Image Rights of Celebrities in the digital Era: Is there a need for the Right of Publicity in Ireland?

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Advertisers utilize the fame of celebrities to sell products to consumers. This is effective because celebrities are embodiments or encodings of certain values and aspirations. These encodings are done by the consumers/audiences. While movie-stars depict glamour, sports stars depict strength and determination to excel. These encoded meanings of celebrities can also be recoded or re-interpreted by the consumers/audience as a form of political or artistic expression. In the United States, celebrities can challenge the unauthorized use of their image rights by relying on the right of publicity but this is balanced with a First Amendme

I – Introduction

The right of publicity as developed in the United States affords celebrities a legal entitlement in the commercial value of their identity or image thereby allowing celebrities to control the commercial exploitation of their identity or image.1 Celebrities in other common law jurisdictions around the world do not enjoy any right such as the right of publicity.2 However, there is a growing trend in some common law jurisdictions to provide some form of protection for celebrities by either

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2 The analysis in this article is restricted to common law countries because Ireland, being a common law country, is most likely going to adopt an approach that is similar to what obtains in other common law countries whenever it decides to develop this area of law. However, it must be noted that case law from civil law countries such as France, Germany and Italy indicates that the courts in those countries equally recognise the need to protect the identity of celebrities from unauthorised commercial exploitation. See, A. E. Helling, "Protection of 'Persona' in The EU and in The US: A Comparative Analysis" (2005) LLM Theses and Essays (University of Georgia School of Law) Paper 45. Available at <http://digitalcommons.law.uga.edu/stu_llm/45> (date accessed: 7 November 2012).
creating a new tort to protect against wrongful appropriation of personality\(^3\) or by extending the common law tort of passing off to protect celebrities against the unauthorised use of their identities and images.\(^4\)

The position is rather unclear in Ireland as the courts have not yet made any definitive pronouncement as to whether celebrities can bring an action to challenge the unauthorised use of their image.\(^5\) Certain celebrities in Ireland have attempted to protect their image from being exploited without their authorisation but none of these attempts have resulted in a judicial pronouncement by the Irish courts. For example, in 1996, Ark Life Assurance Company had used the image of Mary Peters, an athlete who won an Olympic gold medal in 1972, in an advertisement for pension products.\(^6\) Peters alleged in the High Court that the advertisement was designed to take advantage of her personality, goodwill and reputation and that it was done without her consent.\(^7\) The case was subsequently settled amicably in 2001.\(^8\)

Similarly, in 2008 it was reported that Diarmuid McMahon, a Gaelic Athletic Association (GAA) star, sued *The Clare People Newspaper* over the unauthorised use of his image in promotional material by the newspaper.\(^9\) McMahon claimed that the newspaper had misappropriated his personality by the unauthorised use of his photograph and that this created the impression that he was endorsing the newspaper.\(^10\) McMahon contended that he was entitled to restrict the use of his

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7 Ibid.

8 Ibid.


10 Ibid.
image or personality where it was being used for commercial gain.\textsuperscript{11} It was however subsequently reported that the case was struck out apparently because it was abandoned by McMahon as he wanted to avoid the distraction of litigation.\textsuperscript{12}

Despite the current absence of judicial pronouncements on this issue, in due course the Irish courts will have to decide whether or not celebrities in Ireland have the right to control the commercial exploitation of their image and identity. It is however possible that the Irish courts, instead of creating a new right of publicity similar to the position in the United States, might prefer to adopt the approach of the English courts\textsuperscript{13} by extending the tort of passing off to protect against the unauthorised commercial exploitation of the image and identity of celebrities in Ireland.

It is not being suggested here that celebrities should not be entitled to control the commercial exploitation of their image and identity. However, Irish courts should be cautious about extending the tort of passing off to protect the image rights of celebrities. As will be explained in greater detail below,\textsuperscript{14} the right of publicity afforded to celebrities in America is not an absolute right. Defendants who are sued by celebrities can rely on the First Amendment to the American Constitution as a defence against liability. The American courts have devised different tests to determine when the unauthorised use of the image of a celebrity can be excused as a form of expression. This is unlike the common law tort of passing off which does not require the courts to examine whether the use of the celebrity’s image can be excused as a form of expression by the defendant. Once all the requirements of the tort of passing off are satisfied, the defendant will be liable whether or not the unauthorised use amounts to an exercise of the right to express one’s idea freely. Thus, it is argued here\textsuperscript{15} that the extension of the tort of passing off to protect the image rights of celebrities has the potential to suppress certain forms

\textsuperscript{11} Ibid.
\textsuperscript{13} See the English cases of Irvine v. Talksport Ltd., [2002] 2 All E.R. 414 (H.C.); [2003] 2 All E.R. 881 (C.A.); and Rihanna Fenty & Ors. v. Arcadia Group Brands Ltd. & Anor., [2013] E.W.H.C. 2310 (Ch.). The approach of the English courts is discussed below in Part III.
\textsuperscript{14} See Part II below.
\textsuperscript{15} See Part V below.
of artistic and political expressions unless the courts are aware of the need to balance the interests of members of the public with that of celebrities.

This article is divided into four main parts. Part II examines the development and application of the right of publicity to protect the image rights of celebrities in the United States. The First Amendment defence available to defendants in these lawsuits will also be examined. Part III addresses the developments in jurisdictions such as Australia, Canada and the United Kingdom where the courts, in the absence of the right of publicity, have provided avenues for celebrities to protect their image rights either through the development of a new tort to protect against the wrongful appropriation of a celebrity’s personality (e.g. Canada) or by extending the common law tort of passing off to afford protection for the image rights of celebrities (e.g. Australia and United Kingdom). Part IV critically analyses the risks involved in creating new rights for the protection of the image rights of celebrities without taking into consideration the competing interest of the consumers/audience who play an active role in the creation and emergence of the modern day celebrity. It is contended here that it is essential to balance the competing interests of the celebrity and the interests of the consumers/audience by respecting the rights of the later group to make use of the encoded meanings of the celebrity image in political or artistic forms of expressions. This is particularly necessary in order to protect fan fiction and parodies of celebrity images that are widespread on the internet and electronic media. It is argued that the First Amendment defence allows the courts in America to achieve this balance between the celebrity and the consumers/audience to a considerable extent. This is unlike the tort of passing off which does not provide any defence for the protection of the consumers/audience. In Part V it is argued that the courts in Ireland (if and when they are confronted with this problem) should follow the approach of the Canadian courts as this will aid them in achieving a balance between the competing interests of the celebrity and that of the consumers/audience.
II – The Right of Publicity in the United States

The right of publicity can be described as the right of every man to control the commercial use of his image or identity and it protects the associative value that celebrities such as actors and sportsmen bring to products and services through endorsements. The right of publicity was first recognised in 1953 in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* The existence of a right of publicity was affirmed by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*

For a plaintiff to succeed on a right of publicity claim, he must establish that he has been identified by the defendant’s use and that there was a commercial appropriation of the associative value of his identity. However, the defendant can also argue that this use of the plaintiff’s identity is shielded by the First Amendment.

There is a very broad spectrum of features or indicia of identity that a celebrity can seek to protect from unauthorised use under the right of publicity. The courts in the United States have allowed claims by celebrities seeking to prohibit the unauthorised use of look-a-likes, sound-a-likes, a catchphrase used by

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16 According to *The Restatement (Third) of Unfair Competition*, anyone "...who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability." See, *Restatement (Third) Of Unfair Competition*, § 46 (1995).

17 Halpern has pointed out that "...the phenomenon of celebrity generates commercial value. A celebrity's persona confers an associative value, or economic impact, upon the marketability of a product. Whether we like commercialisation of personality or not, the economic reality persists. The market place recognises an associative economic value." See, S. W. Halpern, “The Right of Publicity: Commercial Exploitation of the Associative Value of Personality” (1986) 39 Vand. L. Rev. 1199, 1242-43.

18 In the words of Bird C.J., "[S]uch commercial use of an individual's identity is intended to increase the value or sales of the product by fusing the celebrity's identity with the product and thereby siphoning some of the publicity value or good will in the celebrity's persona into the product. This use is premised, in part, on public recognition and association with that person's name or likeness, or an ability to create such recognition." See, *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979).

19 202 F.2d 866 (2nd Cir. 1953).


21 The First Amendment to the United States Constitution provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.


24 *Midler v. Ford Motor Co.*, 848 F.2d 460 (9th Cir. 1988).
a presenter on a Television show, a race-car driver’s car, and a nickname, among others. A celebrity has also successfully challenged the unauthorised use of a robot to imitate her personality.

Several theories have been postulated to justify the existence of the right of publicity. The task of finding a theoretical justification for this right is not made easier by the fact that in the first case that established the right of publicity in the United States, the court blatantly refused to offer any justification for its decision and was content with stating that the right of publicity was distinct from the right to privacy. According to the court:

Independent of a right to privacy, a man has a right in the publicity value of his photograph i.e., the right to grant the exclusive privilege of publishing his picture...Whether it be labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

Due to space constraints, no attempt will made here to find the correct theoretical justification for the right of publicity but it suffices to note that the following theories have been identified by various writers as possible justifications for the right of publicity: the Lockean theory of property, the need to prevent unjust enrichment, incentive theory (incentive to invest in the development of a

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26 Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).
28 White v. Samsung Electronics America, Inc. 989 F.2d 1512 (9th Cir. 1993).
30 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2nd Cir. 1953).
32 Carty, supra note 29 at 247.
public persona), allocative efficiency theory, the prevention of consumer misinformation, and the theory of autonomous self-definition.

A. The First Amendment Defence

The First Amendment to the American Constitution which guarantees the freedom of expression provides a very useful defence for defendants sued by celebrities for breach of their right to publicity. In balancing the interests of the celebrities and the defendants, the American courts employ several tests to determine whether the defendant’s use of a celebrity’s image can be protected under the First Amendment. Three of the tests used by the American courts will be examined here viz., the direct balancing test, the transformative elements tests, and the predominant use test.

The direct balancing test first appeared in Estate of Presley v. Russen, where the court held that though the defendant’s use of the likeness of Elvis Presley “contained an informational and entertainment element”, the unauthorised use was “primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society.”

In 1996, the Tenth Circuit applied this approach in Cardtoons v. Major League Baseball Players Association. The test as formulated by the court succinctly captures the essence of this approach:

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38 Ibid. at 1339.
39 Ibid. at 1339.
40 95 F.3d 959 (10th Cir. 1996) [hereinafter Cardtoons]. The direct balancing test was also applied by the Eight Circuit in CBC Distribution and Marketing Inc. v. Major League Baseball Advanced Media L.P, 505 F 3d 818 (8th Cir. 2007); and it has also been applied by some courts in California, see, Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146, 1182–83 (C.D. Cal. 2002). The Major League Baseball Players Association is hereinafter referred to as the MLBPA.
his case...requires us to directly balance the magnitude of the speech restriction against the asserted governmental interest in protecting the intellectual property right. We thus begin our analysis by examining the importance of Cardtoons’ right to free expression and the consequences of limiting that right. We then weigh those consequences against the effect of infringing on MLBPA’s right of publicity.\textsuperscript{31}

In applying the test, the court considered the value of parodies of celebrities vis-à-vis the justifications for protecting the right of publicity. According to the court:

Cardtoons’ interest in publishing its parody trading cards implicates some of the core concerns of the First Amendment...A parodist can, with deft and wit, readily expose the foolish and absurd in society... Parodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society... Because celebrities are an important part of our public vocabulary, a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of the idea or value that the celebrity symbolizes in society. Cardtoons’ trading cards, for example, comment on the state of major league baseball by turning images of our sports heroes into modern-day personifications of avarice... Thus, elevating the right of publicity above the right to free expression would likely prevent distribution of the parody trading cards. This would not only allow MLBPA to censor criticism of its members, but would also have a chilling effect upon future celebrity parodies.\textsuperscript{42}

After applying this test, the court decided in favour of Cardtoons by holding that the negative effect of upholding Cardtoon’s free speech on the right of publicity of MLBPA was negligible.\textsuperscript{43} The Cardtoons case shows one of the basic strengths of the direct balancing test i.e. it attempts to make an assessment of the benefits and harms to both parties involved in a conflict between free speech and publicity rights.\textsuperscript{44}

\textsuperscript{31} 95 F.3d 959, 972 (10th Cir. 1996).
\textsuperscript{42} Ibid. at 972-973 (Emphasis added, internal citations and quotations omitted).
\textsuperscript{43} Ibid. at 976.
\textsuperscript{44} See, D. Tan, “Political Recoding of the Contemporary Celebrity and the First Amendment” (2011) 2 Harvard Journal of Sports & Entertainment Law 1, 25 [hereinafter Tan].
The transformative elements test is derived from the fair use defence for copyright infringement under American copyright law\(^{45}\) and it was first applied by the California Supreme Court in *Comedy III Productions Inc. v. Saderup Inc.*\(^{46}\) The test as formulated by the court is to the effect that:

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\text{When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist... On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.}^{47}
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However, the transformative elements test has several flaws. To start with, the fair use test itself is one of the most controversial and unpredictable aspects of copyright law.\(^{48}\) In addition, in the absence of any definite criteria, this test can also result in judges making assessments as to the artistic quality\(^{49}\) of a work based on irrelevant factors.\(^{50}\)

\(^{45}\) According to the American *Copyright Act of 1976, 17 U.S.C. § 107(1)*, in determining whether the use made of a copyrighted work is fair, the factors to be considered include, *inter alia*, “the purpose and character of the use”. This test has been termed the transformative test under copyright law. See, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–85 (1994).

\(^{46}\) 21 P.3d 797 (Cal. 2001).

\(^{47}\) Ibid. at 808, (internal citations and footnotes omitted).

\(^{48}\) See G. Franke, “The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?” (2006) 79 Southern California Law Review 945. According to Franke, “…the test has proven to be extremely vague, as the widely inconsistent holdings of courts that have applied it demonstrate. This is problematic because a vague standard significantly chills free expression - if the
The predominant use test proposed by Mark Lee, although rejected in a California court, was applied by the Missouri Supreme Court in *Doe v. TCI Cablevision*. Essentially, the test distinguishes between predominantly expressive uses and predominantly commercial uses. In the case of the former, the unauthorised use will be protected, but the unauthorised use will not be protected in the latter situation. The Missouri court was trying to improve upon the perceived shortcomings of the transformative elements tests, which according to the court, was unhelpful where the expressive use has both commercial and expressive components.

The court in criticising the transformative elements test, noted that the transformative elements test will protect the unauthorised use once it possesses any expressive elements regardless of the commercial elements in the use. The predominant use test can be extremely useful in protecting works that contain predominantly expressive speech thus giving more protection to artistic and political speech. It equally improves upon the transformative elements test, in the sense that mere visual transformation is not enough to make a work protected; there must be a predominant expressive use.

The basic flaw with this test is that its definitional approach, with commercial advantage as its foundation, does not enable the court applying the test to engage in the kind of balancing that considers the benefits and harms to parties unlike the direct balancing approach that was applied in *Cardtoons*. In other words,

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23 110 S.W.3d 363, 374 (Mo. 2003) [hereinafter *Doe*].

24 According to the court in *Doe*, quoting Mark S. Lee, "[i]f a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some ‘expressive’ content in it that might qualify as ‘speech’ in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight." *Doe*, *Ibid.* at 374.


27 Tan, supra note 44 at 28.


once there is any perception of any commercial element in the defendant’s unauthorised use, there is a risk of it being held to be predominantly commercial irrespective of the quality of the political or artistic components in the use.

It can be argued that the ruling in Doe should be confined to the facts of the case because the use by the defendants in that case was clearly commercial. The defendants admitted that the use was not to make any expressive comment about the plaintiff and the sales of the products were also directly targeted at the fan base of the plaintiffs. Beyond the peculiar facts of Doe, the test cannot be seen as offering any guidance as to how courts should determine what qualifies as predominantly expressive use. David Tan has suggested that the attempt in Doe at evaluating whether expressive components predominate over the commercial components shares much resemblance with the direct balancing approach and the evaluation could also have been performed under the rubric of the direct balancing approach.

Thus, the most satisfactory test appears to be the direct balancing test because it attempts to accord equal weight to the interests of both the celebrity and the defendant. The transformative elements test appears to attach more weight to the interest of the defendant who can prove that he was creative in his unauthorised use of the celebrity's image irrespective of the fact that the defendant's sole motivation was to make profits from such unauthorised use. Also, the predominant use test seems to be skewed in favour of the celebrity who can establish that the defendant’s motive was to make profits from the unauthorised use of his image irrespective of the fact that the defendant’s primary objective was to utilise his artistic talents and freely express himself.

The crucial point to note however is that the courts in America recognise the need to curtail the right of publicity and prevent it from being used as a tool to restrict the exercise of the right to freedom of expression. This is unlike the common law tort of passing off which does not make provision for the courts to examine the likely effect of the protection of the image rights of celebrities on the right to freedom of expression.

60 Doe, supra note 53 at 374.
61 Tan, supra note 44 at 30.
62 Ibid.
III – Developments in the UK, Australia and Canada: Exploring a Range of Options with the Torts of Passing Off and ‘Appropriation of Personality’

A. The United Kingdom

In the United Kingdom, the ingredients of the common law tort of passing off were clearly set out by the House of Lords in *Reckitt & Colman Products Ltd. v. Borden Inc.* These can be summed up as: goodwill or valuable reputation on the part of the claimant or injured party, deceptive conduct or misrepresentation by the defendant, and damages suffered by the claimant as a result of the defendant’s misrepresentation.

According to David Tan, a comparison between the right of publicity applicable in the United States and the tort of passing off in the United Kingdom reveals that they are similar in the sense that both actions recognise that the law should protect the commercial interests of celebrities and prevent unlawful profiting. In relation to celebrities, while the right of publicity protects the proprietary interest in the identity of the celebrity, the tort of passing off seeks to protect the proprietary interest in the goodwill or reputation of the celebrity.

However, unlike the tort of passing off, the right of publicity does not require evidence of the misrepresentation or likelihood of confusion by consumers as to the celebrity’s association with, or endorsement of, the defendant’s use. In addition, unlike in the United States where the defendants can rely on the First Amendment to protect themselves from liability by arguing that their use of the celebrity image can be classified as falling within the realm of protected speech, there is no such defence under the tort of passing off in the United Kingdom.

It was initially difficult for celebrities in the United Kingdom to rely on the tort of passing off to protect their image rights. This was because of the requirement that there must be a “common field of activity” between the plaintiff and the

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63 [1990] 1 All E.R. 873.
65 Ibid. at 292.
66 Ibid. at 292.
defendant before an action in passing off can succeed. Thus, passing off could not provide a remedy for a celebrity whose image had been used to advertise the sale of products with which he had no connection in his primary career.67

The requirement of a “common field of activity” was introduced by Wynn-Parry J. in McCulloch v. May68 where a famous radio presenter attempted to prohibit the use of his name and reputation from being used to market the defendant’s breakfast cereal. According to Wynn-Parry J.:

[O]n the postulate that the plaintiff is not engaged in any degree in producing or marketing puffed wheat, how can the defendant, in using the fancy name used by the plaintiff, be said to be passing off the goods or the business of the plaintiff? I am utterly unable to see any element of passing off in this case.69

Cox and Schuster however note that by the beginning of the twenty first century, the requirement of a “common field of activity” was seen as unrealistic and anachronistic because it had become a widespread practice for celebrities to generate income from endorsement of products which had no connection with their field of primary career.70 It was obvious that if one was a celebrity, then there were only “few conceivable areas of business with which one cannot potentially have a common field of activity”.71

It was therefore not surprising that in 2002, in Irvine v. Talksport Ltd,72 a celebrity was finally able to rely on the tort of passing off to protect his image rights in England. In that case, the defendants had digitally altered the photograph of the plaintiff, a well-known motor racing driver, and used the altered photograph on the cover of the defendant’s brochure as part of a promotional campaign for the

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67 Cox & Schuster, supra note 5 at 329.
69 Ibid. at 67.
70 Cox & Schuster, supra note 5 at 330.
71 Ibid. N. Buckley also notes that “[s]ales from merchandising royalties and various endorsement earnings became increasingly widespread, and in many instances eclipsed the celebrity or originator’s capacity to generate income from their core activity. This commercial practice of selling of one’s name or image became an intrinsic aspect of celebrity...” N. Buckley, supra note 5 at 129.
72 [2002] 2 All E.R. 414 (H.C.) [hereinafter Irvine].
defendant’s radio station. Mr Irvine challenged the use of his photograph by bringing an action for passing off on the ground that the distribution of the brochure amounted to a false endorsement of the radio station. In deciding the matter, Laddie J., adopted a realistic stance and noted that “passing off is closely connected to and dependent upon what is happening in the market place.” He was willing to take judicial notice of the fact that celebrities commercially exploit their images by endorsing products that were outside their field of expertise. He therefore had no difficulty in holding that “it is not necessary to show that the claimant and the defendant share a common field of activity.”

According to Laddie J., for a plaintiff to succeed in an action for passing off based on false endorsement two requirements must be met. First, at the time of infringement, the plaintiff must have had a significant reputation or goodwill and secondly, the actions of the defendant must give rise to a false message which would be understood by a significant section of the market that the plaintiff had endorsed the defendant’s goods or products. Mr Irvine was successful on both grounds.

Thus, it is now possible for celebrities in the United Kingdom to restrict the unauthorised use of their images through the tort of passing off as long as they can fulfil the two requirements set out by Laddie J. in Irvine. It is not clear from the decision of Laddie J. whether the courts in England have to consider if the restriction on the unauthorised use of celebrity images will negatively impact the

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73 The defendants had obtained a picture of Mr Irvine holding a mobile phone and they altered the picture by cutting out the mobile phone and replacing it with the image of a portable radio labelled “Talk Radio”. Irvine, para. 7.
74 Ibid. para. 13.
75 “Even without the evidence given at the trial in this action, the court can take judicial notice of the fact that it is common for famous people to exploit their names and images by way of endorsement. They do it not only in their own field of expertise but, depending on the extent of their fame or notoriety, wider afield also. It is common knowledge that for many sportsmen, for example, income received from endorsing a variety of products and services represents a very substantial part of their total income.” Ibid. para. 39.
76 Ibid. para. 38.
77 Ibid. para. 46.
78 Ibid.
79 The English Court of Appeal subsequently increased the damages awarded to Mr Irvine from £2,000 to £25,000. See, Irvine v. Talksport (Damages) [2005] 2 All E.R. 881 (C.A.).
80 Cox & Schuster, supra note 5 at 335; Carty, supra note 29 at 253. See also the recent case of Rihanna Fenty & Ors. v. Arcadia Group Brands Ltd. & Anor., [2013] EWHC 2310 (Ch.) where it was held that the sale by the defendants of t-shirts bearing Rihanna’s image without her approval was an act of passing off.
right to freedom of expression.\textsuperscript{81} Although Laddie J., in the last paragraph of his judgment,\textsuperscript{82} referred to the UK Human Rights Act of 1998 and Article 8 of the European Convention for the Protection of Human Rights (E.C.H.R.) which deals with the right to respect for private and family life, no reference was made by the judge or counsel to Article 10 of the Convention which deals with the right to freedom of expression. It is not clear why neither the court nor counsel in Irvine raised the issue of freedom of expression. This may be due to the false notion that passing off cannot necessarily have a negative impact on freedom of expression. As pointed out by Wadlow:

\begin{quote}
Since the action for passing-off is by definition confined to the repression of damaging misrepresentation, and lies only at the suit of one trader against another, one would like to conclude that it is inherently incapable of being used to suppress any legitimate form of free expression and that no issues under art.10 of the European Convention on Human Rights are capable of rising. While undeniably true in theory, the proposition is not entirely borne out in practice.\textsuperscript{83}
\end{quote}

Wadlow referred to the case of \textit{Clark v. Associated Newspapers}\textsuperscript{84} to illustrate his point. The claimant in that case, Alan Clark, was a politician, historian and diarist. The defendants had made the claimant the subject of a spoof diary column in the London \textit{Evening Standard}. The publications by the defendant were meant to parody the publication of the claimant’s “Diaries”.\textsuperscript{85} The claimant brought a claim for passing off and false attribution of authorship under copyright law. With regards to the claim for passing off, the court stated that the issue was whether a substantial number of readers of the \textit{Evening Standard} had been misled or were likely to be misled as to the authorship of the articles. However, because the defendants had falsely attributed authorship of the articles to the claimant, it was held that this was misleading and had put the claimant’s reputation and goodwill as an author at risk.\textsuperscript{86} It is not clear

\begin{footnotes}
\textsuperscript{81} David Tan notes that, “[i]n the UK, Australia and Singapore, there is no independent free speech defence in a passing off action.” Tan, supra note 64 at 303.
\textsuperscript{82} Irvine, supra note 72 para. 57.
\textsuperscript{84} [1998] R.P.C. 261 [hereinafter Clark].
\textsuperscript{86} Although the court held that the defendants could continue to publish parodies of the “Diaries” as long as there was no attribution of authorship to the plaintiff. See, Clark, supra note 84 at 281.
\end{footnotes}
how the court expected the defendants to evoke the identity or image of Alan Clark in their parody apart from using his name because for a parody to be effective, the identity of the object of the parody needs to be clearly identifiable. This shows the uphill task likely to confront defendants seeking to argue that their use of a celebrity’s image or identity is justified as either an artistic or political expression.

It is therefore clear that, unlike defendants in the US, defendants in the UK cannot rely on the right to freedom of expression to escape liability once the plaintiff has fulfilled all the requirements needed to succeed under the tort of passing off. David Tan has even suggested that the “passing off action may, in certain circumstances, extend even greater protection to celebrities than in a US right of publicity claim, where the First Amendment defence increasingly is used to curb the expanding proprietary reach of the celebrity identity.”

B. Australia

The courts in Australia, unlike England, have been more willing to extend the tort of passing off to protect the image rights of celebrities. As early as 1960 in Henderson v. Radio Corp. Pty. Ltd. the Supreme Court of New South Wales had refused to recognise as valid, the requirement of a “common field of activity” established in McCulloch v. May. According to the court, once deception and damages have been established it is not necessary to introduce another factor as a condition for the court’s power to intervene. The court made it clear that “once it is proved that A is falsely representing his goods as the goods of B, or his business to be the same as or connected with the business of B, the wrong of passing off has been established and B is entitled to relief”.

In Henderson, the defendant had used the image of the plaintiffs, who were popular ballroom dancers, on the cover of its gramophone record. The court held that this constituted passing off. According to Manning J.:

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87 Tan, supra note 64 at 309. David Tan however contends that the passing off action is not necessarily easier to establish because, unlike the right of publicity, the passing off action requires the claimant to prove an additional element of misrepresentation of the celebrity’s association with the defendant. Whereas under the right of publicity, as long as the claimant can prove that his identity has been misappropriated or used without authorization, there is no need to prove misrepresentation.


90 Ibid. at 234.
The result of the defendant’s action was to give the defendant the benefit of the plaintiffs’ recommendation and the value of such recommendation and to deprive the plaintiffs of the fee or remuneration they would have earned if they had been asked for their authority to do what was done. The publication of the cover amounted to a misrepresentation of the type which will give rise to the tort of passing off, as there was implied in the acts of the defendant an assertion that the plaintiffs had ‘sponsored’ the record.91

In the same case, Evatt C.J. and Myers J. went as far as stating that “the wrongful appropriation of another’s professional reputation is an injury in itself, no less...than the appropriation of his goods or money.”92 This suggestion that wrongful appropriation was enough find to liability is similar to the American right of publicity which only requires wrongful appropriation of a celebrity’s image or identity and not misrepresentation.

The suggestion in Henderson that misappropriation of another person’s reputation was sufficient to find liability was applied by Pincus J. in Hogan v. Koala Dundee.93 In that case, Pincus J. stated that it was no longer necessary to establish misrepresentation to prove passing off in Australia. 94 If this approach had been sustained by the Australian courts, then there would have been no intrinsic difference between the right of publicity in America and the tort of passing off in Australia in cases of unauthorised uses of celebrity images.95 However, this approach was not followed in subsequent cases. In Hogan v. Pacific Dunlop,96 the court reverted

92 Ibid. at 595.
94 The basis of the decision was that it was enough to establish “wrongful appropriation of a reputation or, more widely, wrongful association of goods with an image properly belonging to the applicant.” Ibid. at 520. According to Terry, “[r]e the significance of Hogan v. Koala Dundee Pty. Ltd. is that the juridical basis for the passing off action is misappropriation rather than misrepresentation.” A. Terry, “Exploiting Celebrity: Character Merchandising and Unfair Trading”, (1989) 12 U.N.S.W. Law Journal 204 at 238. See also, A. Terry, “Image Filching’ and Passing Off in Australia: Misrepresentation or Misappropriation? Hogan v. Koala Dundee Pty. Ltd.”, (1990) 12:6 E.I.P.R. 219.
to the traditional view that it was necessary to establish misrepresentation in order to bring a successful claim in passing off.\textsuperscript{97}

Thus, one can conclude that celebrities in both UK and Australia can bring an action in passing off to challenge the unauthorised use of their image where such use creates an impression of false endorsement of the defendant’s product by the celebrity.

C. Canada

Unlike the UK and Australia, the Canadian courts have opted to create a new tort to protect celebrities from the unauthorised use of their images and identities.\textsuperscript{98} The new tort, termed “appropriation of personality”, was created in 1973 in \textit{Krouse v. Chrysler Canada}.\textsuperscript{99} In that case, the Ontario Court of Appeal held that:

... [t]here may well be circumstances in which the Courts would be justified in holding a defendant liable in damages for appropriation of a plaintiff’s personality, amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff...\textsuperscript{100}

This new tort has been described as a hybrid of the American right of publicity and the common law tort of passing off.\textsuperscript{101} It however appears to be closer to the right of publicity than passing off because the focus appears to be on establishing that the defendant has misappropriated a celebrity’s image or identity and it is not necessary to prove misrepresentation.\textsuperscript{102} In addition, the Canadian courts also consider the new...

\textsuperscript{97} In the \textit{Pacific Dunlop case}, the trial court did not make any real attempt to analyse the full import of the decision of Pincus J. in the \textit{Koala Dundee} case. The court merely stated that “misappropriation of reputation without the necessary kind of misrepresentation will not suffice for passing-off.” See [1988] F.C.A. 361 at para. 95. Commenting on the state of the law in Australia, Zapparoni notes that, “at least in an overt sense, Australian courts reject a model that provides protection against all unauthorised uses of celebrity identity in favour of a model based largely on misrepresentation and the requirement of public deception or confusion.” (Emphasis in the original). See, R. Zapparoni, “Propertising Identity: Understanding The United States Right of Publicity and Its Implications – Some Lessons for Australia” [2004] 28 Melbourne University Law Review 690 at 697.


\textsuperscript{99} [1973], 1 O.R. (2d) 225, 13 C.P.R. (2d) 28 (C.A.) (Ontario Court of Appeal).

\textsuperscript{100} Ibid. at 241.

\textsuperscript{101} Howell, supra note 98 at 493.

\textsuperscript{102} See, \textit{Athans v. Canadian Adventure Camps Ltd.} [1977] 80 D.L.R.3d 583 (Ont. H.C.) (Can.). However, dicta in \textit{Gould Estate v. Stoddart Publishing Co.}, (1996) 30 O.R. (3d) 520 seems to suggest...
tort to be protective of property rights the same way the American courts regard the right of publicity.\textsuperscript{103}

The unique aspect of the Canadian approach to the new tort is that the courts recognise that there should be a balance between the interest of the celebrity and the public interest.\textsuperscript{104} In Gould Estate v. Stoddart Publishing Co.\textsuperscript{105} the court acknowledged that Canada does not have a constitutional provision similar to the American First Amendment. Nevertheless, it was held that “no principled argument has been advanced to suggest that freedom of expression considerations should not animate Canadian courts in identifying the public interest and placing limits on the tort of appropriation of personality.”\textsuperscript{106}

In determining how to balance the interest of the celebrity with that of the public the court applied the “sales vs. subject” test. According to the court:

\[\text{Sales constitute commercial exploitation and invoke the tort of appropriation of personality. The identity of the celebrity is merely being used in some fashion. The activity cannot be said to be about the celebrity. This is in contrast to situations in which the celebrity is the actual subject of the work or enterprise, with biographies perhaps being the clearest example. These activities would not be within the ambit of the tort. To take a more concrete example, in endorsement situations, posters and board games, the essence of the activity is not the celebrity. It is the use of some attributes of the celebrity for another purpose. Biographies, other books, plays, and satirical skits are by their nature different. The subject of the activity is the}\]

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\textsuperscript{103} See, Athans v. Canadian Adventure Camps Ltd. [1977] 80 D.L.R. (3d) 583 where the court stated that “it is clear that Mr. Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded.”

\textsuperscript{104} Bolger, supra note 95 at 29.


\textsuperscript{106} Ibid. at para. 22. The court (at para.19) had earlier referred to the American case of Estate of Elvis Presley v. Russen where the court applied the direct balancing test.
celebrity and the work is an attempt to provide some insights about that celebrity.\textsuperscript{107}

Thus, unlike the position in Australia and UK, the Canadian tort of appropriation of personality recognises that the broad protection of the image rights of celebrities can have a negative impact on the right to freedom of expression. The tort of passing off as applied in Australia and UK does not provide clear guidelines as to how the courts should deal with potential conflicts between the image rights of a celebrity and a defendant exercising his right of free speech. It can be argued that if the “sales vs. subject” test had been applied in the English case of \textit{Clark v. Associated Newspapers} (discussed above) it is possible that the court would have reached a different conclusion because the defendants’ work was essentially a parody of Clark’s work. The parody would have qualified as a work where the “subject of the activity is the celebrity” and “an attempt to provide some insights about that celebrity.”

It is therefore preferable for Irish courts to adopt a position similar to the Canadian approach. This is because it affords the court the opportunity to take into consideration the public interest in freedom of expression when deciding whether or not to protect the image rights of celebrities.\textsuperscript{108} It now becomes pertinent to examine why it is important for courts to take into cognizance the interests of the consumers and audience especially as it relates to their use of celebrity images in the exercise of their right of freedom of expression.

\section*{IV – The Role of the Consumers/Audience in the Creation of Celebrities}

David Tan has argued that “the celebrity personality...is a collective product of a celebrity trinity comprising the famous individual, the audience and the cultural producers.”\textsuperscript{109} Cultural producers\textsuperscript{110} here refer to the media professionals involved in the production, management, and distribution of celebrities such as advertisers, brand managers, radio and television stations, and one can add to this list social...

\textsuperscript{107} Ibid. para. 23. See also, \textit{Horton v. Tim Donut Ltd.}, (1997) 75 C.P.R. (3d) 451.
\textsuperscript{108} Irish courts cannot ignore the need to protect freedom of expression because the Irish Constitution protects the freedom of speech in Article 40(6)(1)(i). In addition, Article 10 of the European Convention on Human Rights [hereinafter E.C.H.R.], which protects the right to freedom of expression, has been incorporated into Irish law via the E.C.H.R. Act of 2003.
\textsuperscript{109} Tan, \textit{infra} note 64 at 291.
networking sites on the internet like Facebook, Twitter, YouTube etc. The audience is the consuming public that buys products made by or associated with celebrities – “those who consume the celebrities”. The famous individual is of course the celebrity.

David Tan further notes that:

[David Tan] he celebrity as a widely recognized cultural sign, can encourage the public who identify with the attributed ideological values [associated with the celebrity] to consume the celebrity itself as a commodity (for example, by watching the movies of a particular actor) or products associated with the celebrity (for example, by purchasing celebrity-endorsed products)...Thus, increasingly, when consumers buy various consumer goods, they ‘buy into’ the significations of these commodities in the construction of their self-identities.111

The consuming public often associate fame and glamour with musicians and film stars as well as sport athletes, and they will therefore want to be connected in any way with these celebrities. Once these celebrities endorse any product, their fans will not hesitate to purchase those products. In this context, such celebrities have become encoded with certain meanings that are admired by their fans and consumers. Musical artistes like Beyonce Knowles and Rihanna are considered as fashion icons.112 David Beckham, a football star, has also become “a menswear style icon, with Dolce & Gabbana even crediting him with revolutionising the male approach to fashion.”113

According to David Tan, as a result of the

meticulously conducted public personae of many celebrities – particularly movie stars and sport icons – the semiotic sign of these well-known

111 Tan, supra note 64 at 296.
112 In Rihanna Fenty & Ors. v. Arcadia Group Brands Ltd. & Anor., [2013] E.W.H.C. 2310 (Ch.) at para. 45, Birss J. noted that “I find on the evidence that in 2012 Rihanna was and is regarded as a style icon by many people, predominantly young females aged between 13 and 30. Such people are interested in what they perceive to be Rihanna’s views about style and fashion. If Rihanna is seen to wear or approve of an item of clothing, that is an endorsement of that item in the mind of those people.”
individuals is usually ‘decoded’ by the audience to represent a defined cluster of meanings. While movie stars are often represented as objects of aspiration, glamour and desire, the celebrity athlete signifies heroism, human transcendence and a love for the pure authentic game.\(^{114}\)

In other words, the audience or consumers usually interpret the personality of their cherished celebrity to fit their own view or perspective of life. They construe the celebrities as individuals who have attained heights that they can also strive to reach.

It is these encoded meanings of celebrities that advertisers latch upon and utilise to sell their products. These encoded meanings of the persona of the celebrity can be used to add value to products and increase sales output.\(^{115}\) The essential point to note, however, is that “a particular celebrity individual enjoys goodwill in his or her identity only because consumers have vested [encoded] meanings in his or her readily recognisable persona.”\(^{116}\)

As poignantly argued by Michael Madow:

\[^{114}\text{Tan, supra note 64 at 296.}\]
\[^{115}\text{Ibid.}\]
\[^{116}\text{Ibid. at 297.}\]
\[^{117}\text{Madow, supra note 1 at 355.}\]
The audience or consuming public therefore plays a crucial role in the creation (and also the destruction) of celebrities.\textsuperscript{118} It will appear that it has become easier for the audience to create celebrities with the emergence of the internet particularly through the use of social media like YouTube, Twitter and Facebook. As David Tan rightly notes:

\textsuperscript{118} David Tan notes that, “\textsuperscript{118}Writings in cultural studies have observed that fame is in part defined and conferred upon a celebrity individual by the consuming public, and in part constructed and propagated by the cultural producers.” Tan, supra note 64 at 305.

In the 21\textsuperscript{st} century, the escalating growth in the range of media outlets and the vastly increased speed of circulation of information can combine to create the phenomenon of a vortex effect. In the midst of a vortextual moment, the public persona of a celebrity can be born almost instantaneously, when newspapers, television, radio, tabloids, columnist, internet chatrooms and blogs are all drawn into the same topic. Individuals from almost any field, be it film, sport, music, television, business or even cookery, can be elevated to the status of celebrity. It is this widespread public identification – both of the visual image and the embodied values/ideals – that defines a celebrity, and consequently imparts to it a commercial value in the context of consumption.\textsuperscript{119}

The above analysis can be illustrated with the example of the emergence of the teenage music celebrity Justin Bieber. Bieber’s journey to limelight began in 2008 after “his mother began posting videos of the musical child prodigy singing on YouTube”. Bieber was later “discovered by Scooter Braun, the former executive producer for the record label So So Def.”\textsuperscript{120} It can be argued that Bieber’s celebrity status was created by fans on YouTube and it remains one of the mediums through which his celebrity status has been sustained and developed.

This does not however mean that it is now easier for individuals to capitalise on the strength of the internet to transform themselves into celebrities. A similar attempt in 2011 by another young teenager, Rebecca Black to step into the limelight was swiftly crushed by the audience on YouTube. She tested the waters by releasing

\textsuperscript{119} Ibid. at 300.

\textsuperscript{120} See, Luis-Enrique Arrazola, “Justin Bieber, This is Your Life: On the Star’s 18th Birthday, We Have a Look at His Top Career Milestones” National Post, (2 March 2012) available online at <http://arts.nationalpost.com/2012/03/01/justin-bieber-this-is-your-life-on-the-stars-18th-birthday-we-have-a-look-at-his-top-career-milestones/> (date accessed: 23 July 2012).
a single video of a song titled “Friday” on YouTube but she was immediately confronted with bitter criticisms about the quality of both the lyrics and her voice.\textsuperscript{121} Black’s attempt to attain celebrity status was thus a failure.\textsuperscript{122} It can therefore be said that the audience in the digital era have the power to easily create and destroy a celebrity. Before an individual can emerge as a celebrity, he or she must have earned the approval of a considerable number of people that constitute the audience.

If it is acknowledged that the audience or consumers play a huge role in the creation of celebrities then it should not be difficult to also recognise the fact that the audience or consumers may also be interested in using the image or personality of those celebrities to communicate their ideas to the public. This can take various forms like fan fiction, music covers, parodies, satires, internet memes, and caricature drawings of celebrity images. All these activities abound and thrive on the internet\textsuperscript{123} and as Rebecca Tushnet notes, “\textsuperscript{124}with the rise of video and social networking websites that easily allow fans to reach fellow fans \ldots fan creations are increasingly prominent elements of popular online culture.”\textsuperscript{124} Apart from the fact that the images of celebrities can be used for artistic expression through fan fiction and funny drawings, celebrity images can also be used to convey political ideologies.\textsuperscript{125}

The audience and consumers of celebrities are therefore not dormant participants in the creation of celebrity images. Since they contribute to the creation of celebrity images they should also be entitled to make use of those images to a reasonable extent to express their ideas. As rightly pointed out by Richard Haynes, “fandom is also about the appropriation of images and information to make new


\textsuperscript{122} Nevertheless, it can still be argued that Rebecca Black is already a famous person though with a lot of negative publicity.

\textsuperscript{123} Writing in the context of copyright law, Rebecca Tushnet notes that fan practices of appropriating and reworking mainstream copyrighted works into unauthorised derivatives include “writing fan fiction based on characters and situations in popular works such as the Harry Potter series, drawing fan art showing those characters, editing music videos using footage from television shows and movies \ldots” Any of these activities can also infringe the image rights of celebrities involved in such movies or music videos. Rebecca Tushnet, ‘Creating in the Shadow of the Law: Media Fans and Intellectual Property’, in P. K. Yu, ed., Intellectual Property and Information Wealth – Issues and Practices in the Digital Age, Vol. 1 (Westport: Praeger Publishers, 2007) 250 at 262.

\textsuperscript{124} Ibid. at 263.

\textsuperscript{125} Writing from a cultural studies perspective, David Tan notes that “different groups in society can use particular celebrity images in a variety of ways to represent their cultural identities and convey their political ideologies.” Tan, supra note 44 at 6.
cultural meanings...”\textsuperscript{126} Thus, any regime that seeks to protect the image rights of celebrities in this digital era should also recognise the right of the audience/consumers to express themselves artistically or politically through “connotative recoded uses of the celebrity sign”.\textsuperscript{127} It will appear that the American and Canadian regimes protect the interests of the audience and consumers better than the English and Australian regimes.

\textbf{V – Balancing the Interests of the Celebrity with the Public Interest: The Preferable Option for Ireland}

How should an Irish court resolve a matter involving a celebrity challenging the unauthorised use of his image or identity? It is now too late in the day to argue that celebrities are not entitled to control the commercial exploitation of their image and identity. At the same time, the courts cannot ignore the public interest in ensuring that there is no unreasonable restriction on the right to freedom of expression.\textsuperscript{128} It is suggested here that a preferable approach will be for the Irish courts to adopt an approach similar to the one adopted by the Canadian courts i.e. develop a new tort to protect celebrities against the wrongful appropriation of their personality and also restrict the scope of the tort by taking into consideration the public interest in protecting freedom of expression.

The “sales vs. subject” test developed by the Canadian courts can serve as a useful starting point for an Irish court trying to balance the competing interest of the celebrity and the members of the public. Essentially, if the “sales vs. subject” test is properly applied, where the image or identity of a celebrity is appropriated mainly to publish a factual matter which is in the public interest then there should be no liability.\textsuperscript{129} In addition, parodies and satirical uses of celebrity images should not be prohibited.\textsuperscript{130}

\textsuperscript{127} Tan, supra note 44 at 41.
\textsuperscript{128} Article 40(6)(1)(i) of the Irish Constitution provides for the right of citizens to express freely their convictions and opinions. Also, the E.C.H.R. Act 2003 (which incorporates the E.C.H.R.) equally protects the right to freedom of expression.
\textsuperscript{129} Frazer, supra note 29 at 312.
\textsuperscript{130} Ibid. at 313.
The courts should allow the use of celebrity images as vehicles for social comment or criticism. As pointed out by Hazel Carty, free speech can be endangered when the protection afforded to image rights of celebrities allows them to impose their “preferred meaning” and prevent “different interpretations by others, though those interpretations may be used for powerful social criticism”.

Where the image of a celebrity is wrongly appropriated solely for commercial purposes particularly for commercial advertisements, then the celebrity should be allowed to prohibit such unauthorised use. Invariably, even after applying the “sales vs. subject” test, it will be left to the courts to determine whether to allow or prohibit the unauthorised use of a celebrity’s image based on the factual circumstances of each particular case.

**VI – Conclusion**

It is inevitable that the courts in Ireland will in the nearest future be confronted with the question of whether or not the image rights of celebrities should be accorded legal protection. The Irish courts can decide to follow either the American/Canadian approach or the Australian/English approach. It should however be noted that the former approach is more balanced than the latter approach. The extension of the tort of passing off to protect the image rights of celebrities without any consideration of the right to freedom of expression can have chilling effects on certain forms of artistic and political expressions.

The Canadian approach appears to be the best option in the circumstances and it can serve as a useful guide to the Irish courts. If this approach is adopted, it will prevent a situation where a celebrity converts the protection of his image rights into an instrument of private censorship.

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131 Carty, supra note 29 at 252.
132 Ibid.