THE COMMERCIALISATION OF THE CELEBRITY BRAND AND THE EXPLOITATION THEREOF

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‘Because it is my name! Because I cannot have another in my life! How may I live without my name? I have given you my soul, leave me my name!’

-John Proctor, The Crucible-

I THE COMMERCIALISATION OF THE CELEBRITY BRAND AND THE EXPLOITATION THEREOF

(a) Introduction

On their feet an exuberant, capacity crowd of 81000 fans in the Santiago Bernabeú Stadium chant his name. He appears out of the dressing room tunnel. Real Madrid's obsession. "Ronaldo!" "Ronaldo!". The game is underway. Twenty-two players fight over the ball, but he always remains the centre of attention. "Ronaldo!" "Ronaldo!". Three time Ballon D'Or winner, the greatest footballer on earth. The most expensive footballer in history. "Ronaldo!" "Ronaldo!". He scores the match-winning goal: His 234th, a La Liga record. "Ronaldo!" "Ronaldo!" Net worth: $310 million. Brand endorsements: $28 million. Twitter followers: 39 000 000. Instagram followers: 38 000 000. Facebook likes: 108 000 000. The most liked person on Facebook. Cristiano Ronaldo - the CR7 brand. A cultural-, sport- and fashion icon.

In 2015 Universal Pictures release a documentary, simply titled 'Ronaldo'. I anxiously await its release. After weeks of waiting I now sit glued to the screen. I am mesmerised by the man's talent, fame, fortune and global attraction. A while into the film, my admiration subsides. I'm grappled by an uncomfortable confusion. Am I watching the life of a person or the sale of a product? Is this a human, as I, or is this a manufactured brand? The stars in my eyes fade as I come to a slow realisation: I'm not watching the life of a person anymore, I'm watching a conduit for the 21st century blurring of personality and property. He is the truth of the commercialisation of the celebrity brand.

My ethical petition is this: 21st century culture is one where celebrities become products - and nobody seems bothered by it. Besides Ronaldo one can turn to the life of Kim Kardashian for proof hereof. Kardashian had an ambition: to be rich, famous and a global brand. Arguably talentless, Kardashian grew her brand, through often dubious actions, to become a universally recognised product. But this isn't an ethical discussion

> The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.[1]

I fully agree with Holmes. In a society obsessed with personal brands, selfies, self-indulgence and materialism; my subjective sensibilities can't stand in the way of the proper functioning of the law. With the continuous evolution of Roman society, the *boni mores* constantly re-invented itself to adapt to changing public values. As Brand J stated: 'The *boni mores* and considerations of public policy are not static concepts'.[2]

In the information age, millennials abounding, it is exciting to watch societal developments unfold. At the forefront of cultural movements are your popular leaders - the Kardashians, Ronaldo's and Rihanna's. As aristocrats in feudal times stayed in power, our cultural kings and queens seek to ensure their continuing reign and expansion of influence.

Celebrities' prominence in our daily lives cannot be underestimated. It is therefore quite hard to imagine that little has been written about the confluence of celebrity and the law. Celebrity law, particularly the mercantile element thereof, deserves greater attention. Celebrity's freely use their image to make money - these actions must be governed by an established body of law. The law must assist the celebrity in his commercial activities and must offer safety nets for when others unfairly exploit his celebrity brand.

The topic will be divided into five points of discussion. First, the commercialisation of the celebrity brand will be discussed. Secondly, we will take a closer look at image rights. Thirdly, the delictual claim of passing off as it pertains to celebrities will be discussed. Fourthly, trade marked celebrities will be considered. And finally our focus will be drawn to the personality right of reputation and how it can be influential for the capitalist celebrity's sake.

It is imperative to fully understand the celebrity phenomenon. Through the ages humankind has naturally sought out leaders in an array of fields. We need to grapple with the oddity of this phenomenon to understand the position of these modern societal leaders. The commercialisation of the celebrity brand will be explored. As societal leaders, celebrities are in the remarkable position to

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1 OW Holmes *The Common Law* 40.

2 *Athrox Healthcare Ltd v Strydom* (172/2001) 2002 SCA 73.

utilise their renown for their own benefit. Attention economy is a concept relating to the celebrity's ability to exploit his fame for commercial gain. This theory deals with the association of capital gain with broad-based, far-reaching image recognition. The niceties of attention economy will be explored to offer us insight into the ability of a celebrity to use his fame to make a profit.

Attention economy is a theory aligning itself with image rights. Image rights are the commercial sales aspect of the celebrity entity, offering it legal security and a reactionary arsenal. In South Africa, image rights is a very vague concept. It has briefly been considered by courts and theorists, but no sound approach has been agreed upon. The law must adapt to a changing society. Celebrities are free to capitalise on their brand and a worthwhile way in protecting these entrepreneurial ventures is image rights. But how? The author has come to the conclusion that the United States approach to image rights is the most sound approach. It is understandable, seeing as celebrity culture is immense in the USA. Therefore their laws surrounding it are a lot more fine-tuned. This stream-lined approach is what drew the author to add it into the discussion. Courts in the USA have developed a concept called 'personal goodwill'. The reader will recognise the term 'goodwill' from Competition law. This 'personal goodwill' will be one of the foundation blocks of this discussion and will lend itself effectively to fit in with other chapters.

Thereon following we will consider recent case law wherein celebrities looked to protect their commercial interests through the delictual claim of passing off. Passing off claims instituted over the use of a celebrity brand is a very new concept and will make for insightful reading. It is under the umbrella of passing off that celebrity Rihanna sought the protection of her celebrity brand against the unfair exploitation thereof by third parties. Passing off is a well-established legal instrument that can be very useful to the celebrity.

A next pillar of the discussion is one that is particularly fascinating. Celebrities - left, right and centre - are registering themselves as trade marks. For the first time in the 100+ years of the existence of trade marks; names, faces, gestures and voices are counting themselves among trade mark applications. These intellectual property concepts used to only find application with products and marks, but now they are applied to the commercial value of human beings.

A personality right which can effortlessly be incorporated into the legal protection of the celebrity's attention economy, will be considered. This is the celebrity's right to reputation or a good name. Closely linked to the commercial value of a celebrity is the opinion of the community of him. Were he to be viewed in a bad light, his commercial value will fall. Were the celebrity to believe that someone is infringing on this personality right of his by defaming him, he can institute a claim against said person. This right will protect the celebrity's good name and therefore his attention economy.

The celebrity can thus look to legally protect the commercial exploitation of his brand within the merits of image rights; the remedy of passing-off; the registration of a trade mark; and the personality right of reputation.

This topic has the ability to easily slip out of the control of the author, therefore it will be pinned down to the following method:

Not a lot of cases deal with this topic in South Africa. Our courts have briefly touched on the topic. Most cases considered will therefore be foreign but their exploration will be of great worth to the South African theorist.

The purpose of this dissertation is:

- To explore the phenomenon that is celebrity;
- To engage in a discussion wherein the commercial exploitation of human beings is an acceptable practice in our modern society;
- To establish the remarkable concept of attention economy as a topic of discussion in South Africa;
- To incorporate concepts of law that have previously been reserved for proprietary matters to matters of human identity;
- For celebrities in South Africa to have a more thorough understanding of the legal implications of the exploitation of their personalities for monetary gain;
- To explore image rights in South Africa and lament the lack of clarity surrounding it;
- To establish the usefulness of the American approach to image rights;
- To establish the concept of 'personal goodwill';
- To explore the delictual claim of passing off within the ambit of the discussion;

- To explore the registration of celebrities as trade marks; and
- To show how the personality right to a good name can be useful to protect the celebrity brand.

(b) Understanding celebrity

Modern fixation with celebrity isn't new. When held up against history, fame and infamy is as old as man itself. It is in our DNA, Fischoff[3] holds, as social animals, to look to alpha males and females[4] and to request them to lead the pack. He believes the we are sociologically preprogrammed to follow natural leaders.

Leaders are integral to organised societies and admiration is a natural component of human nature. Strength, beauty and wit have always been traits elevating some above others. The type of leader often depends on the collective philosophy. He is a reflection of that which his community places emphasis on. Celebrities are colourful elaborations of our cultural identity.[5]

In hunter-gatherer times the strongest, quickest hunter was the foregoing leader. And so too, power lay with the most imposing warriors. As man evolved, nomadic groups became vested communities. The *surviving man* gave way to the *thinking man*. *Cogito ergo sum*. Early man's questions about the mysterious led to the elevation of religious figures as leaders. Communities craved leaders and chiefs, kings, pharaohs and emperors took the mantle. Artists, scientists and philosophers in early enlightenment periods also saw the limelight. Elevated figures weren't idle to cement their status either. Egyptian pharaohs created monuments so that generations to come would remember their name. Persian kings had citizens bow down to them in religious fashion. Religious leaders promoted themselves as sons and voices of gods. These examples, in particular, are early situations of the promotion of the self for the commercial exploitation of personality. Celebrities have, to a large extent, in our society, replaced monarchies and deities.[6]

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3 C Carr'A new age of celebrity worship' available at *www.webmd.com*, accessed on 01 September 2015.

4 The author will herein after make use of the masculine pronoun 'he' as reference to both genders.

5 G Turner *Understanding Celebrity* 24.

6 C Rojec *Celebrity* 52.

Another explanation is also as simple as pure curiosity. The masses are curious as to how the elevated individual attained his status. We identify and admire his abilities, deciding that if we work on those particulars we would also receive recognition.

The birth of celebrity commercialisation can be traced back to the advancement of communication methods in the early 20th century. The rapid growth of printed media and cinema, coupled with urbanisation, lured larger audiences to pay attention to the lives of celebrities. The commercial production of celebrity was placed at the disposal of virtually everyone.[7] Photographs and cinema made it a lot easier for aspiring celebrities to have a further reaching influence on society and accordingly boost their commercial brand.

Marilyn Monroe was perhaps the turning point. She was the earliest, most successful, human brand creation. Prior to her, i.e. before the 1950s, celebrity lives were hidden in large part from the public. Limited information was available on celebrities before her, but Monroe bathed in the limelight. Her portrait was used as a magnificent sales tool, she was a creation of master marketeers. Details of her private life was conveyed to the public and this had a significant positive impact on her commercial worth. Not only the glittering aspects, but also the ugly messes of her life, played off in the public eye. Her vulnerability and humanity fascinated her followers and her glamorous and contorted legacy prevails to this day. Her image was a well-manufactured product.

In modern society, celebrity fixation has become a drug. A confluence of forces - technology, mass media and the global village - has made celebrity worship easier and more common. It is a stream-lined, well thought out industry. Public relations- and marketing houses are larger-than-life operations. The manufacturing of celebrity almost always sits in the hands of a remarkable group of ‘inventors and mechanics’: managers, financiers, agents, publicists, coaches, market strategists and marketeers. They are responsible for producing a wide variety of ‘products’ - politicians, sport stars, artists, writers, business- and religious leaders. These ‘inventors’ use a particular strategy to sell their product to the world: research into market potential is done; an audience to whom the aspiring celebrity should appeal to is identified; the celebrity’s concept and story is defined; the celebrity’s

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7 C Rojec *Celebrity* 53.

appearance is reworked to fit the market; additional product development is done; advertising campaigns are set up and distribution outlets are thought out.[8]

Reference is once more made to Cristiano Ronaldo, the Portuguese superstar. Were he to post something to his Facebook page, it means that 108 000 000 people will potentially see it. Alongside this, tabloids regularly publish what celebrities post on social media - thus extending his reach. Were Ronaldo to post on Facebook: 'Here is a photo of my face and I have autographed it. Buy it for $10'. With the click of a button he has launched a further reaching media campaign than any brand marketeers can hope for. Were 0.1% of these followers to decide to buy the Ronaldo image, 108 000 images will be sold and the Ronaldo brand will make a $1 080 000 gross profit. That is a remarkable achievement. Celebrities are lucrative investments and the law must take cognisance hereof.

Kim Kardashian, American reality show celebrity, has been called a smart businesswoman.[9] Forbes[10] state that 'Kim Kardashian has monetised fame better than any other'. Kardashian's market penetration was somewhat unorthodox: a sex tape of her was released in 2007. Shortly thereafter she signed a reality TV show deal with *E! Entertainment* and the rest is history. The topic of 'personal goodwill' will be discussed later on, but, in short, Kardashian has monetised her identity on a massive scale. As the Apple brand is worth millions, the Kardashian brand is too. Attaching the Apple name or logo to any product immediately raises its value. Adding the Kardashian name to any product does the same.

Today she has 26 million Facebook likes; 53 million Instagram followers; 37 million Twitter followers; and an estimated net-worth of $85 million. An accolade to self-branding, in 2015 she published a book called 'Selfish' comprised entirely of selfies she has taken over the years. And as all products who want to remain relevant in the marketplace, Kardashian has frequently 'upgraded' herself. Extensive plastic surgery; risqué clothing and photographs; highly publicised weddings and child births; the Kardashians *are keeping up with the consumers*.

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8 M Hamlin, P Kotler, I Rein, M Stoller *High Visibility: Transforming your personal and professional brand* 39.

9 A Alston 'Kim Kardashian-West: Brilliant Businesswoman?' available at *www.liberalamerica.org,* accessed on 4 November 2015.

10 Available at *www.forbes.com*, accessed on 4 November 2015.

The reinvention of Miley Cyrus, the American singer, is another case in point. As Vodacom rebranded from blue to red; Cell C from red to black; Cyrus, a human being, was totally rebranded. Her Southern-girl charm, complete with wholesome family values was an attractive brand for families and tweens. Her brand boasted movies, albums and merchandise akin to the typical Disney star. Through interviews she appeared to be a reserved, moral outstanding *good girl*.

That brand was binned by her marketeers and replaced in 2012 with a well thought-out, high risk rebranding. Grown up now, her brand needed a way to stay relevant. She was rebranded as a member of the American *Gansta-hip-hop* movement. Comparing her current brand to her Disney one is impossible, they are stark opposites. In interviews it appears as if Cyrus had a total personality change between 2012 and 2013. Building her image around her sexuality, drug use and public provocations, Cyrus's is regarded as one of the most successful rebranding campaigns.[11] Her brand-worth today: 46 000 000 Facebook likes; 24 million Twitter followers; 32 million Instagram followers; and a net worth of $150 000 000.

With social media, celebrities are a-plenty. Its not just the movie stars and sportsmen who are famous anymore. Returning to the South African celebrity market, the author didn't even know who Caspar Lee was before he properly researched him. Lee is a 21-year old Knysnan YouTube personality, insta-celeb, vlogger,[12] and businessman. The young millionaire has a keen awareness of how to utilise social media for his own benefit, posting videos and selfies, with underlying designer endorsements never far off.[13] Lee has, like Cyrus and Kardashian, built a recognisable brand for himself that appeals to a particular target market. Were he to endorse certain products, his fan base will be enthralled with said product.

Obsession with the private lives of others is as old as gossip itself. Tabloids exist for the sole purpose of peering into private lives. So, with mass media, celebrities increase in significance, potency and magnetism. Private lives become tradable commodities. With mass- and social media we can trace the exact moment someone escapes the masses and joins the enclaves of celebrity. He

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11 A Arruda 'Miley Cyrus Rebranding' *Forbes* 05 September 2015 available at *www.forbes.com*, accessed on 5 November 2015.

12 A video blogger.

13 LA Hunter 'South Africa's YouTube millionare' *Times Live* 26 June 2014 available at *www.timeslive.co.za*, accessed on 04 November 2015.

is no longer just *one of us* but now becomes *one of the few*. These *few* are magnets for attention - attention means money - and so, the whole concept of attention economy will be investigated in greater detail.

(c) Attention economy

The capacity to attract attention is a form of capital. Franck[14] calls celebrity the status of being a major earner of attention. Like capital often produces more capital, well-knownness tends to generate even more well-knownness. Franck[15] refers to celebrity repute capital as 'attention economy'. Rein[16] recognises a celebrity as one whose name has attention-getting, interest-riveting and profit-generating value. He states that high visibility means a great deal of economic activity revolves around the attention-holder.

Name recognition plays a substantial role in publication and as such, the more widely a name is known in a particular field, the easier it is for that name to receive more attention over lesser-known names come publication. There is of course a logical agenda behind this for the publisher: the more known the name aligned with the publication, the more the publication sells. The celebrity needs the publication platforms of the publisher to boost his capital; and the publisher needs the *big names* to sell his publications. Gains through publication for both celebrity and publisher will lead to new projects with even more attention capital. The film industry is a case in point of this activity. Production houses obsess over having big name stars play in their films. The bigger the name in the film, the more cinema tickets are sold. A remarkable example of the economical influence of a celebrity on a company was when Michael Jordan, legendary basketball player, returned to play basketball, the stocks of the companies he endorsed, Nike and McDonalds, increased by roughly $1 billion each.[17]

The capacity to attract attention is a lucrative asset in a knowledge-based society. Information is key to publishers, whether it be in film, radio, television, advertising campaigns, political campaigns or

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14 G Franck *Ökonomie der Aufmerksamkeit* 100.

15 G Franck *Ökonomie der Aufmerksamkeit* 101

16 M Hamlin, P Kotler, I Rein, M Stoller *High Visibility: Transforming your personal and professional brand* 14.

17 M Hamlin, P Kotler, I Rein, M Stoller *High Visibility: Transforming your personal and professional brand* 16.

advocacy movements. The aligning of organisations such as the United Nations with superstars such as Angelina Jolie, David Beckham and Emma Watson for humanitarian campaigns, has seen large-scale investments made by the public into these endeavours. Adding Emma Watson's name to the UN Women HeForShe campaign has seen that campaign become a global sensation.[18] Attention draws attention.

As social interaction becomes denser, more competitive and over-populated, visibility and recognition beyond one's immediate circle becomes increasingly significant and lucrative. The rewards attached to the accumulation of attention capital are endless in our post-industrial, information-based society. As a certain writer put it

> It looked too hard to work your way up [to become a successful writer] and the pay was terrible. But I found a shortcut: If I became famous, I will never have a problem getting my work published![19]

Celebrities are dependent on proper management and in turn, celebrities, when properly managed, create profit. Turning a nobody like Stefani Germanotta into Lady Gaga was a win-win situation for both her and the marketeers behind her. Fame dramatically increases earning capacity. The earning capacity of a celebrity can thus be a massive commodity. Celebrities and marketeers invest years of practice to develop a public personality which reaches marketable status. The celebrity identity, embodied in name and likeness, is the fruit of his labours. It is his property, his goodwill.[20]

These publications, whether it be on television, magazines or political talks; speak to the public's desires, needs, wishes and aspirations. Celebrity advocacies and preferences influence consumption patterns and are thus a major economical attraction. Celebrities have vast economic networks and aren't indifferent to expanding these. A celebrity actor can, off the set, be anything from a brand ambassador for a cosmetics company to a political tool used to win votes. This celebrity is paid handsomely for his commitment, garners more attention for his name and increases his monetary worth. A product is more recognisable if it becomes associated with a very recognisable face.[21]

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18 HeForShe is a solidarity campaign run by UN Women. It was launched in 2014 with Emma Watson as spokeswomen and as of 10 March 2016 has more than ten million subscribers worldwide.

19 S Wilson 'Gossip Girls' *Good Weekend* 22 November 2008 available at *www.goodweekend.co.au*, accessed on 09 November 2015.

20 HI Berkman 'The right of publicity - protection for public figures and celebrities' 539.

21 One cannot help but associate George Clooney with Nespresso.

Celebrities are lucrative investments and a bright stockbroker would realise this. The value that merchandise sales, concerts, CD's and advertising adds to the economy cannot be denied.

We have now seen how the commercialisation of celebrity works. This discussion will now focus on the protection afforded to the celebrity brand. The author considers the celebrity's attention capacity and asks: how does the law protect this celebrity brand? Through the portals of image rights, passing-off, trade marks and personality rights. The discussion will thus take for granted that yes, the use in public of a celebrity name can't be contained,[22] but the celebrity must be free to exercise a certain measure of control over his attention economy. The economic value of attention is of such importance in modern society that there undoubtedly exists a need for its legal regulating and management.

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22 In like standing the use of brands such as Coca-Cola, McDonalds or Woolworths in common publishing, such as writing or conversation can't be contained.

II IMAGE RIGHTS

Image rights - or rights pertaining to the image - have been defined as

> [T]he ability of an individual to exclusively control the commercial use of his name, physical/ pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media. The celebrity often earns a substantial license fee or royalty that is paid for the privilege of allowing his name to be used for promotional purposes.[23]

From this definition it is quite clear that image rights are perfect to utilise in the case of the celebrity seeking to protect and exploit his attention economy. The celebrity attention economy is a two legged entity: on the one hand the celebrity's economic value resides in himself, his personal goodwill;[24] on the other he can attach his name, through endorsements, to products and services that he and third parties launch in the marketplace.

A second definition, offered by Blackshaw,[25] is a valuable addition to the first. It defines image rights as

> [A]ccess to the services of the personality for the purposes of filming, television (live and recorded), broadcasting (live and recorded), audio recording, motion pictures, video and electronic pictures (including but not limited to the production of computer-generated images), still photographs, personal appearances, product endorsement and advertising in all media.

Blackshaw's definition draws attention to the actions which may be taken to employ personality for economic gain. Neethling[26] calls image rights 'personal immaterial property'. Image rights thus convey the right to use the personality's name, likeness, autograph, story and accomplishments for practical, commercial purposes. Mostert[27] recognises the important societal role image merchandising plays in South Africa. He states that the use of personal image in connection with sponsorships, merchandising, licensing and endorsements have a major influence on our society and economy.

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23 R Cloete *Introduction to Sports Law in South Africa* 176.

24 Personal goodwill will be discussed later in this chapter.

25 IS Blackshaw and RCR Siekmann (eds) *Sports Image Rights in Europe* 7.

26 J Neethling *Van Heerdeen-Neethling's Unlawful Competition* 115.

27 F Mostert 'The right to the advertising image' (1982) 99 *SALJ* 413.

A number of well-known celebrities constantly appear in television, print and radio advertisements for products or services. It is estimated that celebrities in South Africa can garner as much as R2 million through endorsement contracts per year. Many celebrities can ask up to R100 000 a day for endorsements of company products.[28] However, celebrities and agents are in a constant battle for payments from these companies. A source informed the writer that she, as an agent representing South African celebrity singers, struggles immensely with producers over payment of monies due to her clients. She states that her clients can easily fetch R20 000 per day for performances in advertisements, but are belittled by marketeers only willing to pay as little as R2000 per day. Therefore, the opportunity for the exploitation of attention economy goes lost for many South African celebrities.[29]

Unfortunately, little attention is paid to image rights in South Africa. The underdevelopment of image rights in our country has led to many advertisers using celebrity images without consent.[30] South African courts has not had much occasion to grapple with the issue of unauthorised celebrity merchandising. In fact, the term 'celebrity merchandising' seems not to be recognised under South African law as having any special meaning or validity. This was noted by Harms JA in *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & Another*[31] where he stated that

> Character merchandising doesn't add anything to South African law as the protections provided by the law are based in existing protection under copyright, trade marks and unlawful competition.

Louw[32] submits that this approach is wrong. He dismisses the argument given the practical commercial realities and needs of the stars which cannot be ignored. He argues that the ignoring of image rights up to now is an oversight and a mistake. He believes that our law needs to come to grips with the commercial reality of the South African entertainment and professional sports

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28 A Louw *Sports Law in South Africa* 467.

29 A Louw *Sports Law in South Africa* 467.

30 *Khumalo v CycleLab (Pty) Ltd* 2011 ZAGP 56. This case will be discussed in greater detail in chapter 2.

31 2003 (3) SA 313 (SCA) at 321E-G.

32 A Louw 'Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law' 272.

industries. He holds that celebrities should have access to a real and effective remedy in cases of infringement of image rights. He believes in the recognition of a basis of protection that should be available to stars who are confronted with the practice of unauthorised exploitation of their fame and of aspects of their *persona* for financial gain.[33] The time is ripe for legal reform to protect celebrities through image rights, says Louw.[34]

How does Louw suppose legal reform should take place in this regard? He says we should look to the United States of America. South African law does not expressly recognise a 'personal goodwill' as is the case in the United States.

In perhaps the closest case to have come to image rights of a celebrity in South Africa, the court in *Kumalo v Cycle Lab (Pty) Ltd*[35] considered the use of a photograph of a former miss South Africa by a business in an advertisement without her consent. This case was a perfect opportunity to independently investigate image rights.

Kumalo is a celebrity who built a successful career as a model, television presenter, magazine editor and businesswoman. CycleLab is a retailer of bicycles and cycling products. In 2007 she was in the CycleLab store to purchase a bicycle and cycling paraphernalia. While trying on cycling helmets, a man approached her and took her photograph. CycleLab used the photograph in an advertisement for its store, which was published in a magazine as a ploy to advertise that celebrities buy their merchandise. Kumalo insisted that she did not agree to the taking of the photograph or to its further use for advertising purposes. Her anger stemmed from the fact that the defendant had sought to exploit her image for commercial purposes without her consent. Kumalo duly instituted proceedings in the South Gauteng High Court where she claimed for patrimonial or special damages which she alleged to have sustained as a result of the defendant's unauthorised publication of her image.

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33 A Louw 'Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law' 272.

34 And an appropriate route to reform is the United States one. As will be discussed hereafter.

35 [2011] ZAGP 56.

In reference to Neethling,[36] Borushowitz J stated that what had taken place in this instance was a falsification of the true identity of Ms Kumalo. Her image was used to create the false impression that she had supported the product.[37] Use of her image in this manner constituted a violation of her right to identity. The appropriation and misuse of her image was deemed wrongful by the judge. He held that its use would've been considered, by persons of ordinary and reasonable sensibilities, to constitute an *iniuria* which is deserving of legal protection.

Pertaining specifically to Ms Kumalo's celebrity status, Borushowitz J stated that, although, as a public figure, she must accept that her appearance in public will attract more attention, she still retains the right to be protected against an infringement of her right to identity. He stated that it is universally accepted that public figures or celebrities have a legitimate expectation of protection and respect for their private lives.[38] He concluded that the appropriation by the defendant of the plaintiff's image by using her photograph in an advertisement cannot be justified on the basis that she is a public figure or celebrity. Her claim was thus settled in her favour.

It is fair - and sad - to state at this time that the *Kumalo*-case can be regarded as the *locus classicus* of South African image rights! This shows how underdeveloped the concept is in South Africa. Borushowitz J, however, did offer sound reasoning and did incorporate an adequate measure of consideration in his judgment. This case could well prove very fruitful in the future development of image rights in our country.

The author fears that South Africa might face a case where a celebrity is severely defrauded due to undue exploitation of his image. What then? Our courts will have to look overseas for sound doctrines. Louw is indeed right. The *land of the free and the home of the brave*, deeply vested in its

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36 J Neethling 'The Concept of Privacy in South African Law' at 24.

37 In reference to *National Media Limited and Another v Jooste* 1996 (3) SA 262 (A) at 271C-H).

38 *A v B plc* [2003] QB 195; *Van Hanover v Germany*, European Court of Human Rights (Third Section) 24 June 2004; *MGN Limited v The United Kingdom*, European Court of Human Rights (Fourth Section) 18 January 2011.

identity as a supporter of individual liberty, is one of the best options for any court looking to expound on image rights.

Image rights in the United States of America are a well-established set of legal principles. In the USA can be rest assured that his attention economy receives adequate protection and that he can therefore exploit his image for commercial gain without fear of undue ramifications. It has as objective the recognition of a personality right as an interest which has commercial value and the infringement of which will cause patrimonial damage.[39] The American courts speak of a right to 'personal goodwill'.[40]

To find a definition in American law for the recognition of this personal goodwill, the author looks to Rodrigues'[41] definition of it

> 'Personal goodwill' in identity are rights that offers a person goodwill that would otherwise only subsist in a business or brand. It is the force that attracts one to a famous individual. The tables have turned: a person has a commercial value given his fame.

In *Haelan Laboratories Inc v Topps Chewing Gum Inc*[42] the exploitation of the commercial value of of baseball players without their consent, the court recognised the right of a person to control the publicity value of his likeness. It held that a celebrity must be able to confer exclusive licenses which are protected to the exclusion of others on a legal basis.[43] The right to 'personal goodwill' in the USA is a property right in the commercial use of one's persona. 'Personal goodwill' is alienable, may survive death, and has been expanded to protect a person's voice, gestures and mannerisms.[44]

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39 *Waits v Frito-Lay Inc* 978 F.2d 1093 (9th Cir 1992) California. *Herman Miller Inc v Palaze Imports and Exports Inc* 270 F.3d 298 (Michigan). *Prima v Darden Restaurants Inc* 78 F. Supp 2d 337 (D.N.J. 2000) (New Jersey).

40 *Waits v Frito-Lay Inc* 978 F 2d 1093 (9th Cir (1992))(California)

41 U Rodrigues 'Race to the Stars: A Federalism Argument' (2001) 87 *Virginia LR* 1201 at 1202.

42 202 F.2nd 866 (2d Cir. 1953)

43 202 F.2d 866 (2d Cir. 1953).

44 U Rodrigues 'Race to the Stars: A Federalism Argument' (2001) 87 *Virginia LR* 1201 at 1202.

When one considers ‘personal goodwill’ as an immaterial property right, as with the right to the goodwill of a business, image rights find legal appropriation. Value increases with fame. Fame is the attractive force that brings in custom. Fame elevates sales. The goodwill of the celebrity, as legal entity, is comprised of particular components centrally tied to his image. Regarding the personality of this peculiar entrepreneur as a commodity, well founded value is given to the celebrity’s commercial acclaim.

Save for this right to ‘personal goodwill’, licensing, through contracts, soundly stipulate image rights in the USA. The position is that the employment of celebrities for endorsements will include provision for the control of image rights. Contractual provisions regarding the licensing or assignment of the image rights of celebrities may commonly include aspects such as an undertaking by the licensor to perform promotional services; an undertaking by the licensee to provide assistance to the licensor in preventing infringement of image rights by third parties; an undertaking by the licensor to refrain from licensing identical or similar rights to third parties; and an undertaking by the licensor to refrain from certain behaviour (such as public drunkenness or sexual impropriety) that may negatively affect commercial value.[45]

The extensive coverage of such contracts clarify the position of all parties bound to the attention economy of the celebrity. American law recognises that celebrities’ have definite commercial value attached to their brand. Isaac Farris, nephew of Martin Luther King Jr. said

> we’re not trying to stop anyone from legitimately supporting themselves but we cannot allow our brand to be abused.[46]

This assertion of Rev. King’s image by his family is a legal claim to a share of proceeds from the unauthorised sale of t-shirts, badges and other merchandise which depicted the activist alongside Barack Obama. Farris’ qual was a capitalist assertion - the family lamented the lack of profit they felt were their due as legal owners of the Martin Luther King Jr. image.

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45 RL Yasser *Sports Law: Cases and Materials* 6th ed (2003) at 598-600.

46 ‘Family has a dream- Royalties’, *Daily Telegraph* 15 November 2008 available at *www.dailytelegraph.co.uk*, accessed on 01 December 2015.

Were we to follow Louw's advice and develop an approach similar to that of the United States, image rights in South Africa might arise out of its slumber. The author outrightly states that it is ill-advised for any celebrity to wish to rely on an image rights mechanism at this time, were he confronted with injuries to his brand. Other chapters in this discussion offer more sound and established solutions to the celebrity cause.

The author holds that we must move toward the recognition of such a personal goodwill in South Africa. It would outrightly recognise a *prima facie* inference of a commercial interest. Personal goodwill operates in a similar fashion to the goodwill of a business. In other branches of law the concept of earning capacity is well established. A persons earning capacity gradually develops through one's energy, initiative, studies, experience, financial gains and public exposure.[47]

A plaintiff's proof of the value of his goodwill, would be a question of fact. A significant goodwill, as identified in intellectual property and unlawful competition, would need to exist. It would indeed be rather easy to identify, seeing as the defendant merchandiser recognises himself that the celebrity is of such noteworthy interest that his attachment to the product would boost sales. Unlawful infringement would exist were the merchandiser knowledgeable of the fact that he is depending on the goodwill of a celebrity to make sales without the celebrity's permission. Simple authorisation for the use of the image would be needed. Unauthorised use constitutes an infringement. Fair use of celebrity image and goodwill ought to remain a valid defence. Reference to the *boni mores* will determine whether or not the goodwill of the celebrity has unduly and unlawfully been infringed.

South Africa would be the wiser to look across the Atlantic and consider the development of 'personal goodwill'. Therewith, celebrity's must seek legal assistance when contractual negotiations are underway. They must ensure that contracts soundly stipulate implications of endorsements and the use of the celebrity image. Only then will the celebrity be able to, in an appropriate fashion, use his attention economy for his own economical gain. Image rights will be properly developed in South Africa and this will be an exciting addition to our current body of law.

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47 J Neethling *Van Heerdeen-Neethling's Unlawful Competition* 114.

III PASSING OFF AND THE CELEBRITY

(a) Introducing passing off to the celebrity brand

Within the strands of Intellectual Property law and unfair competition lies the delictual claim of passing off. This concept has historically been applied to goods, marks and symbols - not people. Only within the last couple of years has this peculiarity occurred. The use of the passing off mechanism to protect the celebrity brand offers insight into the economical intentions of celebrities and the extent taken to stay in control of personal branding. Passing off is an effective way to guard one's 'personal goodwill' against unfair exploitation. In essence it is a legal instrument used to combat third parties from *riding the gravy train* of the celebrity's success. Unfortunately, it is not so much a pre-emptive resource as it is a reactionary one.

Passing off occurs when traders use distinctive marks of other parties to create the impression that their performances are similar to the competitor's well-known performance; and thereby they deceive consumers into accepting their performance.[48] In essence then, passing off infringes a party's right to attract custom in that his distinctive marks are used by another party to coax customers away from his brand in an unfair, unacceptable and unlawful manner.[49]

To be successful with a passing off claim a plaintiff must satisfy the following requirements:

- that the plaintiff trader has a *reputation* in a particular mark or symbol;
- that there is a *misrepresentation* by the defendant that his goods or services are in some way associated with those of the plaintiff;
- that there is a likelihood that the misrepresentation will lead to consumers being *confused* into believing that the business of the defendant is connected to that of the plaintiff; and
- there must be *damage* to the plaintiff's goodwill.[50]

For purposes of our current discussion, each of these four requirements will be discussed separately.

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48 HB Klopper, T Pistorius, BR Rutherford, L Tong, P Van der Spuy and A Van der Merwe *Law of Intellectual Property in South Africa* 25.

49 Neethling J *Van Heerdeen-Neethling's Unlawful Competition* 163.

50 O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 160.

South African courts have no exposure to instances where celebrities institute claims for passing off where persons unfairly and unlawfully exploit their brands. There has, however been overseas cases that have dealt with these interwoven situations. An English case concerned the world-renowned celebrity Rihanna. In *Robin Rihanna Fenty and Others v Arcadia Group Brands Ltd and Another*[51] the plaintiff alleged passing off, stating that the defendant had unlawfully used her celebrity brand for their own commercial gain.

The law of passing off is an instrument to protect the business reputation of a trader. The business reputation of a trader forms part of the 'goodwill' of his business.[52] Goodwill is that attractive force which draws custom.[53] Goodwill can be a many number of things but for purposes of the current discussion the relevant one is reputation.[54]

(b) Reputation and passing off

In *Premier Trading Company (Pty) Ltd and Another v Sportopia (Pty) Ltd*[55] reputation was defined as being

> the opinion which the relevant section of the community holds of the plaintiff or his product. The plaintiff's reputation can be associated with certain symbols under which his product is marketed.

The celebrity is greatly dependant on a positive reputation. Without a sizeable reputation, in an extensive geographical area,[56] among a significant amount of consumers,[57] the celebrity's business ventures can easily fail. In *Adcock Ingram Products Ltd v Beecham SA (Pty) Ltd*[58] it was held that the plaintiff must prove that the features of his identity and the marks and symbols linked thereto, has acquired a meaning or significance. This entails that his reputation must exist at the time when

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51 2013 [EWHC] 2310.

52 O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 160.

53 O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 161.

54 Reputation in the case of passing off must not be confused with Reputation in Personality Rights. Reputation in that context will be explored in chapter 5.

55 2000 (3) SA 259 (SCA) 267.

56 1989 (4) SA 427 (T).

57 *Caterham Car Sales & Coach Works Ltd v Birking Cars (Pty) Ltd* 1977 (3) SA 144 (T).

58 1977 (4) SA 434 (W) 437H.

the infringing conduct takes place.[59] In other words, he must already be recognised as having celebrity status at the time when his brand is unfairly exploited. *Geographical area* would therefore be more of a market sector than a physical area. The number of persons that are enough is a factual enquiry and varies from case to case. To prove a reputation the plaintiff will have to offer evidence of his sales and marketing. Market surveys can be used to substantiate the claims.[60] In *GPS Restaurante BK v Cantina Tequila (Mexthe authorcan Connection* CC) *and Others*[61] it was stated that the existence of a reputation can be identified through the prevalence of advertising expenditures. It is therefore submitted that a strong indication of reputation for a celebrity can be his social media followers, products sold bearing his name or advertising campaigns in which he participates.

The celebrity must realise, off the bat, that he himself - his identity, name and attributes - constitute the goodwill of his business. With proper utilisation of these elements of his persona he can pursue wealth in a smart way. Therefore, it would truly aggravate the celebrity who wishes to exploit his attention economy if a third party uses his celebrity brand, without consent, for his own gain. That celebrity would be wise to make use of the passing off action to not only prohibit that third party from using his brand unlawfully but also to seek damages for injury to his reputation.

The celebrity is aware of his attraction force and with proper research knows what the market wants from him. The consumers - and particularly his fans - hope that the celebrity enters the marketplace with products or services attached to his name. The celebrity marketeers create marks or symbols[62] that are to be linked to the celebrity brand. These marks and symbols go hand-in-hand with the celebrity identity. When the celebrity then enters the marketplace his image becomes inseparable from his marks, symbols and the products or services linked thereto. The celebrity has used his favourable reputation to now participate in the economy as a provider.

It is important to note in the *Premier Trading Company* definition that the opinion of the community is either that of the plaintiff *or* his mark. This means that the producer and the products'

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59 *My Kinda Bones Ltd v Dr Peppers' Stove Co Ltd* [1984] FSR 289.

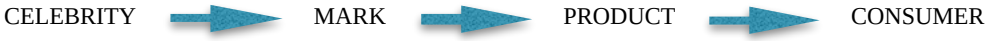
60 *Imperial Group plc v Philip Morris Ltd* [1984] RPC 293 (Ch). See also *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another* 1997 (1) SA (A).

61 [1997] All SA 603 (T).

62 The '*R*' badge of Rihanna will be discussed later on in this chapter.

reputations *can be* separated from each other. The producer is an individual entity apart from his marks and products. Therefore, the celebrity, as established earlier, has an own attention economy. The marks and products he manufactures, spawning from his attention economy, has a separate reputation from his. The capitalist celebrity producer, however, cannot separate himself entirely from his products or else his business ventures would be in vain, for what use is his celebrity status then?

To understand reputation in the celebrity case a simple illustration can be used:



It is the celebrity who is the origin or foundation of the reputation. The celebrity has built up his reputation through various means and now seeks to use his attention economy for financial gain.[63] Through careful planning he creates certain marks or symbols that are to be used as badges of origin on the products or with the services. Hereon following a decision is made as to the avenues of the marketplace which are planned to be infiltrated. Then the products or services bearing the celebrity mark are distributed to the consumer.

Were a defendant to misuse the positive reputation of the plaintiff, it can have a dire impact on the positive view consumers have of the celebrity. As stated in *Premier Trading Company*[64]

> A false representation by the defendant about the symbol used by the plaintiff may encourage or induce potential customers of the plaintiff in the defendant's favour, believing that they were patronising the plaintiff but were in fact patronising the defendant.

The defendant who misuses the celebrity plaintiffs positive reputation for his own gain is acting in bad faith. This conduct cannot be condoned and the celebrity has a right to object thereto. These defendants, often smart businessmen themselves, see opportunities to *ride the coattails* of reputable businessmen and do so hoping that it'll profit their own pockets. Even if a defendant is unaware of the fact that he is acting in bad faith, by using the celebrity image for his own gain, the celebrity may object hereto. This is, as established in chapter 2, so, because the celebrity has the right to maintain control of his celebrity brand.

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63 As discussed in chapter 1.

64 2000 (3) SA 259 (SCA) 267.

In *Kean v McGivan*[65] the court held that courts would not protect non-traders. Therefore the person alleging passing off must be a commercially active trader who seeks a profit out of the use of the trader's mark. For our current discussion this would have the implication that, in the first instance, it must be confirmed that the person is in fact a celebrity. This could be established through submitting evidence that the celebrity plaintiff has in fact a significant reputation and is well-known among a large number of persons.

Klopper[66] identifies a number of scenarios in which reputation can be an issue. The author has narrowed it down to those he believes are applicable for purposes of the current discussion.

Firstly, we will look at the use of one's own name as a means to attract custom. Numerous celebrity's use their own name as the marks or symbols attached to their business endeavours. Fancy or unique names - such as *Riri*[67] - are especially tangible in these situations.

In *Policansky Bros Ltd v L&H Policansky*[68] the court held that the party had established, through his advertisements and the quality of his goods, that his name is valuable as a trade name. The plaintiff, Mr Policansky, as a manufacturer of goods, had become known in the marketplace as the maker of quality goods. The court held that those particular quality goods are readily associated with Policansky's personal name. The court held that another person may not use his name in connection with similar goods unless he makes it perfectly clear to the public that he isn't selling the same goods as the original manufacturer and that he isn't connected to him.

In *Boswell-Wilkie Circus (Pty) Ltd v Brian Boswell Circus (Pty) Ltd*[69] the court held that you may not call your business by any name which is likely to mislead the ordinary run of person into believing that it is or has connections with the business of somebody else. If a person has previously, through his advertisements and through the quality of his goods, made his name valuable as a trade name so that his name has become distinctive both of his goods and of himself

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65 [1982] FSR 119.

66 HB Klopper, T Pistorius, BR Rutherford, L Tong, P Van der Spuy and A Van der Merwe *Law of Intellectual Property in South Africa* 29.

67 A name often associated with the Rihanna brand.

68 1935 AD 89.

69 [1985] 2 All SA 512 (A).

as the manufacturer of those goods, and if his goods have come to be universally known in the market by his name, then his name is said to have obtained a secondary meaning.

In *Button v Jenni Button (Pty) Ltd*[70] the court held that a person has a property right to the use and enjoyment of his own family name as well as in carrying on a business and selling his goods in that name. In this case, however, the appellant had sold her name and goodwill to the respondent and consequently the continued use by her of her own name would infringe the right to the goodwill attached to the JENNI BUTTON™ trade mark which then vested in the respondent. Jenni Button was found to not be entitled to make use of her own name in the course of her business for as long as that business operated in the same field as that of the respondent.

The second scenario Klopper[71] identifies is the appearance of a business. A saying in modern English colloquia is 'she is the face of so-and-so'; for example 'Rihanna is the face of H&M'. This is the situation where a celebrity endorses a third party's product. If Rihanna endorses her own business it means that 'Rihanna is the face of Rihanna'! Rihanna's appearance is the origin of the business. *She* is the business. Without her celebrity likeness, the business cannot exist. It is the distinct features of the celebrity that offers her her business goodwill. Her attributes are of such a nature that, were they imposed upon, it would be to the detriment of her uniqueness as a brand.[72]

The third scenario Klopper[73] identifies is where the defendant trader imitates the get-up or trade-dress of the products of the plaintiff trader. Products are presented on the shelves of retailers in particular forms. The browsing consumer is made aware of the differences between the get-up or trade dresses of each product he passes. So, once more, smart marketeers work hard to ensure that their products *stand out* to the consumers. Trader's have the right to use the get-up or trade dress of their products to distinguish theirs from those of other traders and to enhance the profits of their companies through such strategies.[74]

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70 2008 BIP 242 (C).

71 HB Klopper, T Pistorius, BR Rutherford, L Tong, P Van der Spuy and A Van der Merwe *Law of Intellectual Property in South Africa* 31.

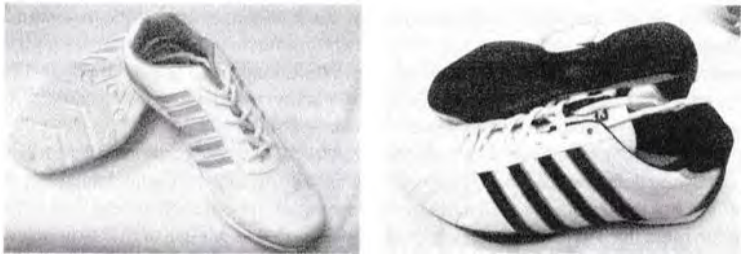
72 *Spur Steak Ranches v Saddles Steak Ranches, Claremont* 1996 (3) SA 706 (E). See also *GPS Restaurante BK v Cantina Tequila (Mexican Connection CC)* [1997] 1 All SA 603 (T) and *Daimler Chrysler Aktiengesellschaft v Afinta Motor Corporation (Pty) Ltd* [2001] 2 All SA 219 (T).

73 HB Klopper, T Pistorius, BR Rutherford, L Tong, P Van der Spuy and A Van der Merwe *Law of Intellectual Property in South Africa* 33.

74 *Distilleerderij voorheen Simon Rijnbende en Zonen v Rolfes, Nebel & Co* 1913 WLD 3.

In *adidas AG v Pepkor Retail Ltd*[75] the court was asked to consider whether or not the respondent retailer had imitated the get-up of the plaintiff's manufactured shoes. The appellant has a trade mark registered over shoes bearing three-stripes vertically:

The respondent in turn sold the following shoes in their stores:



The appellant stated that its three striped shoes had a strong reputation and that the respondent was, through the use of two and four stripe marks on its shoes, committing passing off. The court held that get up must not be generic or common must have an element of uniqueness to have a reputation of its own. The court held that the respondent had acted wilfully to create a false impression as to the origin of the shoes, seeking to deceive consumers into believing that the products are related. In the same breath, a trader can design the get-up of his products to look similar to that of the celebrity's. He can also use models in his advertising campaigns that resemble the attributes of the celebrity.

In *Die Bergkelder v Delheim Wines*[76] the court held that the form, likeness, colours and other attributes of the get up must be distinct from other products. The court stated that certain generic traits cannot receive special protection for they cannot develop a distinct reputation of their own. Herein we find some worthwhile advice for our capitalist celebrities. Inherent to every individual is, of course, certain features. As human assets, celebrities are able to hold a set position among

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75 (187/12) [2013] ZASCA 3.

76 1980 (3) SA 1171 (E). See also *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* 2001 (3) SA 884 (SCA) and *Heyneman v Waterfront Marine CC*[2005] 2 All SA 382 (C).

competing brands. The celebrity must ensure that his brand is of a nature which can easily be identified from others in the market. Lesser known celebrities must therefore pay attention to the fact that they must establish a strong brand in the market place otherwise a court may dismiss a passing off claim, holding that their brand has no truly unique traits.

(c) A misrepresentation must occur

In the marketplace consumers can easily be confused by the sheer scale of products or services at their disposal. This volatile space is there for the taking of smart marketeers. Products can be deceptively similar, creating a representation that the marketeers' product is something which it isn't. Companies can coax consumers into believing that their product bears a particular likeness or quality given its similarity to another trader's product.

In *adidas AG v Pepkor Retail Ltd*[77] the court held that, in matters of misrepresentation, the degree of distinctiveness between two products is of utmost importance. The court held that it must be asked whether or not the public will believe that the similarities or differences of the names, attributes or get-up of the products will lead them into believing that the products are connected to each other. It held that traders must make it perfectly clear to the public that the articles that they are selling are in no way those of the other trader's. The defendant must, at the outset, show that the products are his own and that there is no probability that the ordinary purchaser will be deceived.[78]

(d) Confusion must be present

In *Capital Estate & General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others*[79] it was held that when an enquiry is launched as to whether or not passing off has occurred, one asks whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is connected with that of another.[80] The question that needs to be asked

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77 (187/12) [2013] ZASCA 3.

78 *adidas AG v Pepkor Retail Ltd* (187/12) [2013] ZASCA 3.

79 1977 (2) SA 916 at 929 C.

80 *Value Car Group Ltd v Value Car Hire (Pty) Ltd* 2005 4 All SA 474 (C).

when it comes to confusion, is whether or not a person who casually considers the marks would be likely deceived by their similarities.[81]

The test to determine whether or not confusion is present was discussed in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[82] The court held that

- regard must be had to the similarities and differences between the two marks;
- an assessment must be made of the impact which the defendant's mark would make upon the average type of customer who would be likely to purchase the kind of goods; and
- a comparison must be made, considering the sense, sound and appearance of the marks.

The primary motive of a trader to have its own trade mark is to distinguish his products and services from similar products and services.[83] They are crucial to establish a trader's goodwill and have inherent economic value. In *Premier Trading Company*[84] the court held that actual confusion need not occur, only the possibility of confusion must arise.

In *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd*[85] the court considered strikingly similar marks of both the plaintiff and defendant. It held that the plaintiff must prove that the defendant's use of the features in the mark was not only likely, but *calculated to deceive*; and thus aimed at causing confusion and injury to the goodwill of the plaintiff's business. The defendant must've had the aim of increasing his own sales by tricking innocent consumers into buying his product when the consumer in fact sought the product of the plaintiff.

Establishing confusion in a case is a question of fact.[86] The relevant circumstances of the matter must be taken into consideration and if the evidence establishes that there is a reasonable likelihood

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81 *Lennon Ltd v Sachs* 1906 TS 331.

82 1984 3 SA 623 (A). See also *Century City Property Owners Association v Century City Apartments Property Services CC and Another* [2010] 2 All SA 409 (SCA).

83 HB Klopper, T Pistorius, BR Rutherford, L Tong, P Van der Spuy and A Van der Merwe *Law of Intellectual Property in South Africa* 12.

84 2000 (3) SA 259 (SCA).

85 1977 (4) SA 434 (W).

86 *Lorimar Products Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd* 1981 3 SA 1129 (T).

that confusion will arise, passing off may be present.[87] Passing off doesn't necessarily require that the two traders are trading in the same area of the market but it can be an influential factor nonetheless.[88]

Two Australian matters will help to cross the bridge between passing off and celebrity passing off. These matters dealt specifically with confusion and could be useful for a South African court in the future. In the first case, celebrity ballroom dancers sued on the basis that a photograph of them dancing had been placed, without their consent, on the cover of a music album of dance music. In *Henderson v Radio Corporation*[89] the celebrities reasoned that the record distributor purposefully used their images on the album cover to deceive the public into believing that they endorsed it. The court found that any given consumer would believe that the dancers had recommended the record and therefore found that the use of the dancers' identities was a misrepresentation which gave rise to passing off liability. The court went so far as to, when dealing with the impact of the use of the celebrity images, use the word 'robbed' to describe the misuse of the celebrities image-based goodwill. This strong word choice emphasises the seriousness of passing off in these cases. Many celebrities largely depend on their personal brand for income. Their *image* is the *product* that they market and sell. Were a party to use that image without their consent, it amounts to robbery of their goodwill.

In the second case even fictional celebrities have qualified for passing off protection. In *Children's Television Workshop Inc. v Woolworths (N.S.W.) Ltd*[90] the defendants were restrained from marketing plush toys alleged to be representations of the *Sesame Street* television programme characters Big Bird, Oscar the Grouch and the Cookie Monster. In that case Helsham CJ stated that passing off is prevalent if

> The relevant deception is that the public will believe that the defendant creates a connection between the two businesses, where it has been stated that 'no man may lead [anyone] to the belief that the business which he is carrying on has any connection with the business carried on by another were this not the case'.[91]

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87 *Capital Estate & General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A).

88 *Capital Estate & General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A).

89 1958 1A IPR 620.

90 1981 1 N.S.W.L.R 273.

91 1981 1 N.S.W.L.R 273.

The public will believe - if this is prevalent - if it appears as if the celebrity endorsed the defendant's product without it being so - passing off might well be an efficient tool to use in countering the defendant. The celebrity plaintiff must thus be able to establish that he has a reputation and that confusion is at hand - and so he might well succeed with a passing off claim.

(e) Damage to goodwill

A plaintiff hoping to succeed with a passing off claim will need to prove that he has *locus standi*. Our courts are inclined to hold that only the actual holder of the trade name or mark may institute an action for passing off.[92] *Were* passing off evident, the infringed party has the *Actio Legis Aquiliae* at his disposal for damages[93] or he may seek an interdict to prohibit the party from continuing with the unlawful associations.[94]

In *Reckilt and Coleman* SA *(Pry) Ltd v* SC *Johnson and Son (SA) (Pry) Ltd*[95] it was said that, to identify whether or not passing off has indeed taken place, the court must consider the facts at hand. The judge must transport himself from the courtroom to the marketplace and stand in the shoes of the purchaser. He must take into consideration the actual circumstances in which sales are likely to take place, the nature of the customers and the likelihood of improper articulation - and so damage must be calculated.[96]

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92 *Easyfind International v Instaplan Holdings* 1983 (3) SA 917 (W).

93 *Atlas Organic Fertilisers v Pikkewyn Ghwano* 1981 (2) SA 173 (T).

94 *Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods* 1992 (4) SA 118 (A).

95 1995 (1) SA 725 (T).

96 *Oude Meesters Groep Bpk and Another v SA Breweries Limited; SA Breweries Ltd and Another v Distillers Corporation (SA) Ltd and Another* 1973 (4) SA 145 (W).

(f) Robyn Rihanna Fenty and Others v Arcadia Group Brands Ltd (t/a TopShop) and another[97]

Robyn Rihanna Fenty, or Rihanna, as she is known publicly, is a pop singer superstar. She has sold more than 40 million albums and has massive endorsement agreements with Nike, Gilette and LG. With an estimated net worth of US$120 million,[98] the 27 year old has, save for the commercial success of hits like *Diamonds* and *Umbrella*, built an empire around the sale of Rihanna-endorsed perfumes, clothing, accessories and marijuana products.[99]

On the endorsed clothing one might find photos of Rihanna or references to songs of hers. A tank-top with Rihanna wearing a bikini, posing next to a pool, currently costs R450 on the Rihana Store! Were she not on the shirt, the price would surely be a lot less. Regarding the perfumes, known as 'RiRi', the commercial value thereof lies in the statement on the bottles: 'By Rihanna'. As with the shirt, its undeniable that were this statement not thereon, the perfumes price would drop significantly.[100]

Noticeable on all merchandise authorised by the Rihanna brand, is a particular mark:

The 'R Slash'-mark is used extensively on authorised goods, usually coupled with the name 'Rihanna' or a photographic depiction of the singer. In 2012 TopShop started selling t-shirts in its stores displaying a recognisable image of Rihanna:

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97 2013 [EWHC] 2310.

98 'Pinching Pennies? Rihanna is worth $120 million' *Daily Mail* 8 July 2014 available at *www.dailymail.co.uk*, accessed on 15 December 2015.

99 The official Rihanna store can be viewed at www.rihanna.fanfire.com. The Rihanna marijuana products, known as MaRihanna, will include varieties of marijuana edibles, vapours and concentrates. 'Rihanna launching range of Marijuana products' *TimesLive* 19 Nov 2015, available at *www.timeslive.co.za*, accessed on 15 December 2015.

100 A bottle of 'RiRi' perfume currently costs R925 on the Rihanna Store website.

Neither Rihanna or her authorised licensees offered their consent for the use of the depiction by TopShop. At a retail price of R440, TopShop sold roughly 12000 t-shirts in the 5 months in 2012 that it was on its shelves. This led to Rihanna instituting a claim of $5 million in damages for the unauthorised use of her image. The claim being one for passing off.

The central question in this case was whether or not passing off had occurred in that TopShop had misrepresented that they were aligned to the Rihanna/'R' brand, thereby confusing the public. Rihanna contended that she had a reputation and personal goodwill in connection with her business activities and further, that the use of her image on the t-shirt amounted to a misrepresentation and was likely to deceive members of the public into believing it was authorised by her. She further held that the misrepresentation made the shirt more attractive and so played a material part in the decision of the public to buy it. Rihanna held that the building of her 'R' brand and her image had taken a lot of hard work and it was unfair for a party to use that image without her consent.

Kitchin LJ held that a substantial number of consumers were likely to be deceived into buying the t-shirt because of a false belief that it had been authorised by Rihanna. He held that this damaged her goodwill. He held that it would result in a loss of sales to her online merchandising business and also represent a loss of control over her reputation in the fashion industry.

Kitchin LJ held that consumers are often aware of the fact that pop stars endorse products and are drawn by celebrity endorsements. The judge held that consumers buy products based on personal, subjective, aesthetic appeal - a love for a celebrity could satisfy that appeal and persuade a consumer to buy a t-shirt.

An important question was whether or not Rihanna's image had become such a common, generic one that the power to distribute her image to TopShop outweighed her right to control her image. Was her likeness of such a public nature (such as that of Elvis referenced to by Kitchin LJ) that

TopShop could legitimately use it without fearing passing-off? The court said no, Rihanna still had a unique, distinctive identity and goodwill as a celebrity.

Celebrities are identified marks in and of themselves, with commercial value added to their brands. Kitchin LJ stated that it is a tough call to state that celebrities will have total, universal control over the use of their image. He held that

> No one can (whether celebrity or nonentity) complain simply of being photographed. But the celebrity does have the power to conduct the business of his branding in the fashion that he sees fit and no third party may unduly infringe hereupon. The central issue therefore is one of whether or not unfair exploitation is taking place.

Kitchin LJ held that the law of passing off isn't designed to protect a person against fair competition. He stated that the courts can take judicial notice of the fact that it is common for famous people to exploit their names and images by way of endorsement. The reason large sums are paid for endorsement is because those in business have reason to believe that the lustre of a famous personality, if attached to their goods, will enhance the attractiveness of those goods to their target market. TopShop sought to do this - they didn't obtain the necessary consent to do so lawfully.

Taking everything into consideration, the judge held that TopShop's sale of the t-shirt without her consent, amounted to passing off and Rihanna succeeded with her claim.

IV TRADE MARKS AND THE CELEBRITY

(a) Introducing trade marks to the celebrity brand

The *Trade Marks Act* defines a trade mark as

> a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kinds of goods or services connected in the course of trade with any other person.[101]

In the United States and the United Kingdom it has become quite common for celebrities to register their names and individual traits as trade marks. Paris Hilton™, David Beckham™, Sarah Palin™, Kylie Jenner™, Roger Federer™, 50 Cent™ and Kim Kardashian™ are just some examples of registered celebrity trade marks. Then there are registrations of celebrity associations: Paris Hilton registered *'That's Hot'*™ - a saying she used in a reality TV show; boxing announcer Michael Buffler registered his saying *'Let's get ready to rumble'*™; athlete Usain Bolt's *'Lightning Bolt'*- pose where he bends a knee and extends his arms; rugby player Johnny Wilkinson's distinct kicking stance; and American Footballer Tim Tebow's knelt prayer before each game are all registered trade marks. Nothing in the American *Trademark Act* of 1946 or the United Kingdom *Trade Marks Act* of 1994 prohibits persons from registering their names, attributes or actions from trade mark registration. Neither does our local *Trade Marks Act* 194 of 1993. And so, we have today this remarkable new aspect of trade mark law.

The registration of a celebrity's name, actions or attributes as trade marks allows him to defend himself against unauthorised use thereof. It signals to third parties that, before the celebrity brand can be used for commercial purposes, the celebrity's consent must be obtained. It is also a clear indication that the celebrity seeks to use his image for economic gains and that he is open to joint business ventures where his image is to be exploited.

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101 Section 2(1).

The law of trade marks can be used by the celebrity as a more-advantageous option than passing off. Trade mark registration will be pre-emptive, while passing off is definitely more reactionary. While with passing off the celebrity would need to prove reputation, confusion and damages, with trade marks he will simply have to refer to his registration document.

Registered trade marks give to the owner, once registered, exclusive rights to use that mark in relation to goods or services for which it is registered. The owner can, once registration is completed, prohibit any other party from registering for the same or similar marks. He can furthermore sue anyone who uses the same or similar mark to his in relation to similar products.[102] It is easier to bring a trade mark infringement action than a passing off or personality rights claim. And a trade mark registration - being a matter of public record – has a very strong deterrent effect too. The registered trade mark and the goodwill associated therewith, as stated continuously, a valuable asset. In fact, a South African celebrity already discussed, Basetsana Kumalo, the plaintiff in *Kumalo v CycleLab*,[103] has registered her name as a trade mark so as to ensure future protection of her image!

For a celebrity to obtain the widest possible protection under trade mark law it is important that he exploits his name and image during his life and in a manner which denotes a trade source. He must use the registered trade mark symbol (™) or publicise legal notices. By maintaining strict control of his trade mark, it would ensure the distinctiveness of his name and image for the goods for which he has registered. If a celebrity gets a trade mark for his/her name that does not mean that they can prevent others from using the name with regard to all goods and services. All it means is that they can prevent others from using the trade mark in respect of those classes of goods and services in which they have been registered.

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102 *Trade Marks Act* 194 of 1993.

103 31871/2008.

In *Button v Jenni Button (Pty) Ltd,*[104] a case concerning another South African celebrity mark, fashion designer Jenni Button was interdicted from using her own name for purposes of conducting business in the retail industry. This came after she undertook an agreement with Jenni Button (Pty) Ltd to transfer the goodwill vested in her name mark to the company. After the transfer, Ms Button established a new clothing and fashion brand, PHILOSOPHY, but continued to use her name in connection with the PHILOSOPHY brand. The company objected to this name use. Ms Button raised Section 34(2)(*a*) of the *Trade Marks Act*[105] as a defence. This defence, rightly so, failed, seeing as the Jenni Button name wasn't a registered trade mark.

It would, however, have been of utmost significance to the current discussion had the Jenni Button name in fact been registered as a trade mark. Ms Button argued that she could not be restrained from using her own name in respect of her business. The court held that our law provides for the *bona fide* use of your own name, provided that it is done honestly in the market place, but in this case Ms Button had *signed away* certain rights over the use of her name. The court held that the Jennie Button mark, as well as all goodwill associated therewith, was validly transferred to the purchasers and that her continued use of her name in relation to clothing amounted to passing off. Had the Jenni Button name been Jenni Button™, a trade mark in the hands of Jenni Button (Pty) Ltd; and Ms Button continued to use it in the marketplace, she would've committed a trade mark infringement for the use of her own birth name.

Our centrally discussed celebrity, Cristiano Ronaldo faced an uphill battle himself over the registration of his CR7 mark. An American fitness instructor, Christopher Renzi, successfully registered the trade mark CR7 in 2009. Renzi adopted the mark based on his own initials. In 2014 he instituted a claim against Ronaldo who was using the CR7 mark for his own commercial activities. Ronaldo petitioned to the United States Patents and Trade Mark Office to cancel the trade

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104 2008 BIP 242 (C).

105 Act 194 of 1993.

mark, but it refused. Renzi instituted a civil claim against Ronaldo and the case of *Christopher Renzi v JBS Textile Group A/S and Cristiano Ronaldo*[106] is still to be decided on.[107]

Another unsuccessful registration of a celebrity trade mark was the morally frowned upon one of singer-parents Beyoncè and Jay-Z. In 2012 the music superstars submitted a trade mark application to have the name of their infant daughter, Blue Ivy, registered as a trade mark. The registration of the baby's name was held to be a clever move by the parents for the commercial benefits it holds. Plans for baby products under the Blue Ivy brand were already in place when the application was dismissed. Blue Ivy is perhaps an appealing name to the parents for its aesthetic value, but financial advisors and agents may have weighed in on the decision of the child's naming. The superstars realised their own selling power and their offsprings' as well. They are marketable brands in themselves and cleverly devised a way to make their daughter one too. A Blue Ivy trade mark (belonging to an event organising company) was already registered and additional grounds for refusal included that its registration would be unethical. The critique was levelled at it being morally unacceptable to register a human being as a trade mark who has no say in the matter for themselves.[108]

It is thus evident that celebrity registration as a trade mark isn't a given. The celebrity will need to jump through the same hoops that the ordinary trade mark applicant would. They will need to persuade the Trade Marks Office (CIPC in South Africa) that the trade mark they are trying to register is original, distinctive and not one others might reasonably need to use.

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106 U.S. District Court for Rhode Island, No. 14-cv-00341 2014.

107 A Chung 'Soccer star Ronaldo's trademark case suspended' *Yahoo News*, available at *www.yahoo.com*, accessed on 13 December 2014.

108 N Smalberger "What's in a name?" *Without Prejudice* issue 3 vol 12 available at *www.withoutprejudice.com* accessed on 22 December 2015. P Thompson "Beyoncé and Jay-Z lose battle to trademark name of baby daughter Blue Ivy to small wedding planner business" *Daily Mail* 22 October 2012 available at *www.dailymail.co.uk* accessed on 20 December 2015.

(b) Registering a trade mark in South Africa

Distinctive marks are used to distinguish an enterprise, goods and products or services from those of other traders. Imitation of these distinctive marks amount to infringement of the registered mark which allows the proprietor of the mark to institute proceedings in terms of the *Trade Marks Act.*[109]

To qualify as a trade mark, a mark must be used to distinguish itself from other goods or services. It must have a definite distinguishing factor.[110] It provides a means by which consumers are able to identify a particular product.[111] A person's name has to be so distinctive that the consuming public automatically thinks of a particular person when hearing that name.

The registration of a celebrity name is possible if it is distinguishable from other names. Registration of common names might have trouble being registered, were one to once again take note of the reservations against legal protection of generic terms. Therefore, the celebrity must have a mark he wishes to have registered that is registrable. The celebrity can register his name as a trademark and duly identify in which sectors of the marketplace he wishes to use his registered mark. The *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* of 1957, to which South Africa acceded, identifies 45 classes of products/services into which trademarks can be placed and registered. These range from cosmetics to clothing to crockery. Were the celebrity to wish to market, under his name, any kind of goods, he would find in the Nice Classification a heading under which his products can be registered.

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109 Act 194 of 1993.

110 Section 9.

111 *Triomed (Pty) Ltd v Beecham Group pl* 2001 (2) SA 522 (T) 532-533.

(c) Infringement of a registered trade mark

(i) Infringement of Section 34(1)(a) of the Trade Marks Act[112]

This section states that the rights acquired by registration of a trade mark shall be infringed by -

> the unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion.[113]

Were the celebrity's trade mark infringed upon he can, in the first instance, contest a section 34(1)(*a*) infringement. He must prove that the use of his mark by the third party was without his consent. The third parties who have permission to use the celebrity's mark may only use it for the actions for which they have received permission from the celebrity.[114] In *Television Radio Centre (Pty) ltd v Sony Kabushika Kaisha t/a Sony Corporation*[115] the court held that one would need to consider the nature of the mark, the nature of the goods and the purpose and extent of the unauthorised use.[116] It held that the unauthorised goods must be competition to the original goods.[117] The infringing mark must be used as a trade mark in a commercial sense. Non-commercial use doesn't qualify in terms of this section. It must be used to create the impression that there is a material link between the original and unauthorised marks.[118]

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112 Act 194 of 1993.

113 Section 34(1)(*a*).

114 *MCT Labels SA and another v Gemelli CC* 1991 (1) SA 54 (D).

115 1987 (2) SA 994 (A).

116 *PAG Ltd v Hawk-Woods Ltd* [2002] FSR 46 (ChD).

117 *Beecham Group plc v Southern Transvaal Pharmaceutical Pricing Bureau (Pty) Ltd and Another* 1993 (1) SA 546 (A).

118 *Verimark (Pty) Ltd v BMW AG* 2007 (6) SA 263 (SCA); [2007] FSR 33 (SCA).

In *adidas AG and Another v Pepkor Retail Ltd*[119] the court asked whether of not Pepkor's use of the two and four stripes were used to distinguish their goods from adidas's within the same vein of trade. The court found that the similarity of the adidas and Pepkor shoes meant that they were indeed trade mark infringing. Therefore in the celebrity's case, the third party must show that his product isn't similar to that of the celebrity's and that it is wholly distinguishable.

The celebrity must prove that there is a likelihood that confusion will take place as a result of the use of the infringing mark. He must show that the infringing mark is either identical to his registered mark or so nearly resembles it that it will deceive consumers. To compare the registered and infringing marks, courts will look to the test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[120]

> The plaintiff need not show that customers are, or have been actually confused by the marks, but he must show that a substantial number of potential customers will be deceived or confused by the similarities between the marks.

In the *adidas AG*[121]-case the respondent held that the fact that the plaintiff's three stripe trade marks are so famous means that the likelihood of deception or confusion is reduced as customers would immediately know that it isn't adidas' trade mark but the mark of Pepkor. The court responded hereon by holding that

> the more distinctive the trademark is, or the greater its reputation, the greater the likelihood will be that there will be deception or confusion. Purchasers who are used to seeing the adidas trademarks will be far more likely to conclude that the similar mark is that of adidas and consequently that the competing products come from the same source.

Therefore, a well-known celebrity who has a registered trade mark runs a greater risk of his mark being confused as that of another party. A consumer can easily confuse the celebrity mark with that of another party seeing as he is used to see the celebrity mark.

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119 (187/12) [2013] ZASCA 3.

120 1984 (3) SA 623 (A).

121 (187/12) [2013] ZASCA 3 at 24.

(ii) Infringement of Section 34(1)(b) of the Trade Marks Act[122]

This section states that the rights acquired by registration of a trade mark shall be infringed by -

> the unauthorised use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion.[123]

The primary difference between section 34(1)(*a*) and 34(1)(*b*) is that the latter provides protection for 'similar' goods. This entails that the trade mark owner must prove that the goods or services used under the infringing mark are *similar* enough, not identical, to his trade mark. This subsection has a further reach that subsection (*a*) but is more difficult to prove. To determine whether or not goods are similar, the court considers the nature of the goods; the proposed use of the goods; and the trade channels through which the goods will be retailed.

When using this section the celebrity would need to show that the competing goods are used in a manner that, even if the connection between the two goods isn't direct, its sale will have a negative impact on the marketability of his own goods. He must show that his trademark is dependent on its unique nature and that the opposing party is infringing on the unique state of his mark.

(iii) Infringement of Section 34(1)(c) of the Trade Marks Act[124]

This section states that the rights acquired by registration of a trade mark shall be infringed by -

> the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception.[125]

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122 Act 194 of 1993.

123 Section 34(1)(*b*).

124 Act 194 of 1993.

125 Section 34(1)(*c*).

This section concerns itself with the dilution of the goodwill of the original trader. The celebrity must have developed a significant advertising value and selling power. This must have come about due to its extensive use. This selling power would have to have become diluted because of the unauthorised use by the third party.[126]

It exists to protect the investment, time and effort the trade mark owner has put into making his mark well-known. Trade marks are diluted through the blurring of the advertising abilities of the mark by an infringing mark. The infringing mark must be identical or highly similar to the original trade mark.[127] Dilution by blurring occurs where the use of the mark by unauthorised third parties makes the trade mark more of a generic term than a unique, descriptive product. Blurring doesn't differentiate between whether or not the unauthorised mark is used in direct competition to the trade mark or in any other sector.[128]

The celebrity's mark must be well-known in South Africa. In *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd*[129] the court held that 'well-known' is a term related to the reputation of the mark. To determine reputation, therefore to determine well-knownness, one has to consider whether a substantial number of members of the public are aware of the existence of the mark.[130] Dean[131] expands on well-knownness stating that the degree of recognition of the proprietor's mark in its and the defendant's trading areas and channels of trade is an influential factor in terms of proving subsection (*c*).

The question of fair use of a well-known mark was considered in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae).*[132] The Constitutional Court held that 'fair use' can be qualified if the trade mark is being used in a manner which is an act of freedom of expression. The

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126 *Société des Produits Nestlé S.A. v International Foodstuffs Co* 2013 JDR 2699 (GNP); 2013 BIP 230 (GNP).

127 *Bata Ltd v Face Fashions CC and Another* 2001 (1) SA 844 (SCA).

128 O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 151.

129 1997 (1) SA 1 (A).

130 O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 151.

131 O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 153.

132 2006 (1) SA 144 (CC).

court held that to determine whether or not a trade mark has been used fairly, for purposes of freedom of expression, it must consider the purpose, nature, extent and impact of the limitation of free expression. On the other hand the plaintiff would need to demonstrate the likelihood of substantial harm to his trade mark, which would be to his detriment and which would amount to being unfair.[133]

[133] O Dean and A Dyer (eds) *Dean & Dyer: Introduction to Intellectual Property Law* 151.

V PERSONALITY RIGHTS AS A MEANS TO PROTECT THE CELEBRITY BRAND

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk[134] recognised a right to human identity as a self-standing personality interest. All persons have a right to regard themselves in a particular fashion and to convey to the world a personal image of their choosing. A misrepresentation of a persons image can thus constitute an infringement of identity. As such, you build your reputation on the identity you choose. You build your *personal brand* on the persona you wish to convey to the world. The misrepresentation of a persons opted identity is *prima facie* wrongful and constitutes an *iniuria*.

(a) Recognition of the right to a good name (reputation)

A celebrity's good name or reputation (*fama*) is the regard which he enjoys within the community.[135] The opinion of a celebrity held by a society has a definite effect on his commercial value. The association, characteristics and deeds of a celebrity are primary motivations for this social judgement.[136] The community is responsible for this social judgement and this judgement is made based on moral constructs.[137] Were the community to frown upon the actions of a celebrity,[138] his reputation would be in a bad state. Were the celebrity's make-up to fit in well with the communal convictions, his repute would be positive and this would have a direct, positive effect on his commercial value.[139]

One's good name can therefor be regarded as an asset - personal goodwill. This close link to the intimate identity of a person means that a persons reputation deserves protection as an independent

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134 1977 4 SA 376 (T) 386.

135 SA Strauss, MJ Strydom, JC Van der Walt *Die Suid-Afrikaanse Persreg* 23.

136 McNamara *Reputation and Defamation* 21.

137 T Gibbons 'Personality Rights: The limits of personal accountability' 53. 1997/1998 *Yearbook of Media and Entertainment Law* 199 Oxford 53.

138 For example, were the celebrity to be caught in scandals involving drunk driving, racist comments or sexual debauchery.

139 See *Tap Wine Trading CC v Cape Classic Wines (Western Cape)* 1998 4 All SA 86 (C) 106.

aspect of his personality.[140] The protection of the right to a good name falls within the ambit of both the law of personality and the law of defamation. Reputation, within the personality law, is afforded Constitutional protection under the umbrella of the right to human dignity.[141]

The threshold inquiry as to whether or not a reputation is tarnished is to ask whether the deed or statement is capable of being defamatory.[142] The test is to determine whether the reasonable person would think less of a person because of the supposedly ill-found action.[143]

(b) Defamation

(i) An opposition to reputation

Directly opposed to the right of a good name is the assailing thereof through defamation. Defamation often comes about through the Constitutional right of freedom of expression.[144] This right is stretched to its limits by some.

In *Khumalo v Holomisa*,[145] which was a case that included a political celebrity, O'Regan J said that

> When considering the constitutionality of the law of defamation we need to ask whether an appropriate balance is struck between the protection of the freedom of expression on the one hand and the value of human dignity on the other.[146]

This has a dramatic implication for the level of protection offered to the reputation of a celebrity. Celebrities are 'public property'.[147] Most of them live their lives in the limelight. Shouldn't they then be thick skinned about public criticism? They appear to welcome the attention and so it must

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140 *Khumalo v Holomisa* 2002 5 SA 401 (CC).

141 Section 10 of the *Constitution*.

142 *Sim v Stretch* 1936 2 All ER 1237.

143 *Gardener v John Fairfax & Sons (Pty) Ltd* 1942 42 SR (NSW) 171.

144 Section 16 of the *Constitution*.

145 2002 5 SA 401 (CC).

146 *Khumalo v Holomisa* 2002 5 SA 401 (CC) at 419.

147 As was held in *Khumalo v Holomisa* 2002 5 SA 401 (CC).

be asked, how sensitive should they be when a person is exercises his freedom of expression to criticise them? When will statements about a celebrity constitute defamation? And can these otherwise defamatory comments, ever be justified?

(ii) Qualification of defamation

Defamation is the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his status, good name or reputation.[148] Defamation is a specific form of an *iniuria*.[149] There must be an act: the publication of words or behaviour. There must be an injury to personality: the words or behaviour must be of a defamatory nature. There must be wrongfulness: the personality right to a good name must be injured. There must be intent: *animus iniuria* is the final requirement that must be satisfied.[150]

The mingling of commercial exploitation of identity and the exploited parties reputation was discussed in *Wells v Atoll Media (Pty) Ltd*.[151] In that case a magazine used the photograph of a minor for advertising purposes, without her consent. This publication led to reinforcement of negative stereotypes of women and her personal vilification by classmates and peers. Although she was not a celebrity *per se*, this case offered valuable insight into how our courts can protect the reputation of a public figure.

Her mother, as legal guardian of her minor daughter, launched an application against the publication of the photograph which she stated amounted to an invasion of the girl's privacy and harm to her reputation. The court held that when a photograph is used, without consent, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of reputation, dignity and privacy.[152] The court held that, no matter how one looks at the matter, the publication of a provocative photograph of a twelve year old girl simply cannot be reconciled with

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148 *Tap Wine Trading CC v Cape Classic Wines (Western Cape) CC* 1998 4 All SA 86 (C) 107. See also *Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W).

149 J Neethling, JM Potgieter and PJ Visser *Law of Personality* 44.

150 J Neethling, JM Potgieter and PJ Visser *Law of Personality* 131.

151 (Unreported 11961/2006) [2009] ZAWCHC 173 (09/11/2009).

152 (Unreported 11961/2006) [2009] ZAWCHC 173 (09/11/2009).

generally accepted norms of decency and will always have a dire effect on the girls reputation.[153] The court held that the right to identity is infringed upon if the attributes of a person is used in a way which cannot be reconciled with the actual image that the individual would prefer to convey of herself.

What is the implication of all this for media freedom? With any action for infringement of a subjective right, a variety of conflicting interests must be weighed against each other. With the use of a person's image, the rights to identity, human dignity and freedom of association of the individual must often be weighed against the users right to freedom of expression and freedom of the media. The media ought always be on hot coals when they consider using a person's identity in their publications. This case laid down a better understanding of reputation and publications: If the publication cannot be reconciled with the true image of the person, it might in fact be an infringement.

The restatement of the law laid down in *Grütter v Lombard*[154] in respect of appropriation of image is of much significance. Davis J stated that, to succeed with a claim where the attributes of a person are used without permission, it is a requirement that the person concerned should indicate that there was some misrepresentation of his or her personality. This kind of infringement entails a misrepresentation concerning the individual. In this case it appeared as if the individual approved or endorsed a law firm while it was not the case.

In this case both parties had been practising as attorneys under the name "Grütter and Lombard". Grütter terminated the partnership, but Lombard continued to use the name "Grütter" as part of his practice. Grütter's claim was that it was well-known that the name "Grütter" referred to him directly and he didn't wish to associate his reputation with the firm any longer.

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153 Even if the girl's parents were to offer their consent, is it public policy to accept these publications and endorsements?

154 2007 (4) SA 89 (SCA) 8.

The court found that Grütter was entitled to the protection of his identity and that his uniqueness as a person manifests itself in his personality, character, name and attributes. An individual should, therefore, have an interest in their identity and how it is used. The court went on to say that any unauthorised use of such identity is a violation of that person's right to determine who should or should not have access to his image. The court confirmed that every individual has a right to identity and consequently, when such identity is violated, then one's good name is infringed upon.

(iii) Requirements for liability

Defamation, being aimed at the infringement of the celebrity's good name, occurs if the defamatory statement or behaviour is conveyed in a way that a third party becomes knowledgeable thereof.[155] For defamation's sake, publication is a necessity. Without publication the esteem of the celebrity cannot be diminished. According to *Kyriacou v Minister of Safety and Security*[156] the requirement of publication is satisfied if the defamatory words or behaviour is known by *at least one other person.*[157] If one other person only needs to know about it, then mass-publication by a tabloid about the ill-doings of a celebrity can be a large scale intrusion! This disclosure can be made in writing or other means of representation. Internet platforms are included as ways in which publication takes place.[158]

Were the celebrity to decide that his good name has been tarnished, defamation has occurred and his image has lessened in value, it would be wise for that celebrity to take the matter to court. As a plaintiff in court, he can challenge the assertions of the defendant publisher and so seek retribution and relief for those comments.

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155 *Whittington v Bowles* 1934 EDL 142 145.

156 1993 3 SA 278 (O) 287. See also *African Life Assurance Society Ltd v Robinson & Co Ltd* 1938 NPD 277 295 and *Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W)120.

157 In *Vermaak v Van der Merwe* 1981 3 SA 78 (N) the court held that even if the third party who the defendant communicated the defamatory words to doesn't grasp the defamatory significance of the statement, the defamer will still be liable for his defamation of the plaintiff's reputation.

158 *Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W).

First and foremost, the celebrity must offer proof of the remarks made against him. If it is clear that publication has taken place, the celebrity plaintiff must prove that the defendant is the person who is responsible for the publication.[159] The plaintiff must clearly prove that the conduct was levelled against him as person. This sets up the necessity for a causal connection between the words spoken or deeds committed and his personhood.[160] The defendant will be held accountable if it can be said that he ought reasonably have known that there existed a possibility that a third party might become aware of his defamatory remarks.[161]

For words or deeds to be considered defamatory, the publication must impair the individual's good name and be objectively unreasonable.[162] Held against the *boni mores*, the words or deeds must be deemed unsavoury. To test whether or not words or deeds are defamatory, the court asks whether or not, in the opinion of a reasonable person of ordinary intelligence,[163] the publication of the words or behaviour will undermine or impair a person's reputation. If it is so, that conduct will be *prima facie* wrongful.[164] The ridicule must have a definite and direct effect on the lowering of the esteem in which the plaintiff is held by the community.[165] With the celebrity, this is often easy to ascertain. Other publications will climb on the bandwagon of celebrity scathing, negative remarks will be levelled against him[166] and commercial endorsements may be removed. This has serious implications for the commercial worth of the celebrity brand. It can happen that due to the defamatory statement, other persons (or corporations) are now less likely or completely unwilling to

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159 *Van Vliet's Collection Agency v Schreuder* 1939 TPD 265.

160 *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 2 SA 373 (O) 380.

161 *Pretorius v Niehaus* 1960 3 SA 109 (O) 113.

162 J Neethling, JM Potgieter and PJ Visser *Law of Personality* 131.

163 *Associated Newspapers Ltd v Schoeman* 1962 2 SA 613 (A) 616. See also *Sutter v Brown* 1926 AD 155 163 and *SA Associated Newspapers Ltd v Yutar* 1969 2 SA 422 (A) 451.

164 *De Villiers v Schutte* 2001 3 SA 834 (C) 837.

165 *Kimpton v Rhodesian Newspapers Ltd* 1924 AD 755 757.

166 In *Pitout v Rosenstein* 1930 OPD 112 117 it was held that all the qualities that a man possesses must take a knock because of the defamatory words or behaviour which would thereon following have an impact on the social standing of the man among his fellowmen.

167 In *De Wet v Morris* 1934 EDL 75 77 it was held that the fact that the statements left about such a severe tarnishing of the plaintiff's reputation which caused societal dissociation, those statements were to be regarded as defamatory.

associate with the victim.[167] This public tarnishing has had a disastrous effect on the social standing of innumerable celebrities.

A particular celebrity whose reputation is constantly being attacked is South African president, Jacob Zuma. Mr Zuma has been the victim of a multitude of defamatory statements made against him in the media, social media and public forums. This unyielding assailment has resulted in dismal approval ratings from the South African public.[168] It can be said that publications of defamatory statements against Mr Zuma constitute impairments of his reputation.[169] Some of these assertions, no doubt, are justified, but others are not. It is as if a prevailing prejudice has developed around the man and his reputation cannot escape it. The media[170] are relentless in their attack on his reputation and this impairs the public perception of him.

The circumstances of each case play an important role in the determination of how the reasonable person would react - it is a factual inquiry.[171] The application of the objectively reasonable person test is thus crucial for determining whether a statement or behaviour is wrongful in defamation. The reasonable person for purposes of defamation is deemed to be a fictitious, normal, balanced right-thinking and reasonable human being who is neither hypercritical nor over-sensitive; and is someone with normal emotional reactions.[172] The reasonable person is someone who believes and upholds Constitutional values and values the rule of law.[173] He is a representation of the community and so the defamatory conduct is such as to be unacceptable in the eyes of all members of the community.[174] The context of the case is crucial to applying this test in an appropriate way.

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168 'Study: Zuma losing popularity among South Africans' *Eyewitness News* 14 December 2015 available at *www.ewn.co.za*, accessed on 10 March 2016.

169 Unless justified.

170 In particular a certain cartoonist.

171 *National Union of Distributive Workers v Cleghorn and Harris* 1946 AD 984.

172 *SA Associated Newspapers Ltd v Schoeman* 1962 2 SA 613 (A) 616. See also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 587.

173 *Sokhulu v New Africa Publications Ltd* 2001 4 SA 1357 (W) 1359.

174 *Botha v Marais* 1974 1 SA 44 (A) 49.

The situation in which the conduct is committed and the type of person against whom the conduct is levelled are telling. Thus the position of a celebrity can be different from that of an ordinary member of society. Once more, should the celebrity accept that he is an anomaly in society and must he, accordingly, be more thick skinned? The average member of the community's approach will be telling. If the average member believes that the celebrity cannot be led to feel that the conduct is defamatory, then the court might decide against the plaintiff celebrity.

The requirement of *animus iniuria* is influential to prove defamation for the celebrity plaintiff.[175] The defendant publisher ought to have had the intention to defame the celebrity plaintiff. The intention to defame can present itself in the form of *dolus directus*, *dolus indirectus* and *dolus eventualis*. Accordingly, the defamer's will must be directed toward the consequence or he must have had the reasonable foreseeability that his conduct could cause the consequence it had.

(iv) Grounds of justification relating to defamation against a celebrity

aa) Privilege

Privilege allows for the publication of defamatory words or behaviour and thereby excuses conduct from being wrongful.[176] Where a person has the right or duty to make certain defamatory assertions public; and the persons to whom the assertions are published have a right to learn of the assertions, that person can justify his publication through privilege.

In the situation of absolute privilege, the defendant's protection is absolute and unqualified and liability for defamation is completely excluded. In this case, because of statutory backing, a person is permitted to commit defamatory conduct! An example hereof is that members of Parliament receive complete immunity from defamation for remarks made in Parliament or in one of its committees.[177] The provincial legislatures receive the same protection.[178] In parliament there are a number of persons who can be regarded as celebrities. They include the president, vice-president,

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175 Unless negligence or mistake can be proven as a justification ground.

176 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1202.

177 Section 58(1) of the *Constitution*.

178 Section 117 of the *Constitution.*

cabinet ministers, speaker and certain opposition leaders. The comments of Mmusi Maimane, Democratic Alliance leader, projected against president Jacob Zuma thus fall within the statutory protection offered. Were Mr Maimane to call president Zuma "not an honourable man but a broken man presiding over a broken society",[179] he would easily have been deemed to act in a defamatory way toward the president. Were Mr Zuma to try and hold Mr Maimane liable for his comments in parliament, the *onus* is on Mr Maimane to prove that he has the right to absolute privilege.

In the case of limited privilege, a person who publishes the defamatory matter can deem himself to be under a moral or social duty to do so. Said person must regard themselves to have a legitimate interest in the publication and that the persons to whom he is publishing it to, has a legitimate interest in receiving said matter.[180] To determine whether or not the publication warrants privilege is an objective question. One ought to ask whether or not the reasonable person would deem there to be a duty on the defamer to communicate the defamatory words or behaviour to the receivers.[181]

There are a number of factors which must be taken into account to determine whether or not a person's perceived moral or social duty permits privilege. In the first instance regard must be had as to what the relationship between the parties are and whether or not certain information (necessary for the defamatory remarks), given their relationship, was conveyed in confidence;[182] the seriousness of the defamatory remarks;[183] and the importance and urgency of the issue in respect of which the defamatory charge was made.[184] He must be able to show that his defamatory conduct is

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179 S Apiah "Maimane to Zuma: You are not an honourable man" *Mail & Guardian* 28 January 2015 available at *www.mailandguardian.co.za* accessed on 17 June 2015.

180 *Borgin v De Villiers* 1980 3 SA 134 (D) 148.

181 *Borgin v De Villiers* 1980 3 SA 134 (D) at 577. See also *De Waal v Ziervogel* 1938 AD 112 122-123 and *Mohamed v Jassiem* 1996 1 SA 673 (A) 710-711.

182 *Carbonel v Robinson & Co (Pty) Ltd* 1965 1 SA 134 (D).

183 In this case the we can state that publications which severely tarnish the reputation of a celebrity without there being truth thereto can be deemed to be serious. Fabricated allegations injuring the reputation of a celebrity cannot receive privilege. However, the exposing of truthful celebrity actions can receive privilege. Examples of this would be the investigative journalism which went into exposing cyclist Lance Armstrong for his doping or rugby player Joost van der Westhuizen for his extra-marital affairs. Although these are very serious allegations against the reputation of celebrities the journalists receive privilege on the basis that these allegations prove to be the truth and they were under a moral and social duty to communicate these truths to the public.

184 J Neethling, JM Potgieter and PJ Visser *Law of Personality* 147.

relevant to and reasonably connected with the furtherance of a greater goal.[185] In *Jasat v Paruk*[186] the court held that the defendant transgressed the limits of privilege by acting beyond the scope of the subject matter to which the privilege would otherwise relate. As such, one can state that a journalist would be free to convey defamatory comments about a celebrity within the ambit of a topic that is justified,[187] but he may not overstep the bounds of that privilege.[188]

bb) Public interest

If the defendant can prove that his remarks are both true and in public interest the otherwise *prima facie* wrongfulness of his publication falls by the way side.[189] These expositions must be limited to the precise representations that were made, he cannot allege things for which he has no evidence.[190] Therefore, were a person to allege that a celebrity politician is guilty of fraud, only this fact and its necessary intricacies are worthy of protection. Lambasting slurs, additional to the founding facts, are free of justification protection and the defamer would have to answer for it.

The circumstances of the case, along with the communal convictions (*boni mores*), will determine whether or not a matter is in the public interest. It is held that exposing a corrupt politician is in the public interest whereas doubt can be cast over whether or not the carnal activities of a pop star are in public interest. The merits of each case must be considered. If a broad base of the public were to be convinced that the pop stars conduct (for whatever apparent reason)[191] are in any way a matter of public interest, the defamatory remarks could be justified.

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185 *Borgin v De Villiers* 1980 3 SA 556 (A) at 578.

186 1983 4 SA 728 (N) 733.

187 For example were the celebrity to be participant in an adulterous scandal.

188 Such as alleging certain things about the celebrity if there in fact is no evidence to support such statements.

189 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA).

190 *Verwoerd v Paver* 1943 WLD 153.

191 The pop star could perhaps be viewed as a role model for some young persons and being highly influenceable, exposure to the ludicrous behaviour of a role model could prove to be against public interest.

In *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party*[192] it was held that the public has a definite interest in the doings of public officials, albeit so that those doings are communicated through defamatory remarks. This strengthens the supposition held forth that celebrities should, because of their peculiar position, to be more thick skinned than others.

cc) Media privilege

Reports made by the media should, as an ethical rule, be fair and truthful but, if reasonable, the publication of untruths may be justified. Media privilege, therefore, is an exception to the requirement that only truthful defamatory comments may be published. Media privilege concerns itself with the justification of untruths and should only succeed in exceptional circumstances.[193] It is however a requirement that the publication be made with a reasonable intention of believing the statements to be the truth. For the determination of media privilege justification, the *boni mores* must be used as yardstick.[194] The public interest, the nature and extent of the statements, the nature and societal reach of the medium used, the reliability of the source of the information and the necessity for the publication are all telling factors to determine this justification.[195] In practice this means that defamatory publications made of a celebrity ought to be thoroughly analysed. In this analysis, if it were to be found that the statements are untruths or half-truths, it must be determined whether the public interest justification can hold water. Therewith, consideration ought to be had for the type of allegations that were made against the celebrity. Thirdly, regard shall be had as to the reputation impact of the statements (is the celebrity reputation severely depleted?). Finally, the reliability of the source (can a tabloid be regarded as a reliable source?) and the necessity for the publication will be detrimental to determine the justification of the publication.

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192 1992 3 SA 579 (A).

193 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA).

194 *Khumalo v Holomisa* 2002 5 SA 401 (CC) at 414.

195 *Mthembi-Mahanyele v Mail & Guardian Ltd* 054/2003 (SCA) 65.

dd) Fair comment

If the defamer can prove that his published comments form part of a fair comment on true facts that are in the public interest, the defamation may be excused as not being wrongful.[196] The courts set forth four criteria for a party to succeed with this justification.[197] These criteria are

- The publication made must not be based on fact but must be an opinion;
- The opinion must be fair (it must remain within reasonable limits);
- The facts relating to the opinion must be true;
- The opinion must be a matter of public interest.

ee) Consent

Were a party to lawfully consent to the infringement of his reputation, that defamation is justified.[198] This is done in terms of the principle *volenti non fit iniuria* (to a willing person, injury is not done).[199] It would be up to the defendant to prove that the plaintiff consented to the defamatory publication.

ff) Mistake

Were a party to *bona fide* believe that his conduct is lawful, he therefore has no *animus iniuria* in his actions. His will isn't guided by an intent to harm the plaintiff. In *Nyodo v Vengtas*[200] the court held that were a defendant to honestly believe his defamatory remarks were communicated for a lawful purpose, it can be justified that he never intended to defame and shouldn't be held accountable therefore. The person commenting on the celebrity's actions can thus justify his false statements were he able to prove that he made those comments by mistake.

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196 *National Media Ltd v Bogoshwe* 1998 4 SA 1196 (SCA) at 1202.

197 *Marais v Richard* 1979 1 SA 83 (T) 89. See also *Johnson v Beckett* 1992 1 SA 762 (A) 778; *Heard v Times Media Ltd* 1993 2 SA 472 (C) 476; *Crawford v Albu* 1917 AD 102 105; *Coetzee v Union Periodicals Ltd* 1931 WLD 37 43.

198 *Bester v Calitz* 1982 3 SA 864 (O) 878.

199 *Jordaan v Delarey* 1958 1 SA 638 (T).

200 1965 1 SA 1 (A) 15.

gg) Jest

Jest is a matter highly applicable to defamatory publications. In 2008 president Zuma sued cartoonist Jonathan Shapiro (Zapiro) for damaging his reputation for a cartoon depicting Zuma preparing to rape the Lady Justice.[201] Zuma finally dropped the charges the day before the matter was to appear in court. The newspaper publishing the article, the *Mail & Guardian*, in an editorial following the dropped charges, stated that

> cartoonists are the court jesters who make us laugh and then cry when we realise that what's been drawn is often the fundamental truth or a portent of what might come to pass if the authorare not vigilant. The greater the freedom of the jester, the higher the democratic quotient of a society.[202]

The test laid down whether or not an otherwise defamatory remark is one of jest is to ask whether or not the reasonable person would deem the comments as pure jest and not as intended defamation.[203] Were the reasonable man to interpret the remarks as humorous, no liability can be found on the part of the jester.[204] *Animus iniuria* must once again be present. Zapiro would've needed to prove that he never had the intent to defame Mr Zuma and that the cartoon was simply for comical purposes. If that were the case, in any matter, then jest as justification ground will hold water.

hh) Negligence

National Media Ltd v Bogoshi[205] accepted negligence as a justification ground to not be held liable for defamation. The mass media has on the one side a blinding influence on the views of society but on the other hand carries - in large part - the reputation of public figures. Most public figures serve South Africa in a positive sense and accordingly reckless publications, endangering their good name, doesn't serve the South African society. It has been held that the media unfairly lambast

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201 Daniels G 'The case of Zuma versus Zapiro' *The Media* 19 December 2012 available at *www.themediaonline.co.za* accessed on 01 December 2016.

202 Haffajee F 'Editorial' *Mail & Guardian* 12 September 2008 available at *www.mailandguardian.co.za* accessed on 04 December 2015.

203 *Masch v Leask* 1916 TPD 114.

204 *Peck v Katz* 1957 2 SA 567 (T) 572.

205 1998 4 SA 1196 (SCA) 1210-1211.

certain public figures and are prejudiced from the word go against these figures.[206] It cannot be denied that many of these public figures are indeed deserving of the critique, but petty prejudice shouldn't jeopardise the objective stance of free media. Nevertheless, were a media house to clearly act negligently by publishing defamatory remarks, they wouldn't necessarily be held liable therefore.

206 The African National Congress (ANC) lament the constant media aggression against any actions done by president Jacob Zuma or other high-ranking ANC officials. 'Media too critical of Zuma and ANC - Mkhize' 6 July 2015 available at *www.iafrica.com* accessed on 05 December 2015.

VI CONCLUSION

Throughout history we have looked to leaders to guide us through the evolution of society. The actions of those held in high regard have always had a massive influence on the way in which society conducts itself. And so in our modern society, celebrities fill a remarkable position. With mass media and social media instantly at our disposal, we can stay up to date with the latest happenings in celebrities' lives. Articles are published daily about the stars we adore and those we detest. The media has a massive impact on how we perceive these societal leaders. Gone are the days where a king is king - no matter what. Society can decide who sits on the proverbial throne today and so-and-so might be gone tomorrow. The smart celebrity realises this and, while he is still in the limelight, he uses his attention economy to make a profit. Attention economy is a theory that, at its core means *fame makes money*.

The celebrity has a personal brand - those things which make him famous and attaches a financial value to his fame. His personal brand has, in and of itself, a commercial value. He can use this personal brand to enter the marketplace with his own products or services or to endorse the products or services of third parties. Like a business, the celebrity has a 'goodwill' attached to his brand - this personal goodwill is what makes him an entity unique in the marketplace. It is his reputation that offers his business the ability to stand out among other individuals, products or services.

We have seen that image rights is one of the best ways in which celebrities can protect themselves against unfair exploitation of their brands. However, image rights are horribly underdeveloped in South Africa and so the celebrity should be weary to use them when his brand is unfairly exploited. We saw that the American approach to image rights is a strong instrument at the disposal of a celebrity whose image rights have been interfered upon. American image rights has developed a 'personal goodwill', something we spoke of extensively throughout this discussion. The author argued that it would be in the best interest of South African image rights to incorporate the American approach in our local context.

The author then looked at passing off. Passing off is a worthwhile way in which the celebrity can respond to situations where his brand has been unfairly exploited. Passing off is a reactionary mechanism which has remedies that can assist the celebrity plaintiff to restore the reputation of his

brand. Passing off has been well explored in South Africa and it is interesting to attach passing off to the situation of the celebrity.

Next, we considered the case of trade mark registered celebrities. Celebrities around the world have used the trade mark mechanism to ensure that their brands aren't exploited without consent. Trade marks are very sure ways to pre-emptively see to it that their brands stay within their own hands. Were their brands unfairly exploited, under trade mark law, the celebrity will have a couple of options at his disposal to combat the infringement of his celebrity brand.

Finally, we considered the personality right to a good name. Celebrities have the right to a good name and so they can use personality rights to ensure that their name remains in a good standing. By alleging an *iniuria* the celebrity plaintiff can protect his reputation against defamation We considered the situations where defamation can be justified but all-in-all the personality right to reputation is a well-established way in which the celebrity can maintain control of his brand.

The author enjoyed researching this topic and feels that further exploration thereof is needed. He often felt that a lot more could be said about the different aspects of each matter but is satisfied that strong foundations have been laid. This discussion dealt with the commercialisation of the celebrity brand and the exploitation thereof and at the end of it all the author believes he has covered this topic in a satisfactory fashion.

And so, to us plebeians who sometimes crave fame, the author resorts to a quotation which may settle our hearts and move us away from the yearning to become celebrities ourselves. Words from one of the most famous of them all

'Glory is like a circle in the water which never ceaseth to enlarge itself, till, by broad spreading, it disperses to naught'

-William Shakespeare-

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