away some of the debris that has accumulated around patent-eligibility, however, and probably failed to make things any worse. It got rid of the inane “useful, concrete, and tangible” test. Moreover, Bilski seems to have put an end to the Federal Circuit’s running warfare against the Supreme Court’s patent-eligibility opinions and seemingly tried to follow rather than evade them. But it left a great deal of life to the litigation to clarify and its analysis is frequently baffling. In particular, the opinion completely avoids the technology and business method issues that Mayer J.’s dissent and Dyk J.’s concurrence attempt to address—issues that remain highly controversial and in need of authoritative resolution both in the United States and Europe. 27

Ana Ramalho

Silent Ethics in the Mobile Phone Sector? The Case of the “por qué no te callas?” Ringtone

(©) Character merchandising; King; Mobile telephony; Publicity; Spain

Introduction

November 10, 2007, Ibero-American Summit, Santiago, Chile. Before the constant interruptions performed by the President of Venezuela Hugo Chávez to the speech of the Spanish Prime Minister Zapatero, the King of Spain uttered the soon-to-be famous sentence “why don’t you shut up?” (“por qué no te callas?”). Be it because of the King of Spain’s usual phlegm or due to ongoing controversies between Spain and its former colonies, the rebuke gained both a political and commercial significance.

As a matter of fact, apart from the expected throng of political commentators dissecting the King’s attitude and its respective implications, those blessed with political commentators dissecting the King’s attitude and its respective implications, those blessed with political commentators dissecting the King’s attitude and its respective implications, those blessed with commercial awareness readily started profiting due to ongoing controversies between Spain and its former colonies, the rebuke gained both a political and commercial significance.

The episode raises questions appertaining to a number of long-standing controversies. Undoubtedly, ringtones represent a new market and consequently a new licencing opportunity in the copyright realm. In the United States, for instance, a Memorandum Opinion from the Register of Copyrights, delivered on October 16, 2006,1 gave off the view that ringtones are phonorecords and are therefore covered by the compulsory licence proviso laid down in copyright law.

However, copyright law is not at issue here. Instead, the query involves the use of someone’s personal indicia for commercial purposes without that person’s consent. Hence, the “por qué no te callas” ringtone concerns the so-called right of publicity, an area of law deemed to be either neighbouring or even part of intellectual property, but which holds contours and brings about considerations of its own. Amongst the former, one can definitely underline the ethical rationale presiding to most of the national laws that chose to approach the matter.

Therefore, by gauging the legal implications of the abovementioned incident, the main goal of this article is to draw some conclusions as to how ethics can and should play a role in preventing acts of encroaching upon someone else’s personality rights in the mobile phone industry in general and in the ringtones business in particular.

For that purpose, we will start by analysing the right of publicity from an international perspective (section II). We then follow to examine how ethics can influence that area of law (section III). Finally, we will consider the case of the “por qué no te callas” ringtone, while taking into account the right of publicity from an ethical perspective.

Cuique suum tribue: an overview of the right of publicity

It has long been acknowledged that fame is a commodity. Be it through endorsement, merchandising or media coverage, notoriety sells. Consequently, the right of publicity started to be perceived as the right to use someone’s personality features, such as name, picture or voice, for commercial purposes. We can thus put forth that the right of publicity is the right to commercialise someone’s identity.

Nevertheless, it is noteworthy that this right is not harmonised at an international level. In the United States, the right of publicity was expressly recognised in Haelan Laboratories Inc v Topps Chewing Gum Inc.2 It was also given a particular emphasis by the US Supreme Court in Zacchin v Scripps-Howard Broadcasting Co,3 where a difference between the tort of privacy and the tort of publicity was established.

Be it because of an ethical approach or just due to the tendency to worship celebrities, the US system forcefully protects the right of publicity— for instance, even the commonly used “freedom of speech” defence cannot


2 A ringtone is a digital sound file played by a mobile phone to indicate an incoming phone call or message.


4 Haelan Laboratories Inc v Topps Chewing Gum Inc (2d Cir) 202 F.2d 866 (1953).


6 See S. Barnett, “The Right to One’s Own Image’: Publicity and Privacy Rights in the United States and Spain” [1999] American Journal of Comparative Law 47, 555. It is interesting to note, however, that the author concludes that, when compared to Spain and in certain cases, the US do not have such an extended scope of protection as one might think at first (see Barnett, “The Right to One’s Own Image’: Publicity and Privacy Rights in the United States and Spain” [1999] American Journal of Comparative Law 47, 581).
generally hold against a commercial use of someone else’s personality aspects without consent.\footnote{7}

Conversely, other legislatures have deviated, to a lesser or greater extent, from this line of thought. Under German law, for instance, one finds a general personality right coexisting with specific ones (e.g. right to one’s name or image). Personality rights are unitary in that they protect economic and non-economic interests.\footnote{8} Consequently, the possibility of licencing personality aspects without consent is a rationale for the existence of rights, see J. Ascens˜ao,

Consequently, the possibility of licencing personality rights remains an ongoing discussion.\footnote{9}

On the other side of the spectrum, the United Kingdom does not admit such personality rights as the right to one’s image or name. This will leave the prospective plaintiff with the sole option of seeking injunctive relief through established torts like passing off or defamation—which in turn have their own specific requisites of application.\footnote{10}

This mosaic normative landscape concerning the right of publicity is, of course, intrinsically linked to the cultural, social and legal traditions of the various countries. Because this right touches upon personality features as something inherent to a given person, opinions on whether such right should be alienable or even recognised are thoroughgoing and vary greatly.

It is our opinion that, independently of the legal system at stake, some general conclusions can be outlined and subsequently applied to the case presented. In furtherance of that goal, we follow to discuss the rationale of the right of publicity, while adopting an ethical approach to the matter.

**Right of publicity revised: bringing ethics into play**

The first problem one faces when dealing with the right of publicity is its rationale. Modern markets tend to reinforce the idea of property,\footnote{11} and from that right of publicity is its rationale. Modern markets

The first problem one faces when dealing with the right of publicity is its rationale. Modern markets tend to reinforce the idea of property,\footnote{11} and from that right of publicity is its rationale. Modern markets

In what concerns copyright or patents, for example, the grant of an exclusive right is based mainly on an incentive rationale—if no protection is afforded, the works or inventions will be under-produced, that is, production will remain at a sub-optimal level. Conversely, inasmuch as the allocation of property rights allows for a recoupment of the creator’s investment, the creation flow will arguably have the tendency to rise should a proprietary right be granted.\footnote{14}

In the case of the right of publicity, it has been correctly pointed out that its justification does not amount to fame per se.\footnote{15} In fact, there is a multitude of reasons for people to become famous, some of them not being fair, justified, ethical or moral. Justification for such right must then be found beneath the notoriety it rests upon.

A promising approach would be to retrieve the Lockean view of granting a proprietary right to one’s own person, thus naturally including the right one has to one’s personal indicia. It can be argued, however, that this grant is not ethical, for human features should not be disposable at all. This would lead to the conclusion that the right of publicity could represent an attempt on the general principles of human dignity.

We do not share the abovementioned view, though. One has to perform a balancing exercise of the various rights and principles involved. Human dignity, just as any other principle or right, must be seen *cum grano salis*, i.e. it must be weighed against the other rights or principles deserving to be considered in a given case. Moreover, human dignity is an abstract notion bearing different levels of prohibition. For instance, whereas disposition of one’s own life blatantly goes against it, the exploitation of one’s identity can be considered a borderline case.

One can also resort to a fairness argument. It must be underlined that fairness has both a legal and an ethical dimension. Therefore, a probable intertwimenment would be: in order to be fair, a legal system has to behold and respect certain fundamental rights—such as some personality rights, we add. Yet, there is a clear distinction between the recognition of a personality right and the further step of granting a right to commercially exploit it. We should thus examine whether the notion of justice can extend to the latter.

We call to mind the ancient notion of distributive justice put forth by Aristotle: one’s wealth ought to be proportionate to one’s merit. Similarly, if one is merely appropriating someone else’s personality features to profit from that person’s recognition on the market,
there is no merit-based wealth. However, as stressed earlier, the notoriety of a given person can be far from being justified from an ethical or moral point of view, which will lead us to the same conclusion (i.e. the notorious person also lacks merit).

Hence, regarding the commercialisation of personality features, the fairness argument should be thoughtfully reformulated. The idea of a third party profiting from someone else’s personality traits is somehow repulsive to most of us. This is so because we tend to think of personality rights as something which is inherently ours, on the one hand, and due to the effortless enrichment of that third party, on the other hand.

These commonsense avowals give us a start-off basis towards the recognition of a right of publicity. As mentioned earlier, justification should not lie on fame itself. Instead, one must dig underneath it. As a result, the right to commercialise one’s personal indicia should be prima facie acknowledged as an exclusive right of everyone—celebrities and anonymous citizens—without the fact that the market value of personality features is directly proportional to one’s fame or notoriety. That is, fame is the cause for the willingness to profit from certain personal traits, but it should not certainly be a mandatory requisite for affording protection.

Recalling Kant’s philosophy about the autonomy of the human being, we set forth that the reason for the recognition of one more exclusive right in the already oversized domain of proprietary rights is ultimately self-determination. Because personality features are so closely connected to the person they relate to, the grant of an exclusive right to commercialise them is no more than a natural consequence of the general right to self-determination, widely settled in most legal systems.

Nevertheless, another different problem arises before the possibility of licencing or assigning the right of publicity. Again, ethical reflections should be called upon, forasmuch as they highlight the two faces of the right of publicity. Again, ethical reflections should be called upon, forasmuch as they highlight the two faces of the right of publicity. Again, ethical reflections should be called upon, forasmuch as they highlight the two faces of the right of publicity.

Generally speaking, the telecommunications sector has an economical dimension which cannot be overlooked. However, like ethics, economics cannot stand alone. As in many other strata, telecommunications are relevant in the political and social spheres. It is exactly in the intersection of these domains that the present case takes place.

Taking into account the arguments drawn in the previous sections, and making use of the ethical dimension given to the right of publicity, it is apparent that no third party could simply record the King’s intervention, convert it into a ringtone and commercialise it. That would be a clear-cut case of an unauthorised use of a personality feature (voice), and thus an infringement to the right of publicity as delineated under the model proposed heretofore.

However, in the case under analysis and according to the Canadian Broadcasting Company, an actor was intentionally engaged to avoid legal problems. This fact raises the question of whether an evocation of the public figure is enough to trigger the qualification of a conduct as an illicit one. US case law has occasionally approached this issue, and it seems to provide the legal interpreter with an affirmative answer. In Carson v Here’s Johnny Portable Toilets, the use of a catchy phrase (“Here’s Johnny”) was deemed to be an infringement made for a possibility of licencing of personality rights. One eloquent example is Germany, where the Federal Supreme Court recognised that there are economic interests in personality rights (judgments of October 14, 1986, GRUR 1987, 128 and December 1, 1999, BGHZ 143, 214).

18 Nevertheless, some courts around the globe have found licencing to be admissible, or at least left the door opened to such future decisions. Leaving aside the US, where the right of publicity finds a safe haven and thus assignment and licencing are widely accepted, improbable judicatures have consented on.
21 Carson v Here’s Johnny Portable Toilets 698 F.2d 831, 6th Cir., 1983.
to the right of publicity of Johnny Carson. In both Midler v Ford Motor Co and Waits v Frito Lay, the plaintiffs won the suit for voice misappropriation where an actor’s voice was intentionally used to mimic the one of a famous singer (respectively, Bette Midler and Tom Waits). Nonetheless, some doctrine suggests prudence when drafting the boundaries of the right to evoke.25

Again, ethics must come into play in situations like the above. Ethical considerations ought to be the determinative factor to assess whether an evocation is licit. Evocation can take place through the imitation of a style, voice or mannerism. Whatever the means, it is our view that the ultimate test for infringement should be the closeness of the collage of the evocation to the original personality features which the public ascribes to a given person. The underlying reason for the adoption of such test has an ethical nature as well: the closer one gets to the inner personal sphere of someone else, the more likely one is to scratch that someone else’s identity and right to self-determination.

Differently from the cases where one finds a commercial exploitation of the pure and real indicia of a person, here one must weigh the closeness of the evocation to the personality features against free market principles. The right to evoke should not be the motto for monopolistic strategies, forasmuch as the ethical argument would be lost. Therefore, the scope of the right to evoke cannot stymie free market values when that hindrance fails to be justified from an ethical point of view.

One must also take account of the fact that there are transformative evocations, usually consisting of a parody or satire. This type of situation will naturally be more supported by premises relating to freedom of speech, since the critique or the transformation, rather than the original personal indicia, are the central focus. As a consequence, the transformative use—and not the original aspects of someone’s personality—is the main income generator.26

Importantly, in the case of the “por qué no te callas!” ringtone, the King’s voice is not the distinctive feature allowing for the identification of the person. The voice used to produce the ringtone is immaterial in the sense that the majority of the public could not recognise the King’s voice anyway. Instead, the popularity of the ringtone is a consequence of the specific phrase uttered, enabling an association of the expression with the King of Spain.

That being clarified, could we still defend the granting of a right to evoke to the King? We do not think so. The King’s tirade was nothing more than that: a tirade. It does not reflect his identity, it does not have a close link with his personality, it is not even a sentence which he says regularly. Indeed, the phrase became known as coming out of the King’s mouth. But that was due to a combination of the special political context and the contradiction with the King’s personality that the rebuke seems to represent.

Absent strong ethical constraints, monopolies of random sentences should not be granted tout court. As much as the idea of allowing the impunity of a commercial awareness of this kind might sound blameworthy, in the country of the blind the one-eyed man is indeed the real king.

Conclusion

The mobile phone industry has been one paradigmatic example of the rapid innovation pace which characterises the telecommunications sector. Apart from the obvious core product, the mobile itself, the industry has strongly relied on the popularity (and, consequently, profitability) of satellite businesses such as the ringtones one. Specifically concerning the latter, the mobile phone companies had to take into consideration legal guidelines flowing out from other branches of law, namely copyright.

As the development of technology (and of commercial awareness) encourages an intertwining of the mobile industry and practice with a growing number of other fields, ethical principles are a primary tool in what concerns basic regulatory needs.

Notably, the use of someone’s voice or catchy phrase in a ringtone can call upon the intervention of the right of publicity. However, just like in any other subjective right, the limits to one’s right of publicity must be drawn, for it is not an absolute right. In fact, if on the one hand fairness and self-determination are powerful ethical arguments when regulating the use of personality features by the mobile phone industry, on the other hand the right to evoke has to be carefully curbed. Ethics should not be a motor for the creation of unjustified monopolies, insofar as it lacks argumentative strength to go further. When ethical concerns start becoming blurred, economic principles should step in. Definitely, ethics are not silent in the mobile phone industry, but they sure ought to listen to what economics has to say.

24 It should be noted that there is a specific tort of voice misappropriation in California, though.
Author: Please take time to read the below queries marked as AQ and mark your corrections and answers to these queries directly onto the proofs at the relevant place. DO NOT mark your corrections on this query sheet:

AQ1: Author query: in the fn. you refer to several judgments—could you cite the full case names and citations please?
AQ2: Author query: same as before.