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Common law: Passing off, defamation and breach of confidence

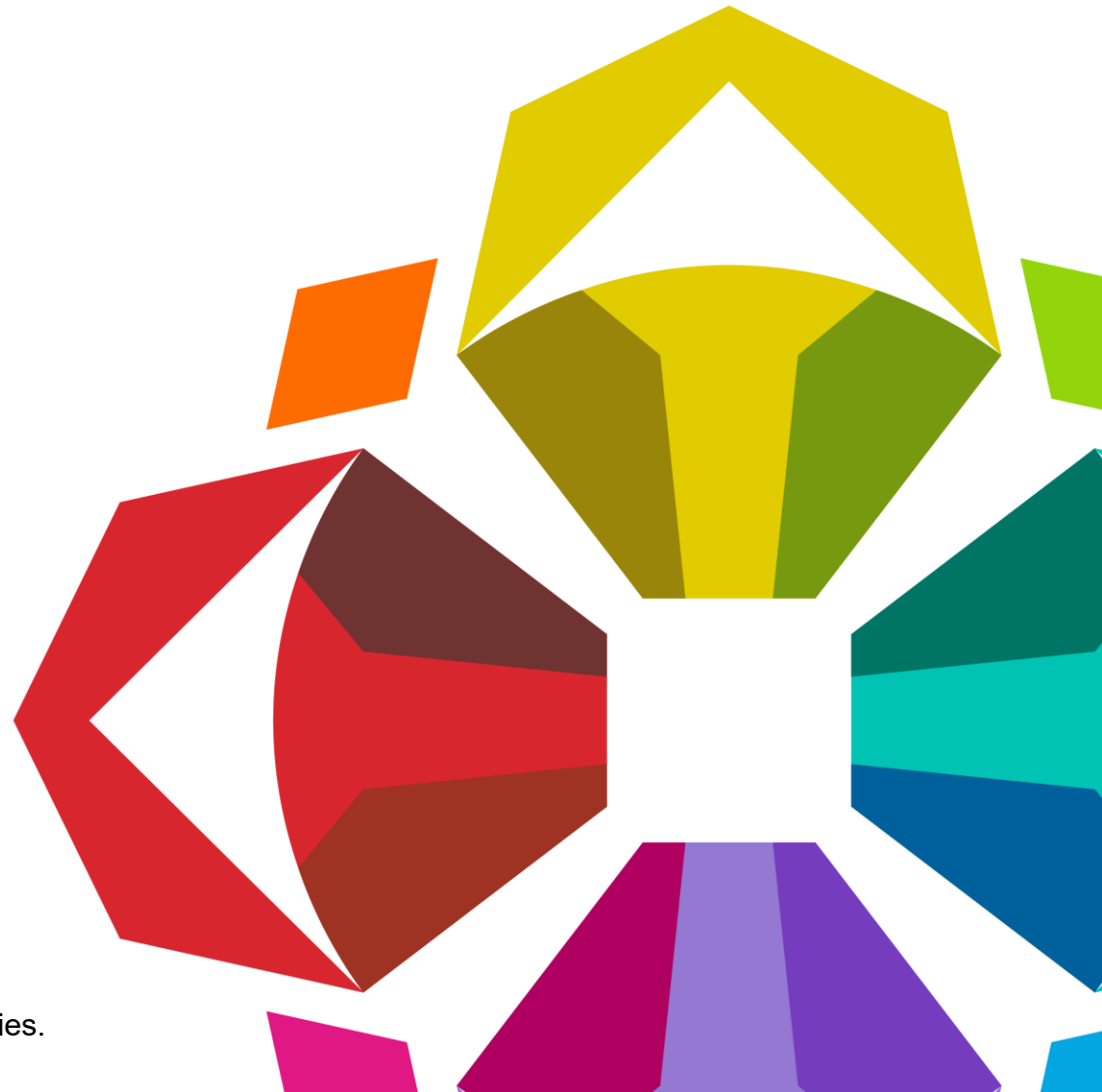
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Passing off



Ideas. People. Possibilities.

Passing off (unfair competition)

- ❓ Strength of rights varies by jurisdiction
- ❓ “*There is in English law no ‘image right’ or ‘character right’ which allows a celebrity to control the use of his or her name or image*” (*Fenty v Arcadia*)
- ❓ However, fairly strong protection for false endorsement where claimant is known for commercial collaborations (*Irvine v TalkSport; Fenty*) – passing off likely where synthetic person used to promote something
- ❓ Low level of protection for lesser-known people, or people not known for commercialising their image (e.g. politicians, royalty etc.)
- ❓ Limited recognition of right in online/social media context – problem of scam ads



Defamation and privacy

Defamation

- ❓ Strong level of protection under common law
- ❓ Attaches to the publication, and could in principle apply to the publication of synthetic media featuring an individual
- ❓ Significant balancing considerations apply, including severity of the damage and rights to free expression
- ❓ Significant enforcement issues, particularly where fake media is published online



Privacy

- ❓ Developed significantly through ECtHR and national decisions
- ❓ Will typically protect a person's right to privacy where they have a reasonable expectation of privacy and that privacy has been impinged upon
- ❓ Limited impact in relation to synthetic media where the information is false, but could apply to synthetic media relating to private information, e.g. synthetically generated video depicting private information
- ❓ Data protection law brings strong protection for a person's personal data, which will likely include their likeness, voice etc., subject to balancing considerations such as private use and journalistic processing



Taylor Swift searches blocked on X after fake explicit images of pop singer spread

White House press secretary calls fake images 'alarming' and urges social media companies to prevent spread of such misinformation

(The Guardian, 28 Jan 2024)

Breach of confidence

Breach of confidence

- ❓ Includes trade secrets
- ❓ Strong level of protection across most common law jurisdictions
- ❓ Protects only information which is kept confidential, i.e. synthetic media which is false will not attract rights in confidence
- ❓ Synthetic media can be used to obtain confidential information (e.g. 'vishing'), which will be unlawful but difficult to enforce
- ❓ Synthetic media may be the product of a misuse of confidential information, e.g. the medium through which that information is misused
- ❓ Limited effective tools to enforce in online context

