

Introduction to the Comparative Entertainment Law

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Time required for reading, including the .ppt files and solving the relevant tasks: 45 minutes

I. Introduction

During the course the participants will be familiarized with the several actors of the entertainment industry (performing artists, music publishers, producers of cinematographic works, radio and television organizations, authors of creative audiovisual softwares) and all the international and European legal instruments in the field of copyright and related rights as well the right of publicity. The theoretical frameworks will be filled with practical experience through international and European court cases with the relevant international and European contractual practices with special regard to the different license agreements.

After completing the course, the participants should be able to separate the different actors and their legal and economic interest of the creative industry, the overlaps between works of the copyright holders and other achievement created by the related rights holders, and last but not least the legal provisions regarding the different actors of the creative industry.

1. Right of publicity

Although the right of publicity does not belong to the realm of copyright or related rights, I consider it particularly interesting. On one hand, right of publicity is closely related to the performers. Performers are commonly known people. Their activity is valued not only by the community, but by the market as well. The most famous actors' names and lookalikes carries significant market value. Leading brands of the world prefer to advertise their products with the help of a celebrity.

Right of publicity is relevant not only because of the performing actors but because of the video game industry as well. Developers of video games are keen on creating as realistic virtual world as possible. In doing so, they are licensing trademarks, copyright protected contents, complete landscapes sometimes. There are games, where virtual alter egos of athletes are created. One of the best sold video game is the FIFA franchise, which highly relies on the lookalike and physical appearance of flesh and blood athletes.

There are similarities between intellectual property and the right of publicity. Both are absolute rights. Infringing this absolute right constitute a direct liability. The protected subject matter in case of intellectual property rights are the creations of the human mind, while in case if right of publicity, the image, appearance, voice or fame itself is protected. These elements are valuable assets which can be commercialized.

Although it is true that the fame itself has a quantifiable worth, its protection has not been recognized worldwide, at least not on that level, which is granted to the creations of intellectual property. It does not mean of course, that right holders of the right of publicity lack the sufficient protection. Not surprisingly, the model of the protection of image rights was developed in a Common Law country, namely in the United States, which is the one of

the biggest market of the world and a leading economic power. The protection defers from state to state. The United Kingdom itself does not have a code regulating the right of publicity, but it does not mean that protection is not granted. The Guernsey-solution is well-known. According to the law of this tiny island of Guernsey, the image rights contain a person's name, voice, signature, likeness, appearance. The right itself is a transferable right, so as the copyright, at least in the Common Law countries. The Guernsey-solution even grants the possibility to register the image rights. After the registration the protection lasts for three years. This is also a typical similarity between intellectual property and the right of publicity. The Anglo-Saxon legal tradition has developed a rich case law in the field of right of publicity. Especially in the United States several tests were invented by the courts, such as the Rogers-test or the Predominant use-test.

Right of Publicity

1. Do image rights deserve protection in the field of intellectual property law?
2. How can a use infringe someone's image rights?
3. Can a computer game be considered as a work made for hire?
4. Who owns an avatar?
5. What is a user-generated content?
6. What does the Rogers-test mean?
7. What does the Predominant use-test mean?

Selected case law:

Holland v. Vivian Van Damn Productions Ltd. [1936–45] MacG. Cop. Cas. 69 (Ch. D.)
Keller v Electronic Arts, No. 10-15387, 2013 WL 3928293 (C.A.9), (July 31, 2013).
Hart v Electronic Arts, No.: 09-cv-5990 (FLW)
SABAM v. Scarlet C-70/10
Promusicae v. Telefónica C-275/06
C-265/19. Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd., Minister for Jobs, Enterprises and Innovation, Ireland, Attorney General.
Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc, 202 F.2d 866 (2d Cir. 1953).
Rogers v Grimaldi, 875 F. 2d 994 (2d Cir. 1989.)
E.s.s. Entm't 2000, Inc. v. Rock Star Videos, Inc. 547 F.3d 1095 (9th Cir. 2008)
Doe v. TCI Cablevision 110 S.W.3d 363 (Mo. 2003).
Irvine v Talksport [2002] EWHC 367
Fenty & Ors v Arcadia Group Brands Ltd (t/a Topshop) [2015] EWCA Civ 3

Recommended readings:

1. Megan Richardson - Sam Ricketson (Ed.): Research Handbook on Intellectual Property in Media and Entertainment, Edward Elgar, Cheltenham, 2017.
2. Ruth Towse - Christian Handke (Ed.): Handbook on the Digital Creative Economy, Edward Elgar, Cheltenham, 2013.
3. Pascal Kamina: Film Copyright in the European Union, Second Edition, Cambridge University Press, Cambridge, 2016.
4. Ruth Towse (Ed.): Copyright in the Cultural Industries, Edward Elgar, Cheltenham, 2002.

Copyright&Related Rights: economic & moral rights	Trademark	Right of Publicity
<p>Protected subject matters: - Dramatic or dramatico musical; choreographic works → performers - Photographic works (Article 4 Berne Convention.)</p> <p>Moral Rights: - Making the work public -Indication of the author’s name -Protection of the integrity of the work.</p> <p>Economic rights: reproduction, distribution, public performance, communication to the public, adaptation, exhibition.</p>	<p>(...) any signs [capable of being represented graphically],* in particular words, including personal names or designs, letters, numerals, colours, the shape of goods or the packaging of goods, or sounds, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertaking (...) (Art 3 of Directive 2015/2436.) (*Art 2 of Directive 2008/95/EC.)</p>	<p>Basic Law of Germany § 1-2: - Human dignity – Human rights - Personal freedoms (develop his personality).</p> <p>Code Civil of France § 9. Italy and Spain – Basic Law Swiss Civil Code §28. Sweden – Act of 1979 on the names and images placed in commercial advertisement</p>

This teaching material has been made at the University of Szeged, and supported by the European Union by the project nr. EFOP-3.6.2-16-2017-00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

