

Fake celebrities and the law

It has become virtually impossible to watch television, listen to the radio or flip through a magazine without encountering advertisements featuring celebrity endorsements. This form of marketing is pervasive because many advertisers believe that endorsements by celebrities can increase the perceived value of the products they are featuring.

The celebrities in these commercials can enjoy protection of their work under copyright law as well as by contractual agreements signed with advertisers.

However, because of the compensation demanded by celebrities for such endorsements, it has become increasingly common to see or hear commercials featuring non-celebrities who impersonate certain well-recognised personal traits of celebrities such as mimicking the voice and accent of a celebrity or dressing up in a way that creates an immediate link to a celebrity. Although this would seem to be a legitimate advertising technique, there are legal implications to these actions.

Personal habits, image, voice, accent, physical characteristics, and even catchphrases are examples of personal traits that distinguish one person from another. Normally, the law does not protect one's personal traits (which can be collectively referred to as "personality"). However, when celebrities use their distinctive personality commercially, such as when they use their personality as a means to commercialise certain products, the parties involved tend to seek protection under the legal system.

Personality right has long been known under the US legal system as "right of publicity". Although there is no federal law on this, many US states have legislation recognising right of publicity, which prevents unauthorised commercial use of one's name, likeness, or other known aspects of one's personality. In the UK, although there is not a written law on personality right, previous case law demonstrates that protection of personality exists to some extent. The first successful case of the kind was in 2002 when Formula One driver Eddie Irvine successfully protected his image based on the passing-off action of false celebrity endorsement.

Although French President Nicolas Sarkozy recently failed in his first attempt to protect the use of his image on voodoo dolls and had to file an appeal, the existence of the suit itself proves that the concept of personality right is recognised in France. Similarly, a review of court cases reveals that celebrity personality right is recognised in Germany, Italy, and other European countries, as well as in Japan.

Under the Thai Trademark Act, photographs, drawings, devices, brands,

names, words, letters, manuals, signatures, combinations of colours, and shapes or configurations of objects can be protected as trademarks. But the fact that a trademark is designed particularly for use in connection with products to distinguish those of one owner from those of others makes it difficult, if not impossible, for the personality of a person to be protected under trademark law.

It seems unlikely that personality could serve as a tool to determine the source of origin of one product from another. Personality can be used, at best, as a tool to guarantee quality or to endorse products, not to indicate their source.

The concept of "passing off" is used in Thailand to protect owners of unregistered trademarks from being exploited by others who try to pass off their products as those of the owner of the unregistered trademark. As mentioned, personality can never become a trademark. Likewise, the Thai passing-off concept cannot protect unauthorised commercial use of one's personality. This stands in contrast to other jurisdictions, such as the US or UK, where passing-off action may be applied for misappropriation of personality.

There are also obstacles to protecting personality under copyright law. The Thai Copyright Act serves to protect "expressions of ideas" rather than to protect personal traits of an individual. The law of torts would seem to offer an alternative means to protect personality rights because damages to any right can be protected by tort law. However, "any right" in the sense of the tort law only covers "right that is protected by the law". Hence personality right, which is not currently recognised under our legal system, is unlikely to be protected under the law of tort.

Given these shortcomings, the conclusion can be reached that a celebrity's personality is not entitled to protection under the Thai law. "Fake celebrity endorsement" is therefore not against the law. But even if the Thai law does not yet recognise personality right, celebrities and advertising agencies should be aware of the developments of this aspect of the law.

This perspective could become useful when doing business internationally because although personality right is not officially protected in most countries and there is hardly any specific legislation on the matter anywhere, this right is recognised and protected to some extent in many countries.

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