
When HMRC looks to the stars

Disputes over image rights are increasingly about income and tax, says **Edward Fennell**

In the age of celebrity, image is everything, so it is not surprising that image rights are controversial in law and a thorn in the side of the taxman.

When scores of HM Revenue & Customs (HMRC) officers descended last week on West Ham and Newcastle United football clubs, the immediate word was that they were investigating tax fraud linked to the abuse of image rights. The fact that French authorities were helping their UK counterparts highlighted that this is a cross-border problem. Amazon and Google may be the unacceptable face of global tax avoidance, but there is no shortage of superstars who are taking advantage of tax havens so that their image rights can be accrued without the risk of interference by tax officers.

Historically much of the litigation around image rights focused on well-known people protecting their pictures, signatures and the like from being misused or exploited by others without their consent.

Andy Brown, of Bird & Bird, points out: "Image rights disputes in the UK have tended to consist of contractual, tortious and intellectual property disputes such as whether an image rights agreement constituted an unenforceable restraint of trade — in the case of Wayne Rooney, *Proactive Sports Management Ltd v Rooney* [2012] — and whether a T-shirt bearing a celebrity's photograph constituted an act of passing off — in the case of the popstar Rihanna, *Fenty v Arcadia Group Brands Limited (t/a Topshop)* [2013]."

Yet as the swoop on football clubs demonstrates, the contentious aspects of image rights are increasingly related to how they might be used to shelter income from the tax authorities.

Image rights have an established place in the relationship between clubs and players. "While not strictly speaking a legal right under English

law, the concept of image rights enables footballers (and their clubs) to commercialise various aspects of a footballer's identity such as pictures of them, their name, voice and anything else that is particular to them," says

Ingrid Silver, of Dentons. Miles Dean, the managing partner at Milestone International Tax Consultants, puts it this way: "These rights matter because they have potentially significant value to the individual over and above his/her earning potential from their particular profession."

Sarah MacDonald, of Wiggin, agrees. "A huge amount of money is generated from celebrities and sports personalities exploiting their 'brand,'" she says. "We have seen many personalities commercialise themselves (trading and licensing just like a product). It is only natural that they should want to protect this."

What appears to be the problem is that slugs of salary can be dressed up as image rights payments so as to enjoy the tax breaks such payments offer.

As Alex Kelham, the head of the sports business group at [Lewis Silkin](#),

explains: "In sports such as football, the complexities arise in determining the genuine value of a player's image rights."

"Often a player requests that they are paid for the exploitation by their club of their image rights via their image rights company, which is a legitimate and completely legal practice. However, if the value of the image rights has been

inflated with the salary reduced accordingly, the taxman is missing out on income tax and national insurance on the inflated element of the image rights fee. If the player's image rights company is based in the UK, HMRC will be paid by the image rights company. However, foreign players may have established their image rights company in their

home country or another tax-efficient jurisdiction, potentially depriving HMRC of other income."

With HMRC showing increased interest in the tax treatment of image rights payments, more image rights tax disputes in the courts and tribunals, are likely, Brown predicts.

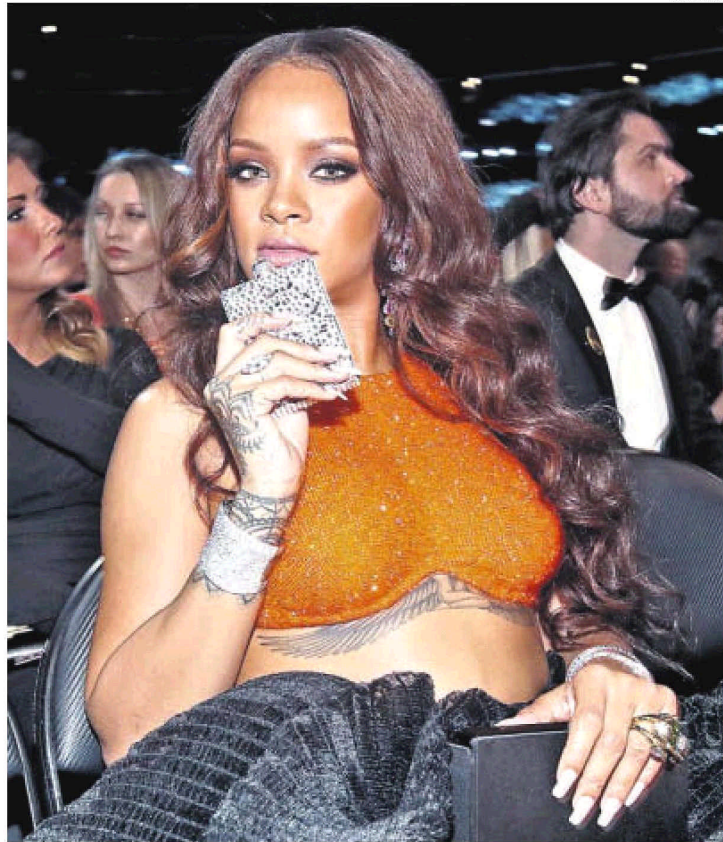
Part of the problem is the lack of a coherent approach to these rights. Michael Hekimian, the legal director in the commercial team at Ashfords, says: "It's safe to say that image rights in the UK are built on a mish-mash of existing laws — everything from privacy laws through to trade mark registration, copyright, passing off and defamation, as well as advertising standards all have an impact on this area of law." He adds: "With the value of image rights hard to quantify and the legal status so amorphous and variable between different jurisdictions, the exploitation of image rights is opaque — accordingly they can be open to misuse or abuse."

Things are changing, however. Last year Jon Thompson, the chief executive of HMRC, told the House of Commons public accounts committee that the government should review the "rather convoluted" way in which elite sports stars pay tax on their image rights. The government seems to have taken the message on board. The budget committed HMRC to publishing guidelines for employers who make payments of image rights to their employees.

Brexit is unlikely to make any difference to this. As Kelham points out: "There is no uniform approach to these issues across the EU."

Ironically, the only European jurisdiction to have a specific registered image rights regime is the nicely off-shore, but non-EU Guernsey.





The singer Rihanna took on Topshop over the use of her photograph on a T-shirt

