

# **The Problem with the Image of Athletes**

By Laura Sigal\* and Matthew Finnis\*\*

## **Introduction**

In a year where the focus on Australia's elite athletes' performances off the field has generated as much, if not more, discussion than their on-field heroics, it is inevitable that lively debate will follow as to the role model status of sportspeople and the extent of social responsibilities which attach to this position.

Rookie athletes entering professional sporting leagues and teams are now routinely briefed on the implications of their new job on a range of aspects of their life, not the least of which involves the concept of the young athlete's identity developing a life all of its own, and the prospect that whilst the athlete will bear responsibility for his or her identity, (s)he may not always be in a position to authorise how it is used.

In 2007 there were over 700 media representatives accredited to cover the AFL competition – a figure roughly equal to the number of players in the game and nearly double the number of journalists covering federal politics.

Undoubtedly, AFL players benefit from the enormous public interest in their sport, whereby media rights and corporate sponsorship revenues deliver impressive salaries and commercial opportunities for the stars of the game.

However the celebrity style media coverage and increasingly complex layers of commercial arrangements which have become a feature of the modern professional game also expose athletes to the risk of losing control of the use of his or her image.

Athletes, and other Australians, should be legally entitled to control the use of their names, likenesses, and other components of their image<sup>1</sup>, both as an economic property interest and a human right.

In Australia, we currently have laws which recognise and protect the interests of sporting clubs, event organisers, sponsors and sporting leagues- all the parties involved in a sporting event except those who participate directly, and who generate the public support underpinning the sporting pursuit – the athletes.

This article seeks to establish the case for reform of the current legal framework to more equitably recognise and protect athletes' legitimate interests in their identities.

## **Current Law**

Under Australian law athletes do not have either personal or commercial property rights in their images.<sup>2</sup> Anyone is free to exploit an athlete's image so long as he/she is not otherwise in breach of a legal duty and/or obligation. Accordingly, athletes must resort to "back door" methods to protect the economic value of their images such as:

1. laws protecting the rights of consumers to not be misled;

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<sup>1</sup> Components of image are distinguishing features such as signatures, voices, unusual mannerisms, etc.

<sup>2</sup> For the purpose of this paper, "image" refers to a person's name and likeness.

2. laws protecting individual's public reputations against defamation;
3. laws protecting persons who have copyright interests in expressions of their images;
4. laws protecting those aspects of individual's identities that are capable of being registered as a trademark;
5. laws protecting the trademarks of associated corporations (such as sporting clubs' guernseys, logos and nicknames); and
6. laws protecting an individual's contractual rights.

It is submitted that for a variety of reasons briefly set out below, the above protections are inadequate to arm the modern athlete (or celebrity) with the ability to properly protect the use of his or her personal image.

### *Consumer Protection Laws*

Australian law protects consumers from misleading claims through actions under sections 52 and 53 of the Trade Practices Act, 1974, (Commonwealth) (the "TPA") and the common law tort "passing off". In the past, athletes have prevailed in cases in which advertisers have used their images in a manner that would cause a consumer to incorrectly infer an endorsement from the athlete or a connection between the athlete and the company/product.<sup>3</sup>

However, it takes little creativity to avoid a passing off / TPA claim and still exploit the commercial value of a celebrity's image.<sup>4</sup> In the Olivia Newton-John case, a cosmetics company used a celebrity look-alike to convince Jane average that its products would help her achieve the "Olivia look". The court held that it was clear that the person in the advertisement was not Ms Newton-John, thus that the public was not deceived into connecting the advertiser with Ms Newton-John.

Currently, an advertiser could feature an athlete using its product or service so long as it included a disclaimer<sup>5</sup> stating, for instance, that the athlete used the product without being paid to do so through any type of endorsement deal.<sup>6</sup> If the public is not likely to be deceived, an action will not lie.

### *Defamation*

A defamation action may be available where an athlete's image is used in a manner that could harm his / her reputation. In one of the earliest cases in which an athlete sought to protect his image, *Tolley v Fry*<sup>7</sup>, a golfer claimed that use of his image in an advertisement carried the defamatory imputation that he had received payment for the ad, and thus, was dishonestly holding himself out as an amateur. The court found that, under the circumstances, the advertisement was defamatory and held for the golfer. In *Ettinghouse v Australian Consolidated Press*<sup>8</sup>, a rugby player who was

<sup>3</sup> See, for instance, *Talmax Pty Ltd v Telstra*, (1996) 36 IPR 46; *Wickham v Association of Pool Builders* (1988) ATPR 40; *Hogan v Koala Dundee Pty Ltd*, (1988) 12 IPR 567.

<sup>4</sup> See *Olivia Newton-John v Scholl-Plough* (NSW G208 of 1986)

<sup>5</sup> It should be noted that the disclaimer in *20<sup>th</sup> Century Fox v South Australian Brewing* (1996) ATPR 41 was not found to be one that the public would believe given the specific circumstances of the case.

<sup>6</sup> Unlike the advertising codes in the UK, the Australian Association of National Advertisers Code of Ethics does not protect privacy or require permission for the use of testimonials or endorsements (See, for instance, the The British Code of Advertising, Sales Promotion and Direct Marketing).

<sup>7</sup> [1931] AC 333.

<sup>8</sup> (1991) 23 NSWLR 443

pictured nude in a magazine prevailed in defamation: the photo implied that he had allowed himself to be photographed nude for financial gain.

However, given that defamation actions generally require an untrue imputation that would diminish the plaintiff in the estimation of a portion of the community, it has limited use in preventing the unauthorised use of an athlete's image where no specific negative connotation is made.

### *Copyright*

Australian copyright laws protect the expression of ideas, such as a visual work, an audio recording, a broadcast, a photograph, etc. by vesting the creator with property rights in the material.<sup>9</sup> Copyright does not protect individuals or their images. Copyright protection is available to prevent, for instance, the unauthorised use of an athlete's photograph or clip from a game broadcast, however the right of action lies solely with the holder of the copyright.

As such, a commercial photo library which owns copyright in photographs taken of sporting performances is in a position to license or sell such images to third parties without any consent being required of the athlete who is the subject of the photograph. Whilst in some circumstances an athlete might be in a position to formally support the claim of a copyright holder against an unauthorised use of a copyright image, he or she would be unable to recover any damages he suffered from such use.

### *Trade Mark Laws*

Similar to copyright, trademark laws provide scant assistance to athletes who want to control their images because they are only applicable to certain indicia of an athlete's image, rather than to the image itself. A trademark is a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or a combination of these used to distinguish the goods and services of one trader from those of another.<sup>10</sup> As such, an athlete may register his / her signature or nickname as a trademark in attempt to prevent their use by others provided such use is in trade or commerce. Whilst the athlete may also register a specific likeness of him / herself as a trademark, only that specific depiction would be capable of protection.

It may be possible for athletes to indirectly assert rights in the use of their image where the unauthorised use of an athlete's image also includes unauthorised use of the athlete's club's trademark (for instance, the club logo or guernsey), provided the athlete can convince the club to take active steps to enforce its own rights. It might be argued that the fees applicable to the use of an athlete's image under the sporting collective bargaining agreements (where applicable) ought be paid to the athlete if his / her club acquiesces to the use of its trademark by failing to enforce its rights.

### *Contract Law*

At present, contract law is the most valuable instrument which an athlete can use to protect against unauthorised use of his / her image. Whilst athletes may not directly

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<sup>9</sup> Australian Copyright Council Information Sheet G10 An introduction to copyright in Australia.

<sup>10</sup> From Australian government intellectual property and sports commission sites:

[http://www.ipaustralia.gov.au/trademarks/what\\_index.shtml](http://www.ipaustralia.gov.au/trademarks/what_index.shtml);

<http://www.ausport.gov.au/bsc/factsheets/factsheet33.asp>

control their image rights, they certainly control their actions, including where they appear and what they say.

It is now common for sporting leagues, clubs and private companies to enter into agreements with Athletes that prescribe the parties respective uses of athlete images in exchange for a range of benefits.

For example, in the collective bargaining agreement between the AFL and its players, the parties set out the manner in which the AFL may use players' images and the remuneration required for such uses as part of the overall contract establishing the terms and conditions for employment of AFL players.

Similarly, individual athletes often enter contracts which limit the use of their image as part of an endorsement or commercial contract. For instance, an athlete may agree to appear in an advertisement for a product, so long as (s)he is paid for all other uses of his / her image in connection with that product.

However, because the control of image rights comes only through agreement, and because a third-party could potentially use the same rights without payment, it is submitted that contract law does not provide sufficient protection of image rights.

### **Overseas Protections**

Athletes' image rights are formally protected in the USA, the UK and Europe. These protections are generally derived from human rights and privacy laws, rather than through laws that protect commercial or property interests.

As a result, Australian athletes whose images are used in international advertisements without their consent must look outside Australia for a remedy. Indeed, the reality is that an Australian athlete such as Harry Kewell may be successful in defending the unauthorised use of his image by a third party in London, however not be in a position to prevent the same use by the same party from occurring in Sydney.

### **Law Reform**

Although individual image rights are not currently recognised in Australia, the Howard government did instigate a review of the Federal Privacy Act in 2007. In its recent discussion paper<sup>11</sup>, the Australia Law Reform Commission reviewed suggested reforms including the following from the New South Wales Law Reform Commission<sup>12</sup>:

“A person would be liable under the Act for invading the privacy of another, if he or she:

- (a) interferes with that person's home or family life;
- (b) subjects that person to unauthorised surveillance;
- (c) interferes with, misuses or discloses that person's correspondence or private written, oral or electronic communication;
- (d) unlawfully attacks that person's honour and reputation;
- (e) places that individual in a false light;
- (f) discloses irrelevant embarrassing facts relating to that person's private

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<sup>11</sup> ALRC, *Review of Australian Privacy Laws*, Discussion Paper 72 (2007)[5.48]

<sup>12</sup> NSWLRC, *Invasion of Privacy*, Consultation Paper 1 (2007)

(g) *uses that person's name, identity, likeness or voice without authority*<sup>13</sup>

While the ALRC appears to support the NSWLRC proposal<sup>14</sup>, the “non-exhaustive” list in its own proposal, (Proposal 5-1), did not include item (g), above.

The ALRC proposals also express an intent that the media exemption provided under the Privacy Act not apply to the tort of invasion of privacy while continuing to exempt the acts and practices of media organisations in the course of journalism.<sup>15</sup>

It is submitted that The Privacy Act should be amended to reflect the position suggested by the NSWLRC, above. An individual's name, likeness, signature, mannerisms, voice, or other distinguishing feature should be in his/her control and should not be used without his or her consent other than for legitimate news/editorial purposes. The news/editorial exception should be limited to legitimate public concerns and should not extend to promotional items used to generate sales of the publication, such as posters inserted in Sunday papers.

Absent these amendments to the Privacy Act, Australian athletes will continue to be denied rights available both to athletes overseas and to the clubs, leagues, and sponsors involved in their sport.

*\* Laura Sigal is a solicitor who advises the AFL Players' Association, as well as player associations in other sports.*

*\*\* Matthew Finnis is General Manager – Operations with the AFL Players' Association and is also a solicitor.*

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<sup>13</sup> NSWLRC, *Invasion of Privacy*, Consultation Paper 1 (2007) [6.32]

<sup>14</sup> ALRC, *Review of Australian Privacy Laws*, Discussion Paper 72 (2007)[5.6-5.71]

<sup>15</sup> *Ibid* [38.70-71]