

## Image Rights of Sports Celebrities

*This study aims to present a proposal for the consecration of the Image Rights of Sports Celebrities as an autonomous legal reality with all its underlying social, economic, and legal particularities. To achieve this goal, it is also important to keep the balance between what is still the core and minimum scope of protection of the expression of the personality of the free individual, responsible for their image rights, and the emerging right to exploit such rights economically, as an expression of the iconic function of their image. This way, it will be important to go through the consolidated legal frameworks concerning this matter and the emerging legal frameworks concerning Image Rights, which will be essential for the desired autonomization of the Image Rights of Sports Celebrities.*

**Keywords:** *Image – Sports Celebrities – Personality Rights – Publicity Rights – Image Rights.*

### Part One – Introduction and conceptual definition of Image Rights of Sports Celebrities

#### *Brief Introduction*

It is essential to define the multiple elements that form the concept of Image Rights of Sports Celebrities before presenting such concept and showing the relevance of adopting such unifying framework.

This study will briefly describe the concept of Celebrity, particularly of the Sports Celebrity, and explain how the meaning of Image can and must be construed in this context. This will aim at better understanding and supporting the transition to what should be recognized as the Right to One's Own Image, for most people and, especially, for said Sports Celebrities.

Then the study will describe the most relevant legal frameworks concerning the protection of Image Rights of Sports Celebrities, where the common and friction points between them will be identified, as well as the signs that show a tendency to materialize and adopt a single framework for the Image Rights of Sports Celebrities, both at the statutory (as in the innovative Guernsey framework) and supra-statutory level.

This study ultimately aims to present a global, inclusive solution for a problem that we believe that exists, that is the inadequateness of traditional solutions, at the level of internal legal frameworks, to the fast-moving change of Image Rights of Celebrities, in general, and Sports Celebrities, in particular. A solution with two levels and two planes.

Firstly, with the minimum scope concerning the right to protect one's own image, constituting an absolute, inalienable, unavailable, and indispensable right. Secondly, with the emergence of an economic right to exploit Image Rights of Sports Celebrities or other Celebrities, although this study only refers to the former.

## *The Theory of the Image and its concept*

After the introductory note, it will be essential to define and materialize the concept of Image, which seems simple but, after a detailed study, turns out to be quite difficult to explain, as we will show. Without giving a detailed historical description of Image, its theory and concept, we find it important to make some remarks that will help understand the single concept and framework of Image Rights later on.

Since the beginning of the history of knowledge that philosophers and thinkers have found relevant the complex relation that unites image to reality, and the definitions of both concepts. In *Republic - Book 6* - Plato discussed the problem, defining Image as “... *in the first place, shadows, and in the second place, reflections in water and in solid, smooth and polished bodies and the like.*” Later, the Medieval Rhetoric defined Image as “*aliquid stat pro aliquo*” – something that is into the place of another thing – already noting that we might be dealing with something that could inclusively be fabricated or consist of an object of human or mechanic intervention.

However, despite theoretical views, it seems undeniable that Image must be understood as something that is used to represent another thing. An image is a selection of reality – a small frame, an instant shoot, or a sound bite – that can ultimately even exclude any representation of reality but is also a variety of representative elements and the internal structure that organizes those elements.

From the symbiosis between image and reality emerges, almost as if magically, the representation of an object, which is absent, and that can be observed even when facing the strong resistance of religions, especially when the object is human representation. Such distrust also came from a pedagogical standpoint because for many years the general thought was that “*if it is improper for producing arguments, image is however remarkable for intensifying the ethos and pathos.*”

This said, there are many ways in which images can be classified. There is a distinction between natural images, i.e., without human intervention – the reflections and shadows described by Plato – and artificial or fabricated images that require human intervention. Concerning the latter, we will present five significant and important viewpoints for defending a broad, unequivocal concept of Image Rights of Sports Celebrities.

The “*Modern*” theoreticians who study Image address Image according to two different postulates. One can be defined as textual and is mostly based on the American tradition, which sees Image as a text with the same characteristics of language production, understanding image as a discovery of its “*minimum constituents*”. The other, usually defined as semiotic, is linked to the European tradition, which sees image as a sign, whose analysis is based on the discovery of how it relates with the object it represents or with other symbol systems used in society.

Regardless of the perspective, we believe that an Image should be analysed from multiple standpoints: materiality and dimensionality (two-dimensional or three-dimensional, natural or created, real or virtual, among others),

1 elaboration process (including tools used to elaborate such image), but also  
 2 expression (including internal organization, such as contrasts, likeliness,  
 3 colours, lines, scale effects, among others).

4 But we also believe that is essential to analyse its iconic functions,  
 5 perceived as the relationship between the image and the object it represents,  
 6 which can be divided into three basic types of connection: representative,  
 7 symbolic, and conventional.

8 The first steps of this “endeavour” have been taken – with the adoption of  
 9 a broad concept of Image. It is now time to pay special attention to the concept  
 10 of Celebrity, especially the Sports Celebrity, as conduit for the need – or not –  
 11 for an autonomous concept for their Image Rights.

### 12 13 *The Concept of Sports Celebrity*

14  
15 It will not come as a surprise to those who follow sports, whether as  
 16 professionals or fans, that Celebrity archetype is gradually replacing the Hero  
 17 archetype, best portrayed by the idea that “*while the hero was a great man, the*  
 18 *celebrity is a great name.*” Starting with what we would be concluding later, it  
 19 is our duty to break down the very reason for such conclusion.

20 Today, products are mostly sold as Celebrity extensions. And a Celebrity  
 21 is, by definition, someone who is widely recognized by society. The word  
 22 comes from the Latin word “*celebritas*”, which means “*famous, notorious*”,  
 23 showing that fame and recognition are the main elements for achieving the  
 24 Celebrity status. But not the only. In addition to those, to become a Celebrity,  
 25 one must have an active presence in society, or at least in the media, offering  
 26 some meaning to at least one group of people. The approximation of Celebrity  
 27 to “*hero*” defines hero as a character with the traits and values of a role model.  
 28 But while Celebrities absorb the attention and fulfil the collective imagination,  
 29 from an individual perspective, Heroes emerge from the Collective.

30 Conceptually, it is possible to identify three large groups of Celebrities,  
 31 although the post-modern, if this is what they are called nowadays, are a cliché  
 32 and affirm our experience in the society of the spectacle. And it is not  
 33 disgraceful to recognize that popular entertainment and culture are fascinated  
 34 by mass productions. Sports events are quintessentially the greatest example of  
 35 that, and the multiplication of mass sports events is not mere luck. They are  
 36 undoubtedly one of the most powerful conduits to attract crowds and  
 37 consumption.

38 For this and other reasons, sports became one of the main Globalization  
 39 motors “*providing a temporary target to collective conscience.*” We believe  
 40 that this is not a recent phenomenon. However, the voracious, unprecedented  
 41 development of homogenization and codification of sports rules worldwide, as  
 42 well as the increased control of the sports phenomenon, for economic and  
 43 financial interests, have accentuated the importance of sports as a metaphor for  
 44 Globalization in the last two decades.

45 And this was how a new world spatialisation of sports events was born,  
 46 with broadcasts on TV or any other platform, transforming champions and

high-performance athletes into Celebrities. The image of such Sports Celebrities, in the broad sense we are defending, is typically the image of desirable models of social success. But the measurement of sports and personal performance ultimately manifests a new human rationalization power, with this logic being associated to the creation of Sports Celebrities, determined by the media, i.e., “*a phenomenon typical from the age of the common man that can ascend to notoriety by showing his actions.*”

However, the nature of contemporary Sports Celebrities is significantly different from the nature of former Sports Celebrities. While former Sports Celebrities were known almost exclusively for their sports feats, contemporary Sports Celebrities can be totally or partially fabricated under such sports success model. In this case, the construction of Image Rights is gradually turning from the concept of *Super Athlete* to the concept of Sports Celebrity, with clear consequences for the framework that we will defend.

The importance of media does not concern only the sports careers of Celebrities but also their personal lives, which boosts the economic effects of the exploitation of the Image of Sports Celebrities made by multiple Brands, and ultimately, of the exploitation of Brands made by Brands.

It can be said that “*the world of celebrities relies on opinion, and renouncing secrecy is the price to pay for achieving the celebrity status in this world of notoriety.*” This is undoubtedly one of the essential, moulding points of the two-lawyer framework(s) concerning the Image Rights of Sports Celebrities that we will defend. And that is why Sports Celebrities are constantly making confessions, usually hosted by the media, accepting to expose their private lives to the extent that the economic and recognition effects for the Brands that work with Sports Celebrities are also precisely measured and usually result in millions of euros.

## **Part Two – Protection of the Image of Sports Celebrities**

### *The Right to the protection of one’s image*

Now that we have defined the concept that we find the most truthful to reality, we should explain that not all concepts are deserving of legal protection nor the need of such protection and its politicization arise at the same time and under the same circumstances.

The own’s image only got protection as a right in the 20th century and as consequence of the constant opposition with a general right to freedom. This way, the successive civil codes kept on ignoring this right, which was initially encompassed by intellectual property or copyright.

However, the constant growth of the technique, with the consequent discovery of the technical media that allow for the instant capture of images, associated with the establishment of media that widely disseminate everything that may cause different sensations, even if primitive, accelerated the evolution

1 of image rights, not only from the substantial standpoint, but also in terms of its  
2 handling and legal consecration.

3 In short, image gained non-autonomous protection under the right to  
4 honour or the right to privacy in privacy. For the reasons above, the protection  
5 of image rights faces significant problems because their protection is more and  
6 more criticized by the joint action of two circumstances. On the one side, the  
7 continuous development of technical means that jeopardize privacy. On the  
8 other side, the *patrimonialization* of image, which results in significant  
9 financial increases when exploited by soccer players, movie stars, or others.  
10 But the Law also intends to regulate image as a communication means. It was  
11 after the French Revolution and the development of media that the Law began  
12 to protect and be interested in the right to intimacy and image.

13 In fact, image is a representation of something outside of itself. When  
14 personal, it can be assumed as the representation conveyed by such person to  
15 the exterior. But, as said before, personal image is not only about the person's  
16 figure or physiognomy, or the body that appears in the real, palpable world.  
17 Personal image comprises not only the physical body of the human person, but  
18 also their personality, knowledge, education, life as a human being, age,  
19 appearance, occupation and tastes, intelligence, how they integrate society,  
20 family, culture, and their human and professional sensitivity. In only a few  
21 words, the Law sees image as "*all formal, sensitive expression of the*  
22 *personality of an individual*", encompassing the so-called sound image,  
23 gestures, and dynamic personality expressions that show in reality, whether  
24 projected or virtual.

25 If the Law sees Image as everything we just said, then the object of a  
26 person's image rights is everything that is part of such person and that can be  
27 represented outside themselves and perceived by others. Consequently, Image  
28 includes all, or almost all, prerogatives and characteristics of personality rights,  
29 such as inalienability, although it is a fact – and we will explain this later on –  
30 that image rights can be the object of exploitation – given its economic utility  
31 and a certain moulding framework.

32 Notwithstanding all the other ways of human expression, Image Rights are  
33 also absolute rights, in the sense that they are recognized as genuine  
34 personality rights and therefore must be recognized by third parties, unless  
35 there is an authorization or consent (which must be expressed) for the image to  
36 be used.

37 If image rights are personality rights, they are also subjective, because they  
38 materialize into a tangible power that is formed by real and potential faculties,  
39 i.e., the faculty of being able to reproduce, disseminate, or publish the image,  
40 to the exclusion of any other, except when there is an express authorization. As  
41 subjective rights, image rights are twofold, i.e., they include power/obligation,  
42 and the legal system must act when they are used abusively.

43 We did not dismiss the theories concerning image rights. We used them to  
44 support our understanding. From the negativist, as opposed to the positivist,  
45 and within the latter, the subsumption, the right to one's own image, to the  
46 moral identity of a person, to the autonomous right under the positive law. We

sure see image rights as granted with autonomy and not as autonomous, distinct rights, but as special personality rights which gather all personality rights within themselves. For this reason, we can say that image rights show the same general characteristics as personality rights, namely of being subjective rights of private character and absolute nature.

As we have seen, image rights are rights that entitle a person to reproduce, disseminate, or publish their image commercially or not and, if desired, to prevent others from reproducing, disseminating, or publishing their image without their authorization or consent.

Image rights are absolute rights to the extent that they are recognized as genuine personality rights, which imposes such recognition (except where there is permission to use the image) but are also exclusive to the extent that they do not establish a legal obligation but a universal obligation. And they are subjective, because they result in a concrete power formed by real and potential faculties.

The appearance, affirmation, and models of protection of image rights are very inconsistent over time and space and are often influenced by the political and economic context of each legal framework.

### *Consecration by the European Convention on Human Rights*

Before we begin the first analysis on the divergences or similarities of what can be perceived as Image Rights of Sports Celebrities in the legal systems we consider more relevant, we believe it is essential to analyse how the protection of image rights was set forth by the European Convention on Human Rights (ECHR), and how the Case Law of the European Court of Human Rights (ECtHR) has interpreted the defence of such image rights.

The ECHR has created obligations for public institutions and mainly for Courts, so that its provisions could not be contradicted. Despite the division between the United Kingdom and other countries in continental Europe, the ECHR plays a harmonizing role in the protection of the “*personality*” of the individual as a person, invoking a person’s right to privacy<sup>1</sup> and right to property<sup>2</sup> in the First Protocol to the ECHR<sup>3</sup>.

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<sup>1</sup>Article 8 of the ECHR, entitled “Right to respect for private and family life”, sets forth that: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>2</sup>Article 1 of the First Protocol to the ECHR sets forth that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.”

1 In the sports context and especially in the scope of Image Rights, it is  
 2 essential to highlight article 8 concerning the right to privacy, whose full text  
 3 can be found as a footnote, and article 1 of the Protocol on property protection,  
 4 which they grant to the body, and the constitution of image rights *per se*, whose  
 5 full text can also be found as a footnote.

6 It is also important to note that the European Court of Human Rights  
 7 (ECtHR) was created on January 21, 1959 to legally address the violations to  
 8 the ECHR, because the absence of a justice system for this purpose in each  
 9 Member State, and the absence of a Court, even if a Court of Final Appeal,  
 10 would turn the ECHR into a dead letter.

11 Among the vast case law of the ECtHR, the well-known cases of *Adrian*  
 12 *Mutu* and *Claudia Pechstein* are relevant in scope of this study and as  
 13 background.

14 Among other things, *Pechstein* claimed that the ongoing proceedings with  
 15 the Court of Arbitration for Sport (CAS) in Switzerland did not respected the  
 16 “fair hearing” principle. In what concerns us, the Court has agreed with  
 17 *Pechstein* when she claimed that there should have been a public hearing, as  
 18 this decision could have made the CAS change its closed-door hearings policy,  
 19 as it did. The five times Olympic champion *Pechstein* was banned by the  
 20 International Skating Union (ISU) for two years in 2009 due to an irregularity  
 21 with her blood tests, even though the German athlete had never missed a test.

22 In that same year, the CAS rejected the appeal of the Romanian ex-striker  
 23 *Mutu* against FIFA’s decision to sentence him to pay 17.17 million euros to his  
 24 former soccer club Chelsea for damage arising from a positive cocaine test  
 25 with subsequent contract termination attributed to player default.

26 And lastly, the lawsuit that opposed the renowned German goalkeeper  
 27 *Oliver Kahn* to the German State. In short, the ruling by the ECtHR  
 28 unanimously considered that there was no violation of article 8 (right to respect  
 29 for private and family life) of the European Convention of Human Rights.<sup>4</sup>  
 30 The case concerned the repeated publication of photos of the children of Oliver  
 31 Kahn, the former goalkeeper of the German soccer team, in two magazines  
 32 intended for the general public, despite such publication was prohibited by  
 33 German Court of the First Instance.<sup>5</sup>

34 We know that these cases are not an example of a concrete decision made  
 35 by the ECtHR concerning the specific theme of Image Rights. However, we  
 36 believe that the ECtHR will soon be required to decide on related matters,

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<sup>3</sup>The Council of Europe wrote the ECHR on November 4, 1950. The Convention became effective on September 3, 1953 and was covered by the Human Rights Act 1998 in the United Kingdom, under which the Convention’s content directly applies.

<sup>4</sup>Proceedings no. 16313/10 of the European Court of Human Rights.

<sup>5</sup>The ECHR observed that the editor, following the lawsuits filed by the player, had been sentenced to pay penalties in the amount of about 68% of the sum claimed by those lawsuits. The Federal Court of Justice of Germany had found that the player’s children – whose faces were not visible or had been pixelated – could only be identified in the photos by the presence of their parents, of Oliver Khan, and the text that accompanied the photos, and that they (children) were not the main topic of the news, but the relationship of their parents after the divorce.

particularly those concerning Image Rights, especially of Sports Athletes. Whether it be as consequence of the role played by FIFPro or the failure of Collective Conventions in identifying what should or should not be considered Image Rights inherent to team sports, or even the clear lack of distinction between Individual Image Rights and Collective Image Rights and the limits of each other. This way, the ECtHR will be one of the fundamental pillars for the individualization of the protection of Image Rights and Sports Celebrities, in the past, present, and future times.

#### *Universal Declaration of Player Rights*

Mostly internationally, Image Rights are now beginning to be considered part of the agenda of Sports Law, especially (and this is what is significant) by means of Athletes themselves. We believe that, with the right emphasis, despite hesitant, it will be considered a Fundamental Right, showing that path in front of us will sooner or later lead to a more and more effective and efficient cross-border protection, as we desire.

The year of 2017 has seen many progresses concerning Human Rights associated with Sports, as multiple Sports Organizations (for instance, UEFA, FIFA, and COI) began to incorporate Human Rights into their By-laws, Collective Conventions, Standard Contracts and other procedures, leading to the publication of the *Universal Declaration of Player Rights* by the *World Players Association* on December 14, 2017.

This declaration resulted from the two-year work of more than a hundred Athlete Associations and multiple Human Rights Associations and Experts and aimed to lay the foundation stone on the autonomization of Image Rights that we defend. Here, specifically, as a Fundamental Right.

Concerning Image Rights, it is mostly about their inclusion in Personal Rights. Article 12 of the Declaration makes it clear that “*a player’s name, image and performance may only be commercially utilized with his or her consent, voluntarily given*” and that “*every player is entitled to have his or her name, image and performance protected.*”

Although they cannot be immediately evoked in future ahead, it is true that, together with other international legal instruments, they are showing the currentness and need for consecration and can be the foundation for the adoption of the concept of Image Rights of Sports Celebrities by the multiple legal systems in an autonomized, vertically structured way.

#### *Tour around the “legal world”*

We will make a brief description of the key aspects concerning image protection and of how such protection happens or may happen on a supra constitutional plan. Now, we will see how the main *geo-legal* blocks, which are more consolidated, affect the Image Rights of Celebrities, especially Sports Celebrities, and under which logic and legal solutions they gravitate.

1 The US were undoubtedly the country whose legal system has sooner  
 2 realized the importance and economic and legal impact of the Image Rights of  
 3 Celebrities, especially Sports Celebrities. Image rights of athletes, clubs, and  
 4 sports organizations are worth millions, if well planned and managed. In the  
 5 US, Sports Celebrities protect their Image Rights in multiple ways, despite not  
 6 absolutely, as we will describe later.

7 In conceptual terms, Image Rights have been associated to privacy and  
 8 publicity rights. It must be said that the market that economically exploits  
 9 Image Rights in Sports concerns a niche of athletes to whom we call Sports  
 10 Celebrities. The interaction between privacy and publicity rights and the  
 11 freedom of speech and freedom of press represents the tensions inherent to  
 12 Image Rights of Sports Celebrities.

13 Publicity rights in the US aim to protect against any commercial  
 14 exploitation that is not authorized by the holder of such rights, as every person,  
 15 celebrity or not, has the right to advertise to own, protect, and exploit their  
 16 image commercially.

17 It can be said that the Image of Celebrities is protected via Publicity  
 18 Rights. These aim to protect a given subject against the non-remunerated  
 19 and/or unauthorized commercial exploitation of their likeliness or identity, in  
 20 whichever mode or form. It is a universal right that applies not only to  
 21 Celebrities, being historically based on the right to privacy. We can say that it  
 22 concerns the right to own, protect, and commercially exploit one's identity.

23 In the US, the protection of Image Rights may also come from Copyright,  
 24 differing greatly from State to State, especially in terms of "*post-mortem*"  
 25 effects, applicable law, and compensation for damage caused.

26 In Europe, the situation concerning the protection of the Image Rights of  
 27 Sports Celebrities is dual, because the United Kingdom and most countries of  
 28 Continental Europe are two separate realities.

29 The United Kingdom has not formally acknowledged any property right  
 30 for image protection, and image enjoys a lower degree of legal protection than  
 31 in other legal systems in Continental Europe and the US.

32 In the absence of such formal acknowledgement, it is essential to describe  
 33 the concept of image in the United Kingdom. The word "*image*" may refer not  
 34 only to a given physical expression, free from any emotion or subjectivity, but  
 35 also to the perception of other people about a given subject. In the United  
 36 Kingdom, however, although not formally acknowledged, the concept of  
 37 "image rights" is adopted in a broad sense, just like what we are defending in  
 38 this study<sup>6</sup>.

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<sup>6</sup>The importance of and problems faced by Image Rights in the Sports world in the United Kingdom, especially with the emergence of soccer competitions. This way, Sports Celebrities have registered trademarks under the *Trademarks Act 1994* (TMA) or the EU regulation (EU trademark) to protect several symbols that the general public associates to them, including their own names, signatures, numbers, and surnames. However, the goal of this protection are products and services, which does not make it the most appropriate "tool" to protect image rights in all its dimensions. There is also protection via Copyright, under the *Copyright, Designs and Patents Acts 1998*, but this also shows the limitations we have described and will

1 In the United Kingdom' legal system, and perhaps in most legal systems,  
 2 Trademark protection is the most effective way to protect the image of a  
 3 Celebrity. A trademark can be registered for the name, signature, surname,  
 4 slogan, voice, or image of a person, although the Name is the most common  
 5 thing being registered<sup>7</sup>.

6 In the United Kingdom, the key protection when it comes to Image Rights  
 7 of Celebrities is the "*Passing Off*", which can protect the "*goodwill*" and  
 8 reputation of natural or legal persons that arises from their corporate activity.

9 However, as opposed to the US system, the legal system in the United  
 10 Kingdom ignores the existence of Image Rights, even denying their existence  
 11 in some cases.

12 In short, although under certain circumstances and within specific limits,  
 13 Sports Celebrities can protect their image under the data protection, trademark  
 14 and copyright laws, but the broader protection of their Image Rights, as we  
 15 defend it, is still weak, despite the growing importance of Image Rights,  
 16 especially in British soccer.

17 It is now time to cross the *Channel* and go to Continental Europe, where  
 18 Image Rights are generally protected and expressly established in most  
 19 countries, even if not as autonomously and broadly as we argue. Considering  
 20 the limits of this study, we would just like to mention the key aspects of the  
 21 Italian and Spanish legal frameworks. For historical reasons, the Italian legal  
 22 system has always been quite aware of the specificities of the protection of the  
 23 Image of Celebrities, namely in the Fashion, Automotive, and Sports  
 24 industries. The Spanish legal system has awakened only recently, but strongly,  
 25 to the practical matters (mostly at the taxation level) of Image Rights,  
 26 especially those concerning Soccer Players, and their impact on Spanish  
 27 territory and worldwide.

28 There are other legal systems emerging in addition to those where Image  
 29 Rights are more consolidated, such as the US, United Kingdom, and some  
 30 countries in Continental Europe, like Germany, France, Portugal, Spain, and  
 31 Italy.

32 Mostly due to the strong population increase and consumption trends, the  
 33 economic impact of the Image Rights of Sports Celebrities is being felt as  
 34 never before on legal systems of countries like India, Japan, Russia, and mostly  
 35 China.

36 The limitations of this study do not allow us to "*stopover*" in those  
 37 countries, but we will go to Guernsey.

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further develop in this study. Protection also occurs via other instruments that will not be described in this study.

<sup>7</sup>For instance, *David Beckham* has registered his name for multiple products, including perfumes, hair care and cosmetic products, and *Alan Shearer* has registered his image for multiple products, such as clothing, bags, and sports items. Major contemporary stars like *Leonel Messi* and *Cristiano Ronaldo* are also examples.

1 *The Guernsey Case*

2  
3 Among all the legal frameworks described before and notwithstanding the  
4 more or less relevant differences between them, it is possible to identify a  
5 common thread, which is that none of them admits the independent and unitary  
6 consecration of Image Rights, of Sports Celebrities or any other person. As far  
7 as we know, Guernsey is the exception,<sup>8</sup> and we would like to describe and  
8 analyse its legal system, for the best possible reasons<sup>9</sup>.

9 The level of protection of a person's image has increased over time and in  
10 multiple jurisdictions, whether via the case law or via its inclusion, to a lesser  
11 or greater extent, in other legislations, such as Intellectual Property or  
12 Industrial Property.

13 Until 2012, and we believe that until today, no normative body had been  
14 created with the exclusive purpose of protecting all the aspects that determine  
15 the image of a person and, particularly, of Sports Celebrities.

16 Considering the described specificities and needs, Guernsey has become  
17 the first jurisdiction in the whole world to establish a legislative body to  
18 register and protect Image Rights, knowing for sure that the Island would  
19 become more attractive for a significant number of entities and individuals and  
20 that this would consequently result in the reinforcement of a structure that  
21 supports the population.

22 The grounds for this legal construction are "*personality*" protection, not  
23 only for individual human beings, but also for groups of natural persons, legal  
24 persons, and even fictional characters, such as the Avatars of soccer players.

25 The consecration of Image Rights in one single, systematized body aims to  
26 allow that Athletes, Clubs, and other sports entities consider ensuring, with a  
27 high degree of certainty, the ownership of their Image Rights in conjunction  
28 with other Intellectual and Industrial Property rights. Because they know that in  
29 Guernsey there is an unequivocal legislative structure that will allow them to  
30 exploit such rights universally and with total legal safety.

31 Talking about whether Guernsey is a private Tax Haven for Image Rights  
32 or not is not in the scope of this study (perhaps this could be discussed in a  
33 study concerning the international taxation of Image Rights of Sports  
34 Celebrities). But we should talk about the incorporation of a series of  
35 protective circumstances, associated with the image of an individual, into a

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<sup>8</sup>A British Crown Dependency, Jersey is an island of the Channel Islands that has a separate relationship to the Crown and can offer an attractive tax regime to the companies that are incorporated there. The Jersey jurisdiction, as well as the Isle of Man or Guernsey, are not part of the United Kingdom.

<sup>9</sup>On the one side, guided by the idea that exploiting the identity and image associated to a person has commercial value, especially when it comes to Celebrities, whether they are Sports Celebrities or not, along with their main activity, but intrinsically connected to it, trading their images in association with the promotion of products or services. And on the other side, that the main type of activity provided by Sports Celebrities is somehow ephemeral, but potentially of short duration, and that it must be built and protected so that it can be used alongside the main activity from its very beginning, as if it was perpetuating such activity, often even beyond death.

unitary concept that, although admitted at the level of Case Law and Doctrine, had still not seen daylight on its own and in an unequivocal format.

After this important footnote and although the island is seen as another Tax Haven, the truth is that Guernsey is trying to build a kind of “*Silicon Valley*” that aims to centralize and manage Image Rights worldwide. This is why this regime and its key features are truly important and perhaps revealing of what the future holds for this type of rights.

These “*new*” Image Rights will not replace other intellectual and industrial property rights that also exist in Guernsey, such as trademarks, patents, design rights and copyright, but they will constitute another right worthy of autonomy and protection.

The new Law was written to complement those other intellectual and industrial property rights and the total package may bring significant benefits. Although the new Image Rights apply and protect only those rights which were registered in Guernsey, this registration will also provide incredibly useful evidence for other countries about the way to go when it comes to protecting Image Rights of Sports Celebrities.

Please note that the immediate practicability of the protection granted by Guernsey to Image Rights faces and will face many hardships, mostly in practical terms, in disputes with other legal frameworks.

Firstly, in terms of the procedural and administrative aspects of the registration, maintenance, and direct and efficient application of such rights and other rights. Secondly, because Guernsey must become part of all the main international treaties on IP, so that the holders of such rights can have access to a simple, swift lawsuit in foreign countries.

There are also other factors that anyone holding IP must foresee and plan when it is time to choose Guernsey as the management centre for their Image Rights and other similar rights. For example: could the transfer of IP rights to Guernsey and subsequent configuration of an international licensing structure really improve the position of the holder? Or could it create an administrative, legal and/or logistic burden that outweighs the benefits?

These questions can hardly be answered by a young regime as this one. However, we are sure that a regime that allows for the registration, potentially in an indefinite way, of personal traits, such as voice, signature, image, appearance, silhouette, features, face, expressions (facial or verbal), gestures, mannerisms, or any other distinctive characteristic in any photo, illustration, image, moving image or digital representation<sup>10</sup>, or any other personal trait, will bring legal security, despite the practical anxiety that the young – regimes – always encompass.

What we are not so sure of is the universal applicability of this regime in its current development stage, because, given its freshness, the applicability of these Image Rights was not yet exhaustively tested in the legal arena. This way, we can question the extension and impact that a regime that applies to an island with a population of only a little over fifty thousand, who have

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<sup>10</sup>Just like the charismatic virtual soccer player “*Tsubasa*”.

1 established the autonomous protection for Image Rights, can bring to the  
2 international scene<sup>11</sup>.

3 But we must recognize that there is still a long way to go for those  
4 sentences to be acknowledged by other legal frameworks that do not even  
5 recognize such regime in an autonomous way.

6 However, considering what matters to this study, Guernsey confirms that it  
7 is possible to consecrate, register and protect Image Rights, whether at a  
8 statutory or supra-statutory level, especially for Celebrities, although without  
9 legal adequacy, accommodating the single concept of Image Rights of  
10 Celebrities, or in what this study concerns, of Sports Celebrities.

11 In short, *Guernsey* seems to adopt a concept of “*image*” that is close to the  
12 contemporary concept adopted by the US and some European Courts, and that  
13 includes photos, illustrations, names, surnames, personal traits, and distinctive  
14 features, as a logotype or any other trait associated with personality and its  
15 expression.

16 Likewise, the Image of Sports Celebrities consolidates a way of ownership  
17 that is liable to be exploited, licensed, or used with legal security, with its  
18 violation or the violation of any other image connected to it used for  
19 commercial purposes or direct or indirect financial purposes, without the  
20 consent of its holder, being easily condemned.

21 That is, when improper use generates a risk of confusion or association  
22 with the Image of the Sports Celebrity that was registered or takes unjustified  
23 advantage from or harms the reputation or economic value of the Image of the  
24 Sports Celebrity.

25 Regarding this, Trademarks seem to be the foundation of the preliminary  
26 commandments of the new Guernsey regime, although acknowledging the  
27 special virtualities of Image Rights as a whole to protect.

28 Exceptions, of course, are also many and justifiable, such as the use of the  
29 Image of Sports Celebrities in a clearly public scenario, news, comments, and  
30 satires. But also, for educational, cultural, and comparative advertising  
31 purposes. The use of images is also allowed when it is merely descriptive and  
32 used only to identify or describe something other than the personality,  
33 functioning as a reminiscence of the exception of fair use in the US Trademark  
34 Law, which allows a descriptive trademark to be used to describe something  
35 different than the products or services under the trademark.

36 The Guernsey approach to Image Rights is still very recent and not yet  
37 clear in many aspects, as referred above, such as how exceptions are  
38 interpreted and the extension of damage that can be conceded in case of  
39 violation. Also, as stated, the applicability of any decision outside Guernsey is  
40 questionable.

41 However, a regime like the *Guernsey* regime for Image Rights of Sports  
42 Celebrities, which are protected by a registration procedure, seems to provide  
43 more certainty, especially with the licensing or granting of rights, which is

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<sup>11</sup>We must say that the legislation of Guernsey applies to England and Wales and that its violation may result in lawsuits in Guernsey with the required acknowledgement and effect of the sanctions adopted there.

extremely problematic in the Sports industry, because the holder of such rights is not always easy to identify.

### **Part Three – Proposal for the Consecration of Image Rights of Sports Celebrities**

#### *The Necessary autonomization*

You could be asking yourself why there would be the need to autonomize Image Rights of Sports Celebrities when there are partial protections under multiple standpoints and in distinct areas of Law.

We believe the whole logic involved in the protection of Image Rights via Intellectual Property, Industrial Property (Trademarks), Criminal Law, and other areas of Law originated from a restrict vision of what the Image of a Celebrity is, ignoring all the situations caused by a highly technological society via the Internet, at least, for the last twenty years.

So, we argue that the traditional instruments for the protection of Image Rights were not capable of dealing with the new, resurgent problems and challenges that we face nowadays, in their whole and in an absolute manner. Copyright, for instance, only protects work creators, while trademarks play a different role when it comes to the protection of names and brands registered under them.

It is important to note that Image Rights are not just a matter of Intellectual Property (IP) based on the individual's creation that originates from the intellect and is subsequently materialized by the creator or others. These creations are protected, regardless of their value. The combination between the identity of a Sports Celebrity, their performance (sporting or not), and the expression of their personalities has become an autonomous asset, whenever it has the power to attract the public.

Many were the Athletes who became famous, or gained the Sports Celebrity status, because of their sports performance or any other positive or negative performances (who does not appreciate a good villain?), within the sports they practice or not.

Interestingly, this intangible, measurable asset can also refer to a person combined with an animal or a machine.<sup>1213</sup>

Can this intangible, measurable, and unique asset be included in any of the categories of rights that already exist in the legal “market”? We believe that it cannot.

The protection under Copyright is insufficient, because there is no protection for the sensory perception caused by Image Rights, such as we describe and defend them, although they have similar characteristics. The protection under Trademarks is also insufficient, because, in this case, the decisive factor is not intellectual creation, but the unique combination of a

<sup>12</sup>For instance, in horse races, the Jockey and his Pegasus.

<sup>13</sup>For instance, in F1 races, Schumacher and his Ferrari.

1 distinctive symbol of given a product or service, while for Image Rights the  
 2 decisive factor is the combination of a distinctive sports performance or any  
 3 other performance and the individual, unique personality that projects onto its  
 4 recipient.

5 This way, it is possible to conclude that, despite being close to  
 6 Trademarks, both in terms of ratio and requirements, Image Rights encompass  
 7 exceptional characteristics that require a specific legal solution. Image Rights,  
 8 in the case of Sports Celebrities, must be addressed in their strict sense as the  
 9 image that requires immediate protection and as the combination of the person,  
 10 sports performance or any other performance, and the sensory impact of such  
 11 combination on the public and how the public perceives it.

12 Therefore, it must be clear who the holder of Image Rights of Sports  
 13 Celebrities is: Celebrities themselves. We recognize and commend that those  
 14 rights are used by third parties when expressly authorized by their holders. But  
 15 we believe that Image Rights cannot be alienated, and that this constitutes an  
 16 insurmountable limitation to the regime, as we understand and defend it, as any  
 17 business that implies such alienation would cause the non-existence or  
 18 impossibility of the object. We believe that Image Rights of Sports Celebrities  
 19 are an intangible and measurable but inalienable asset.

20 We are aware that the privacy of Sports Celebrities or other Celebrities is  
 21 less protected when compared to other people. Because their actions are public,  
 22 on most occasions, and because they have achieved a *Celebrity status*, as  
 23 described in the first part of this study. In fact, when an athlete participates in a  
 24 public competition, they are somehow waiving some aspects of their privacy,  
 25 and they do it in a legitimate way and should accept the consequences that arise  
 26 thereof.

27 This way, in addition to interests originated from their intrinsic  
 28 personality, which should be protected, Sports Celebrities have economic  
 29 interests that must also be protected and considered. However, the multiple  
 30 legal frameworks in force focus mostly on the consequences of the violation of  
 31 those interests, instead of focusing on preventing such violation. In the case of  
 32 Celebrities, this is often fatal, because these violations can happen in the most  
 33 uncommon ways, moments, or forms.

34 We are not talking about an absence of protection, but the absence of  
 35 proactive legal registration, exploitation, protection mechanisms for the Image  
 36 Rights of Sports Celebrities – in what we call *legal market* – which turns out to  
 37 enable their violation, in the simplest way, but also their much harder repair.  
 38 And we are not even addressing the non-deliberate violation of these rights,  
 39 which often escape conventional protection.<sup>14</sup>

40 We have seen that the cross-border character of Image Rights of Sports  
 41 Celebrities is not well adapted to the autonomies of existing legal frameworks,  
 42 and we have identified the emergence of robotized electronic formats of Sports

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<sup>14</sup>For example, Celebrity “A” may have entered into an exploitation agreement with manufacturer “B” for their products to be endorsed by association with “A”. How does “C” become aware of such agreement? “C” could assume that they can benefit from referring to “A”, but they will be violating involuntarily the “agreement made between A and B”.

Celebrities, which we believe should also be encompassed by concept of Image.

In our opinion, this requires that all Image Rights formats are reformulated to form one single normative body that can respond better, but above all faster, to the violations that occur in China, India, the US, or the EU in the same second or *nanosecond*.

### *The Essential characters*

As the need for autonomization was already justified, we must now identify, even if briefly, the main characteristics that these Image Rights, applicable to Sports Celebrities, must have.

In this regard, we will follow the “*new*” regime established in Guernsey, but without disregarding the traditional legal solutions presented by the other legal frameworks, namely concerning the protection of one’s own image.

Firstly, we propose that the registration of personality becomes strictly effective to protect all current, historical, and future images associated with such personality. That is, if a given person can express something unique, by any means, this can and must be protected by Image Rights.

Therefore, following such registration, the patrimonial extension of the personality of the Sports Celebrity may be the object of commercial exploitation, as if it were a kind of “*usufruct*” or, even further, a commercial lease agreement. But such exploitation had to occur under a reinforced degree of legal certainty and security due to the registration. However, we must repeat and internalize that Image Rights cannot be alienated, even when we believe that it is a necessary consequence.

We defend the registration of Image Rights on an electronic platform, similarly to what is currently and successfully happening with the CE marking, with a preliminary publication for opposition purposes and subsequent objection periods. And where the opposition is found to have no grounds or where there is no opposition at all, the application will be approved and published.

We also defend that Image Rights include a natural person or a legal person. Theoretically, we recognize that the registration of Image Rights of a legal person could be the object of another study, but we had to make this remark. However, if we assume that the Image Rights of people who are not real, i.e., fictional characters, can also be registered, it will not come as a shock that two or more individuals who are intrinsically connected and form a collective, universal legal person could be the object of this registration, as suggested.

Especially because we also believe that two or more natural or legal persons, which are known by the public to be connected via a common goal and who form a collective group or team, can be, as already mentioned, a fictional character of a human or non-human being<sup>15</sup>.

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<sup>15</sup>Practical examples of registrations that could occur in this specific context would be *Robert Downey Jr.* and *Charlie Chaplin*. In terms of group personality, *Laurel and Hardy*, and my

1 This said, following the Guernsey example and considering a broad  
 2 concept of Image, we believe that Image Rights are exclusive rights concerning  
 3 the images associated or registered with the personality of the registered object.  
 4 Such concept includes the name of a person or any other name for which such  
 5 person is known, but also their voice, signature, likeliness, appearance,  
 6 silhouette, expressions (verbal and facial), gestures, mannerisms, or any other  
 7 feature or personal trait that distinguishes them, or any photo, illustration,  
 8 moving image or digital representation, or any other of another person, to the  
 9 extent that the other person is not identified or chosen in connection to the use  
 10 of the image.

11 The normative framework we defend is also utilitarian by nature, as the  
 12 registration brings a real benefit, with a registered Image being seen as distinct  
 13 and valuable enough for us to measure it or have the possibility to do so.

14 Such measurement will become a great asset, whether it be where  
 15 exploitation licenses are assessed or where damages are estimated after the  
 16 potential violation of Image Rights, instead of what happens nowadays. In  
 17 addition, the registration will also bring the possibility of considering damage  
 18 “for lack of knowledge.”<sup>16</sup>

19 However, a personality’s name does not have to be the same as a person’s  
 20 name.<sup>17</sup>

21 In this legal solution we are now presenting, reasons for denying  
 22 registration would be the presence of a representation of a protected emblem,  
 23 such as a national flag, or the Olympic symbol, in any image or personality.  
 24 And situations where the registration was based on any declaration,  
 25 information, or document that constitutes a protected right of any third party, or  
 26 where images associated with the personality had become so frequent or  
 27 generic that they would no longer identify a specific personality. And, lastly,  
 28 situations where the personality or image in question was considered identical  
 29 or similar to an existing personality or image that was already registered, or  
 30 similar to an existing personality or image that was already registered where its  
 31 unjustified use would constitute loss or undue advantage.<sup>18</sup>

32 We believe that the Trademark is the legal figure that is closer to the  
 33 regime we are defending. In terms of violation, only a “*protected image*” can  
 34 be violated. Also, for it to be a “*protected image*”, the date of violation must be  
 35 distinct, i.e., if it was recognized as being associated with the registered  
 36 personality by a significant or relevant public sector anywhere in the world.

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beloved *Queen* or *Muse*. Or, lastly, as examples of fictional human characters, *James Bond* and *Tintin*, and as examples of non-human fictional characters, *Shrek*, *Snoopy*, and *Mickey Mouse*.

<sup>16</sup>For example, think about the pose of *Usain Bolt* after winning a race, or the ever-changing images of *Madonna*.

<sup>17</sup>Look at the example of Lady Gaga, where the registered holder of the personality and associated image are different than the real person, and where the respective licensing of Image Rights are especially relevant.

<sup>18</sup>The notion of identical or similar is much easier to understand in this context than it seems, and Industrial Property Courts have been fighting this by reinforcing and creating concepts like “*confusingly similar*” e “*likelihood of association*”.

But also recognized as valuable, i.e., if it could or had the potentially to be exploited economically.

This way, Image Rights are considered to have been violated for commercial use or purposes, or whenever a direct or indirect financial and economic benefit arises from such violation, when such use was not authorized by their holder, provided that the image is identical or similar to a protected image and the likelihood of confusion exists for the public or that the image is identical or similar to a protected image and its use cannot be justified and an undue advantage is being taken from the character or reputation that distinguishes a person, causing damage to that same person.

In our opinion, the use of image can, however, be justified in communications to the public, which includes, but is not limited to, physical presences, exhibitions, works of art, drawings, documents, photos, the use of the image in relation to sponsors or for purposes or marketing or endorsement of goods, services, activities, or events, as well as the use of the image in relation to goods or holders of the image and the use of image as domain name or company name.

#### *The – extremely brief – Harmonization perspectives*

We are aware that the proposal for an autonomous legal figure, whose need arose mostly from the practice and harmful effects of its violation, is not backed up anywhere but in Guernsey and that this raises complex uniformisation and cross-border application issues.

We are sure that there would be many good examples of legal regimes, which are now essentially and perfectly consolidated in multiple legal instances, that once experienced the same anguishes we are now experiencing with the Image Rights of Sports Celebrities.

Firstly, we believe that Image Rights of Sports Celebrities are liable to subsist, before being narrowed by the most conservative areas of the Law, just like intellectual and industrial property rights, among others.

Secondly, such rights are affirmed by the existing geopolitical blocks, such as the US, which have created Image Rights in the format of “*Publicity Rights*”, expanding them and subjecting them, above all, to a registration regime.

In the EU, the matter of Image Rights, in our opinion, would be legally worthy, but also, and above all, economically strong enough to give rise to a normative instrument, a Directive that would be transposed to the Members States, more or less broadly.

We could wish for more also at the level of bilateral cooperation agreements between States and international agreements. For instance, the US do not sign any international cooperation instrument, without that same instrument having express rules about Image Rights, which could (in the eyes of some) turn the desire for the harmonization we suggest less fanciful.

1 This paper could not encompass the study of each of the harmonization  
 2 suggestions presented, but it is important to mention that such harmonization is  
 3 desirable and, as in many other areas, possible.

## 4 5 6 **Conclusions**

7  
8 We concluded that, regardless of the name we want to give them, Image  
 9 Rights must be defended as a necessary consequence of one's own personality  
 10 rights and as something that is inherent to the human condition, irrespective of  
 11 the social status where we are born into, find ourselves in, or die in.

12 Moreover, this is what determines and reaffirms the more personal,  
 13 inalienable, vital character and the minimum, residual substance of human  
 14 individuality.

15 However, some people, by means of their lives, art, physiognomy, or  
 16 others, have a power of attraction that promotes certain behaviours in other  
 17 people, especially in terms of product and service consumption and opinions.

18 That is why we defend a broad concept of Image, capable of embracing  
 19 realities that are apparently as distinct and distant as the name, physiognomy,  
 20 virtual representations, voice, and silhouette. However, those people we call  
 21 and define as Celebrities have characteristics that distinguish them from other  
 22 people and that enhance the patrimonial extension of those rights that are  
 23 inherent to image protection itself.

24 And it is precisely when it comes to acknowledging the economic potential  
 25 of Celebrities and, in the scope of this study, Sports Celebrities, that a type of  
 26 "*secondary right*" emerges with the patrimonial dimension of the right to one's  
 27 own image. This right is born from scratch, although emerging from the  
 28 minimum protection inherent to any human being, which we defend under the  
 29 protection of one's own image. In practice, and to achieve what we desire,  
 30 Image Rights of Sports Celebrities include a kind of "*usufruct*" of the  
 31 patrimonial substance.

32 Notwithstanding, such right keeps its umbilical connection to the essential  
 33 features of the protection of image rights, i.e., it remains indisputable, vital,  
 34 absolute.

35 In the light of the above, the alienation of the Image Rights of soccer  
 36 player X, Y, or Z is impossible, contradicts its own terms and should be seen as  
 37 nothing more than a "*sound bite*" or news "*frame*", apart from Law or not.

38 Such "*thing*" does not exist and cannot exist. Instead, what exists is the  
 39 transfer of the right to "*use and enjoy*" (as included in the Portuguese Civil  
 40 Code) of the patrimonial substance of Image Rights.

41 This way, the architecture we defend is formed by a first level, a first layer  
 42 of protection of the Image Rights of Sports Celebrities, where we can find its  
 43 vital core, which is not negotiable, and a second level, object of exploitation,  
 44 whether by the holder, consolidating the "*root*" and personal "*usufruct*", or a  
 45 third party, where the "*root*" is separated from the "*usufruct*". In this sense, and  
 46 with the presented limitations, all the other exploitation variables seem

possible. That is: for a specific part of the territory or any other part; for certain products or services; for one, two, three, or four years; in conjunction or exclusively. Provided that the minimum protection scope and identification features defended herein are not harmed.

We believe that an autonomous, unifying concept of Image Rights, of Sports Celebrities or not, which originates from the protection of one's own image via the classical instruments and, in certain cases, from the emergence and protection of an economic exploitation right, which we call patrimonial extension, is the best and most effective protection against the multitude of violations that can happen anywhere and at any time.

That is why we believe in its conceptualization and autonomization, regardless of the name given by the multiple legal systems, which hold a set of rights that exist individually but that are not capable of protecting the Image Rights of Sports Celebrities in the best way possible. As said before, based on the minimum scope we presented herein, and following the guidelines of the innovative procedure adopted in Guernsey, especially, when it comes to their registration.

This mitigated solution will enable an improved, more timely protection of such rights and will establish the foundations for the desired and suggested global harmonization proposal, because Image Rights, especially those of Sports Celebrities, are global.

Such harmonization can be achieved in many ways and at many levels. Whether via international instruments – bilateral or multilateral commercial agreements between States – or any other global normative instrument. What we know for sure is that a new path must be outlined urgently.

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