages but an account of profits where the intrusion had a certain degree of seriousness, which was not discussed in the House of Lords as far as the publishers of OK magazine were concerned. In Douglas v. Hello! [2005] EWCA Civ. 595, para 132 ff., the High Court refused an account of profits payable to the Douglas couple.

³⁹ Douglas v. Hello! [2007] UKHL 21, paras. 117, 120.

⁴⁰ *Ibidem*, paras. 74 et seq. (Lord Brown).

municated. The decision indeed has take a step from objectively evaluating the nature of the information as capable of being construed as confidential to imposing a general obligation to respect the contractual transfer of personality aspects. In any event, the conclusion seems unavoidable that the House of Lords has created a hybrid publicity right that indeed has a quasi-proprietary effect. For celebrities, this means that protection is available on the basis of privacy considerations, whereas for their exclusive licensees a quasi-proprietary protection is available on the basis of the commercial value attributed.

c) Scope of Licensees' Rights

The remaining issue in future will be the scope to which that information can be said to be protected as against indirect recipients. This issue will arise under circumstances where the information is disclosed to a person not being aware of the circumstances imposing the duty of confidentiality – i.e. the knowledge about the commercial transaction and its value. It would appear from the decision that in such case no obligation exists, and that therefore the claim must fail. However – and this was not an issue here – English courts have likewise held the indirect recipient liable under specific circumstances. As such, the breach of confidence action only applies as between a claimant and defendant where a specific duty is owed, and is not applicable to the indirect recipient. This, following the House of Lords decision, is still good law. In general, an indirect recipient is bound under principles of the law of equity – according to the ‘springboard doctrine’⁴¹ – only where that recipient positively knew that the information was confidential,⁴² where it was received under mischievous circumstances.⁴³ Where the Human Right Act applies, however, it now simply suffices that private information is published, which would now only require a test balancing the conflicting interests of the press with those of the individual.⁴⁴ Hence, if there is confidence in the information to be exploited, and that confidence is based on privacy, it would seem that there is now sufficient reason for holding an indirect recipient liable, since in such cases the press can naturally not rely on Article 10 (2) ECHR where that information had been exclusively licensed. Therefore, presumably a celebrity will be likewise successful to prevent further publication. However, does the same conclusion apply to the licensee? Here, the situation indifferent because privacy aspects are not applicable. However, it only appears to be a small step to recognising a full proprietary in rem effect of such transactions. The first reason is that the

⁴¹ *Attorney General v. Guardian Newspapers Ltd.* # 2 [1990]1 AC 109, 280 et seq.

⁴² *Hellewell v. The Chief Constable of Derbyshire* [1995] 1 WLR 804, 807; *Creation Records v. News Group Newspapers* [1997] EMLR 444, 455.

⁴³ *Francome v. Mirror Group Newspapers* [1984] 2 AllER 408.

⁴⁴ *Venables Thompson v. News Group Newspapers and Others* [2001] 2 WLR 1038,1054.

distinction between private and commercially exploitable information may become further diluted in future, thus continuing to extend the breach of confidence action. The second reason is more subtle: although it is accepted that confidential information as such does not give rise to a property right,⁴⁵ many commentators believed that the expansion of the action and the further liability of indirect recipients has finally given confidential information of such status. However, it would seem premature to conclude an overall proprietary effect.

d) Passing Off

But at this point a licensee may be able to rely on different causes of action. In the past, courts have consistently refused to allow for the protection of commercially valuable aspects of personality rights. As far as trade mark law is concerned, attempts to register personality aspects as such, or to register names or images on memorabilia have, by and large, been rejected because English trade mark law required that the mark in question served as an indicator of origin.⁴⁶ In the case of, for instance, fan memorabilia this was found not to be the case.⁴⁷

It is at this juncture that the decision in *Douglas v. Hello!* and decisions rendered under the passing off action appear to converge. In general, passing off constitutes a commercial tort, consisting of the three elements of a misrepresentation made in the course of trade that is designed to deceive the public as to the origin of goods or services. Initially, the action was restricted to instances where the public was factually misled as to the origin of goods, but it was later found that it could apply where there was confusion as to endorsement. The shift towards a recognition of such form of confusion was very much instigated by cases in which personality aspects of celebrities had been appropriated.

Thus, in the *Irvine v. Talksport* decision,⁴⁸ it was held that the use of a racing driver's image and voice in a radio commercial constituted passing off. The reason was that the public was being misled into believing that the celebrity had entered into a licensing agreement,⁴⁹ and that therefore goodwill had been appropriated. The difference to classic passing off cases lies in the confusion element,

⁴⁵ As was reiterated in *Douglas v. Hello!* [2007] UKHL 21, para. 120.

⁴⁶ *JANE AUSTEN* Trade Mark [2000] R.P.C. 879; *Tolley v. JS Fry and Sons* [1931] AC 333. *PUSSY GALORE*' Trade Mark [1967] RPC 265; *American Greetings Corp's Application* [1984] 1 W.L.R. 189 ('*HOLLY HOBBIE* Trade Mark'). *ELVIS PRESLEY* TM [1999] RPC 567; *TARZAN* Trade Mark [1970] RPC 450; *Executrices of the Estate of Diana, Princess of Wales Application* [2001] ETMR 254; *Re Fanfold Ltd's Application* [1928] RPC 199.

⁴⁷ *BACH* and *BACH FLOWER* TM Application [1999] RPC 1, 43; see further *Blanco White/Jacobs, Kerly on Trade Marks* (13th ed., London 2006) § 8–58.

⁴⁸ [2002] AllER 414.

⁴⁹ *Laddie J.* also referred to the implications of the Human Rights Act in general, asserting he would have been prepared to grant protection against such use under Article 8 ECHR as such.

since it had been long established law in England that the public must be confused as to the origin of goods or services rather than to endorsement of a particular use by a celebrity.⁵⁰ In case the public becomes educated that a celebrity character has licensed certain rights, it is easily imaginable that an action for passing off can be successful if brought by the licensee. It is important in this context that the decision in *Irvine* was motivated, similarly, by a need to recognise the impact of Article 8 ECHR on English law after the coming into force of the Human Rights Act.

e) Conclusion: A Publicity Right?

Overall, therefore, the extensions in both passing off and breach of confidence have altered the face of English law as far as celebrity rights are concerned. The true scope of these actions and the impact of their partial overlaps are still to be tested, and although it seems fair to say that English law is currently far from doctrinally consistent system for the protection of celebrities' privacy and publicity rights, it is likewise certain that the long established lack of personality rights has been largely overcome. The recent judicature has, however, very much concentrated on the commercial implications of personality rights, and the future may see English law following the US role model of a dedicated publicity right.⁵¹

⁵⁰ *Irvine v. Talksport Ltd.* [2003] F.S.R. 619, CA.; *General Tire and Rubber Co. v. Firestone Tyre and Rubber Co. Ltd.* (No. 2) [1976] R.P.C. 197, HL; *Stringfellow v. McCain Foods* [1984] R.P.C. 501, CA; *Mirage Studios v. Counter-Feat* [1991] FSR 145; *Lyngstad v. Anabas* [1977] FSR 62. See further *Character Merchandising and the Limits of Passing Off* [1993] LS 289; *ders.*, *Heads of Damage in Passing Off* [1996] EIPR 629.

⁵¹ See also the decision by the Ontario High Court in *Krouse v. Chrysler Canada Ltd.* (1972) 25 *Dominion Law Reports* (3d) 49, affirming a right against appropriation of personality aspects.