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An author (eg. an actor) has the capacity to exploit their work (eg. a character or artificial personality) or material without others being able to copy that work. Copyright owners are entitled to monetary remuneration upon the use by others of their particular work. It also specifies the remedies available to an author in the event of the unauthorised exploitation of the subject matter of the copyright. These provisions allow the owner of a copyright to bring an action for infringement and to seek relief in the form of an injunction, award of damages or account of profits.

Performance is protected under the Copyright Act and arguably a character or personality created in the performance is also capable of protection and monopolisation under the Copyright Act. Tribute bands are excluded from infringement under the Copyright Act.

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Aspects of packaging as a trade mark is particularly relevant to personality insofar as the external representation of an actor or personality’s character or image may be a registrable trade mark e.g. the colour pink for the late Barbara Cartland, the external clothes and general get up of the characters Bob Downe and Dame Edna Everage.

Personality Rights in Australia
Ann Slater looks at possible avenues for Australians to protect performance rights and rights in personalities.

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sense" with the defendant record producers who had used the dancers' image on a dance record. The Court held that the plaintiffs had been presented as endorsing the defendant's record in the course of their professional activities. Subsequently, Australian courts accepted the broad proposition that an action for passing off lies where there is a misrepresentation by the defendant that the plaintiff has endorsed or approved a particular product, service or business.1

In Hogan v Koala Dundee Pty Ltd,2 Pinous J indicated there was a "degree of artificiality in deciding image-filching cases on the basis that the vice attacked is misleading the public about licensing arrangements". Subsequently, in Pacific Dunlop Ltd v Hogan3 the plaintiff complained of the use of a short sequence from the movie Crocodile Dundee in a television advertisement for a brand of shoes. In the course of his judgment in the Full Federal Court, Burchett J observed that:

The consumer is moved by a desire to wear something belonging in some sense to Crocodile Dundee. The arousal of that feeling by Mr Hogan himself could not be regarded as misleading, for then the value he promises the product will have is not in its leather, but in its association with himself. When, however, an advertisement he did not authorise makes the same suggestion, it is misleading, for the product sold by that advertisement really lacks the one feature the advertisement attributed to it."4

Despite his observations, Burchett J framed his decision squarely in the traditional terms of passing off, signalling that the court did not require an unequivocal representation of endorsement in order to make out the action.

This conservative approach was highlighted by the decision of the Federal Court in Honey v Australian Airlines Ltd5 where the athlete Gary Honey sought unsuccessfully to restrain the use of his photograph on advertising posters. Northrop J concluded that he was not satisfied that a reasonable number of persons, on seeing the poster would have concluded that the plaintiff had given his endorsement to Australian Airlines. Similarly, considerations applied in Newton-John v Scholl-Plough (Australia) Ltd.6

Defamation

At common law, a person's reputation is protected largely by the tort of defamation.

The law of defamation within Australia varies between each State and Territory. Some States apply the common law, others apply both the common law and statute, and finally, some States are governed solely by statutory provisions.

A defamatory statement is a statement which holds a person up to hatred, ridicule or contempt or tends to lower the person in the estimation of a right thinking ordinary decent Australian.

To be defamatory an imputation need have no actual effect on a person's reputation. A defamatory statement may be conveyed by words or visual images either singularly or in conjunction. An imputation may be conveyed even though it is not apparent on the face of the words alone.

A person will establish a cause of action in defamation if there are three elements present:

• that the words carry a defamatory imputation - "meaning";
• the matter is capable of identifying the person - "identification";
• the matter has been communicated to at least one other person - "publication".

It has been held that the use of a person's name without his authority may be restrained by an injunction, regardless of whether there is a defamatory imputation conveyed or not, if the use is calculated to cause his pecuniary loss.7

Again, although the law goes some way to protecting an individual's reputation, it does not provide an absolute right amounting to the prevention of the use or misuse of a person's likeness or character.

1 10 IPR
3 (1989) 14 IPR 398.
7 Tulley v Fry [1930] KB 467. See the judgment of Greer LJ at 478.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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