

Image control: how the ability to exercise commercial control over an image free-rides upon the right to keep information private.

In 1990 a celebrity actor lay badly injured in a hospital bed. Uninvited a journalist and photographer entered his room, interviewed him and took photographs. Allegedly the actor had given permission. 15 minutes later he had no recollection of the event. The court thought the actor might have wanted to 'sell' his own story of the injury and subsequent recovery and the actions of the journalist and photographer would undermine that strategy. At first instance the judge granted an order restraining publication of the story and of the pictures based on malicious falsehood. On appeal the court varied the order. The story and pictures could be published but all reference to the actor agreeing to the interview should be removed. Their lordships noted that the case was a 'graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision could be made to protect the privacy of individuals.'

In 2008 a self-made 'reality' celebrity was diagnosed with cancer. In 2009 she was subject to intense controlled media scrutiny as she made arrangements for the short remainder of her life which included getting married and undertaking painful treatment. The media celebrity is said to have made millions from the media attention surrounding her last months, money which will go towards her children's upbringing.

Yet there has been no legislation in the UK underpinning this control exercisable by the reality celebrity. Rather it has been 'privacy' as opined upon by the European Court of Human Rights and interpreted by the courts in England and Wales using the law of breach of confidence as viewed through the lens of the Human Rights Act 1998 that has enabled these developments. Key cases along the way have involved Naomi Campbell; the Douglas's; Caroline von Hannover; David Murray; Max Mosley; and Anastasios Reklou.

In England and Wales (and Scotland) the result, it seems, is that it is possible to exercise de facto control over the image – a power which free-rides upon dignitarian concerns but has none of the attendant rationales for why such control should be exercisable, whether it is desirable, how it should be exercised or what its limitations should be.

In discussing this area this presentation will:

1. Comment on the current state of the law in England and Wales (and Scotland) enabling control over the image tracing the key 'privacy' cases which have led to this position
2. Critique the justifications underpinning the power of positive exploitation
3. Compare the current position in England and Wales with other jurisdictions
4. Question whether it is inevitable that a publicity right will develop from, and free ride upon, a right to keep information private.

Professor Charlotte Waelde
Co-director SCRIPT
University of Edinburgh
Charlotte.Waelde@ed.ac.uk

