

EIP

Fenty & Ors v Arcadia Group - Rihanna gets shirty with Topshop

Summary

In this High Court case ([\[2013\] EWHC 2310 \(Ch\)](#)), Birss J held that the UK high-street fashion chain Topshop committed an act of passing off when they sold T-shirts emblazoned with a photograph of the pop singer Rihanna. Key to the decision was that there was misrepresentation because consumers might have purchased the T-shirt under the false belief that it was authorised by Rihanna. This conclusion depended on the similarity of the photograph to official album covers, Topshop's particular position in the fashion retail world and its use of celebrities for promotions in the past.

Background

In March 2012, Topshop started selling a T-shirt with an image of Rihanna on it. Topshop had obtained a licence from the independent photographer who took the photo but had nothing from Rihanna herself. There is no free standing right in England for a famous person to control the reproduction of their image. Without a case under copyright, a passing off action was brought by Rihanna against Topshop.

Decision

The law of passing off in England requires the three elements of goodwill, misrepresentation and damage. This case turned on the question of misrepresentation.

It was agreed that Rihanna's image on a product does not necessarily give rise to a misrepresentation. However, the claimants pointed to Topshop's previous efforts to emphasise connections between the store and famous stylish people, such as Rihanna.

Topshop ran a competition in 2010 to win a personal shopping appointment with Rihanna. Rihanna also visited Topshop in February 2012, which Topshop chose to publicise by tweeting to their 350,000 Twitter followers. Birss J agreed that this showed that Topshop were seeking to take advantage of Rihanna's position as a style icon.

The defendants were dealt another blow when Birss J considered the image chosen for the T-shirt. He acknowledged that the image on the T-shirt bore similarities to images of Rihanna from one of her albums and from the music video for one of her singles. These similarities, the judge ruled, would have been noticed by Rihanna's fans and thus the image used on the T-shirt could have been viewed as part of the marketing material for the album and single.

The judge did agree with the defendants that it was important to note that there was no indication on the garment that it was authorised. However, this was not enough to overcome the similarity of the image to official ones and Topshop's position as a fashion retailer with public links to famous stars in general. He held that a substantial portion of people, many of them fans of Rihanna, would have been incorrectly inclined to think that the T-shirt was authorised, meaning that a misrepresentation had been made.

On the issue of goodwill, Birss J came to the unsurprising conclusion that, thanks to her role as a "style icon", Rihanna had ample goodwill to succeed in a passing off action. Topshop's sale of the T-shirt resulted in a loss of control over the singer's reputation in the fashion sphere and a loss of sales to her merchandising business, meaning the final requirement of damages was satisfied. Hence Birss J found in favour of the pop star and ruled that Topshop's actions did constitute passing off.

Comments

In spite of the fact that a celebrity does not have a general right under English Law to control reproduction of their image, this case confirms that it is possible to succeed in a passing off action when the circumstances suggest that the public will incorrectly consider an item to be authorised. The decision was influenced by Rihanna's strong position as a "style icon" and Topshop's position as a retailer with public links to famous stars. The similarity of the image used to official images was important and this could have more general relevance: Birss J noted that this was itself a strong indication that a product may be authorised. Had Topshop chosen a different image of Rihanna the decision could well have been in their favour.

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