

Neutral Citation Number: [2013] EWHC 2310 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 31/07/2013

Before :

MR JUSTICE BIRSS

Between :

(1) ROBYN RIHANNA FENTY
(2) RORAJ TRADE LLC
(3) COMBERMERE ENTERTAINMENT
PROPERTIES LLC

Claimants

- and -

(1) ARCADIA GROUP BRANDS LIMITED (T/A
TOPSHOP)
(2) TOP SHOP/TOP MAN LIMITED

Defendants

Martin Howe QC and Andrew Norris (instructed by **Reed Smith**) for the **Claimants**
Geoffrey Hobbs QC and Hugo Cuddigan (instructed by **Mishcon de Reya**) for the
Defendants

Hearing dates: 17th, 18th, 19th and 23rd July 2013

Judgment

Mr Justice Birss :

1. Topshop is a well known fashion retailer. Rihanna is a famous pop star. In March 2012 Topshop started selling a t-shirt with an image of Rihanna on it. The image was a photograph taken by an independent photographer. Topshop had a licence from the photographer but no licence from Rihanna. Rihanna contends that the sale of this t-shirt without her permission infringes her rights. Topshop does not agree. This action is the result.
2. It is important to state at the outset that this case is not concerned with so called “image rights”. Whatever may be the position elsewhere in the world, and how ever much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image (*Douglas v Hello* [2007] UKHL 21). There is a developing law of privacy but no question of that arises in this case. The taking of the photograph is not suggested to have breached Rihanna’s privacy. A celebrity may control the distribution of particular images in which they own the copyright but that right is specific to the particular photographs in question. Whether an image right can or should be developed is not what this case is concerned with.
3. This case is concerned with passing off. To establish passing off three things must be proved by Rihanna. She must show that she has a goodwill and reputation amongst relevant members of the public; the conduct complained of must be shown to make a misrepresentation, i.e. to be likely to deceive those members of the public into buying the product because they think it is authorised by her; and that misrepresentation must cause damage to her goodwill. If these elements are established, Rihanna has a good claim against Topshop. If they are not, Rihanna has no ground in law to object to the sale of her image on the t-shirt. That is what this case is about.
4. Mr Martin Howe QC leading Mr Andrew Norris appears for the claimants instructed by Reed Smith. Mr Geoffrey Hobbs QC leading Mr Hugo Cuddigan appears for the defendants instructed by Mishcon de Reya.

The witnesses

5. The claimants’ witnesses were Mrs Desiree Perez, Ms Farida Kaikobad, Ms Ciarra Pardo, Mr Ciarán Coyle and Ms Sophie Hope.
6. Mrs Perez was the claimants’ main witness. Her evidence was given over a video link to New York. She works for Roc Nation, a talent management company founded by Shawn Carter (known as Jay-Z). Mrs Perez is a member of Rihanna’s management team. She described Rihanna’s career, including not just her music career but her promotional work and endorsement agreements, and also her relationship with Topshop. Mrs Perez articulated the claimants’ case as to why purchasers would think it was an official authorised product and why it would be likely to deceive her fans.
7. Mrs Perez was a combative witness. My impression was that the combative nature of her responses to Mr Hobbs’ questions was due to a significant degree to a difference in culture between an English barrister and a New York based individual in the music business and was not the result of a desire to avoid assisting the court. The cross-examination did expose the limits of Mrs Perez’s experience. She has no relevant

experience of the trading conditions in the relevant part of UK high street fashion retailing nor of Rihanna's business before 2011.

8. Ms Kaikobad is a brand director at River Island, another major UK fashion retailer. River Island entered into a collaboration agreement with Rihanna in 2012. Ms Kaikobad explained River Island's reasons for entering into this agreement. She described Rihanna as a style icon and trend setter with a core following of women from their teens to their thirties. She was a careful and measured witness.
9. Ms Pardo is Rihanna's creative director and has undertaken this role for 6 years. She works with Rihanna on her music videos, artwork for albums and advertising campaigns, and accompanies her on campaign and magazine shoots. Three years ago Ms Pardo founded Gravité Creative, of which she is the CEO and creative director. Gravité Creative is described as a "full service marketing and branding company that builds brands for artists, athletes and business". Ms Pardo's evidence explained the lengths Rihanna and those associated with her go to in order to seek to control her image. She said that Rihanna was working hard to identify herself as a serious fashion designer and items such as the t-shirt in issue do not support that goal. Ms Pardo gave her evidence honestly. This included her evidence about what she thought Rihanna would think, although it emerged that she had not asked Rihanna about the particular point. I am not prepared to place weight on the views of a witness about what another person, who is the first claimant and could have given evidence herself had she wished, might think.
10. Mr Coyle runs a brand licensing agency called Beanstalk. Mr Coyle's evidence described the state of the brand licensing business as he saw it today. At an application before trial, Mr Hobbs submitted that this evidence was inadmissible expert evidence. I regarded it as evidence of the circumstances of the relevant trade. Mr Coyle gave his evidence honestly and candidly but I did not find Mr Coyle's evidence to be of any material assistance in this case. It was much too generalised and unspecific to be of any value and I will place no weight on it.
11. Ms Hope is a trainee solicitor at Reed Smith. She visited the London branch of Topshop a few weeks ago and took photographs of the display of some t-shirts in the shop. The claimants relied on her evidence to show that products similar to the one in issue in this case (which sold out last year) were sold in a group which included some images which were authorised by the person appearing in the image as well as others which were not. She expressed views about how things appeared to her. She gave her evidence fairly and honestly. Nevertheless I am not satisfied that her evidence, from a trainee solicitor in the intellectual property department of the claimants' solicitors, is of assistance in representing the impressions of the general public.
12. The claimants had been going to rely on the evidence of Mr Jeremy Joseph of Live Nation Merchandise Ltd. Live Nation has a merchandising agreement with Rihanna (via her company Combermere Entertainment Properties LLC) relating to her current Diamonds world-wide tour. Shortly before he was to give evidence it emerged that Mr Joseph was in an employment dispute with Live Nation and refused to attend court. The claimants sought to call a Mr Krassner instead who would attest to what Mr Joseph had said. I refused to permit the claimants to call another witness in this way in those circumstances but I did permit the claimant to rely, via a Civil Evidence Act notice, on the small part of Mr Joseph's witness statement which attested to the

relationship between Combermere and Live Nation and the fact that Live Nation paid a significant advance for those rights and expected to achieve sales in excess of many millions of pounds over the less than 2 year life of the tour.

13. The defendants' witnesses were Mrs Anna Svard, Mr Philip Chatalos, Mrs Sheena Sauvaire, Miss Claire Drummond, Mrs Rachel Armstrong, Ms Tanya Sharpless and Ms Madelaine Evans.
14. Mrs Svard is a buying manager at Topshop responsible for blouses, knitwear, brands and some other areas. The Rihanna t-shirt in this case was a product of the jersey department, which was not part of her area of responsibility albeit that her oversight role means she knew in general terms what was going on. Mrs Svard gave her evidence honestly, seeking to assist the court. She described Topshop's customers and Topshop's approach to its products and to trends. One of Mrs Svard's responsibilities is a line of t-shirts with images, sold under an in-house Topshop brand called Tee and Cake. Essentially Topshop sells products which are either designed in house or by external suppliers. The Rihanna t-shirt was not part of a specific Topshop trend but was bought as a product to add to the jersey offering. Topshop offers about 9000 products in a season with 50% being clothing. There are about 650 jersey garments in a season. Mrs Svard placed the t-shirt in its context at Topshop, as part of a trend for the sale of image t-shirts and as part of a summery, tribal "Calypso" trend. She also explained that the t-shirt would have been sold as part of a wall of t-shirts, vests and other kinds of jersey tops. Mrs Svard said that Topshop did not create a link with Rihanna because of an image on a t-shirt.
15. Mr Chatalos is the managing director of Knitmania UK Limited. Knitmania is a major clothing design and manufacturing company. In recent years 70% of Knitmania's business has been in fashion printing, i.e. applying images to clothing and supplying that clothing to retailers. Topshop is a major customer of Knitmania and Mr Chatalos visits the retail stores frequently to see how his products are selling. Knitmania supplied the t-shirt to Topshop and Mr Chatalos described the discussions which led to that supply. Knitmania has given an indemnity to Topshop in relation to this product.
16. Mr Chatalos explained how image licensing works from Knitmania's point of view, mentioning his company's relationships with major licensors such as Walt Disney, Warner Bros, Lucas Films and David Bowie. He distinguished between artist authorised products (my term) and "third party images" (his term). Artist authorised products include those sold pursuant to the arrangements with the major licensors referred to. In those cases the use of the image has been authorised by the person (assuming it is a person) who appears in the picture. What Mr Chatalos called third party images are images placed on garments for which Knitmania has obtained a copyright licence derived from independent "third party" photographers but no licence from the person depicted. The t-shirt in this case is therefore what Mr Chatalos would call a third party image.
17. Mr Chatalos stated that there has been a recent fashion trend for iconic images on t-shirts and gave evidence of image t-shirts supplied by Knitmania using third party images to UK high street retailers since Sept 2011. He had prepared a schedule attached to the Defence which listed examples of t-shirts carrying Rihanna's image which were on sale without authorisation from her.

18. Mr Chatalos also distinguished between traditional merchandising and fashion garments. He regarded them as distinct. I will address that below.
19. Knitmania makes a business selling third party image garments. I thought that in giving his oral testimony Mr Chatalos was acutely aware of his company's position in this dispute, not simply based on the indemnity to Topshop but the fact that this case may have wider ramifications for his business. His interest seemed to me to be emotional as well as commercial. None of the major witnesses before me were neutral and I am sure Mr Chatalos was seeking to give his evidence honestly and fairly, but I was not satisfied that I could place significant weight on Mr Chatalos' views when they are supportive of the defendants' case. I was not so concerned about his evidence on matters of primary fact.
20. Mrs Sauvaire is Head of Marketing for Topshop. She explained how Topshop undertakes its marketing. She described Topshop's recent three year collaboration with Kate Moss, describing her as a global fashion icon with unquestionable and enduring fashion credentials. In December 2012 Topshop launched a new partnership with American actress Kate Bosworth, who, like Kate Moss is renowned for her fashion choices and is admired by the fashion press for her sense of style. Mrs Sauvaire described the wide-spread prevalence of endorsements and collaborations in the fashion industry. She also described a marketing campaign in 2010 which Topshop undertook with Rihanna and addressed an allegation from the claimants that Topshop had attempted to engender a connection with Rihanna. I will return to that below. As regards the t-shirt in issue, Mrs Sauvaire said that consumers expect a more overt level of marketing communication before they will assume a connection between a celebrity and a brand like Topshop. Mrs Sauvaire gave her evidence honestly.
21. Miss Drummond is the PR manager for Topshop. She gave a number of examples of occasions when Rihanna's representatives have contacted Topshop. She also addressed a specific incident which occurred in February 2012. On that occasion Rihanna visited Topshop's flagship Oxford Circus store and the matter was picked up by the press. Miss Drummond said that Topshop's press team was not responsible for those reports. Miss Drummond gave her evidence entirely fairly.
22. Mrs Armstrong is a trainee solicitor in the defendants' solicitors currently seconded to the legal team at Arcadia, the parent group of the defendants. She gave evidence of efforts she had undertaken to find out if Topshop staff were aware of any feedback from customers concerning the t-shirt. She was a good witness but I am not satisfied the exercise Mrs Armstrong described was sufficiently rigorous to establish the proposition advanced, that there had been no comments or relevant feedback relating to the product.
23. Ms Sharpless is employed in the Topshop personal shopping department. This is a service which Topshop offers to VIPs. She said that the personal shopping department do not publicise the visits of VIPs. She was not cross-examined. I accept her evidence, which was focussed on what the Topshop personal shopping department does and does not do.
24. Ms Evans is the Buying Director at Topshop, in charge of the whole of Topshop's buying team. At the relevant time she was a Head of Buying and her responsibility

included the jersey department which bought the t-shirt. She described the sale of the t-shirt by Topshop in the period from about 6 March 2012 until it sold out in August 2012. About 12,000 units were sold. The product sold well and was only marked down at the end of its run. The price was £22 until mid June. It was sold in shops and online. The customers' online comments were positive.

25. Ms Evans explained that when first sold online the t-shirt was described as RIHANNA TANK and "Photographic Rihanna motif tank". On 14 March Topshop changed the text online to remove the use of the word Rihanna, no doubt because RIHANNA is a registered trade mark for clothing. She also explained that at around the same time as the t-shirt in issue, Topshop sold 5,000 units of two other oversized image t-shirts showing pop stars, one of Tinie Tempah and one of Prince. They both came from Knitmania.
26. Ms Evans was not able to attend trial because she was required to undertake jury duty. Her witness statement was served under a Civil Evidence Act notice. I will give it such weight as I think appropriate.

The defendants' objections at trial to the claimants' evidence

27. Two weeks before trial, the defendants applied for an order striking out a number of witness statements and parts of witness statements then being relied on by the claimants. I dealt with that application at the time (*Fenty v Arcadia* [2013] EWHC 1945 (Ch)). As a result statements from three witnesses which the claimants had wished to call were ruled out. One element of that application was that I accepted Mr Hobbs' submission that any remaining evidence which was simply an opinion about human nature and/or an opinion on the ultimate issue before the court was of no value and need not be cross-examined. However the parties could not agree whether and to what extent any such evidence remained in the witness statements of the claimants and the defendants. So at the start of the trial I had to rule on that point with reasons to be given in this judgment. Much of the material was in the evidence of Mr Coyle and Mr Joseph. Since I have not found Mr Coyle's evidence to be of assistance, there is no point in addressing it at length. For what it is worth, I found that the passages objected to (which were said to be merely opinions about human nature and were in paragraphs 11, 12, 14, 15, 19 and 20) were not merely opinions about human nature, they were evidence of the circumstances of the trade. Since Mr Joseph did not attend, the passages complained of are not in evidence anyway.
28. The defendants also objected to passages in Mrs Perez's evidence. Passages in paragraphs 17, 47, 54, 72, 73, 74 and a part of 94 were said to be merely opinions about human nature. I disagree. They relate to the circumstances of the trade and are admissible. For example the passage objected to in paragraph 54 has Mrs Perez saying "*Due to the magnitude of Rihanna's success, companies and individuals have from time to time attempted to exploit her goodwill for their own purposes by producing products and clothing which suggest an association with her*". This is not in either category advanced by Mr Hobbs. It is not a stunning piece of evidence but can be said to have a bearing on goodwill. Another example is in paragraph 72, in which Mr Perez said that "*Journalists cite Rihanna in their articles because they know she has a huge fan base, is at the cutting edge of style and her fashion choices will interest their readers.*" This is also not in either category advanced by Mr Hobbs and bears on the issue of the nature of Rihanna's goodwill. Paragraphs 17 and 47 are

closer to Mr Hobbs' line in that they refer to what fans want or think but the statements appear in the context of explaining how and why Rihanna's business overall operates and when seen in that context they amount to relevant evidence.

29. Passages in paragraphs 71, 83 and parts of 84, were said to be opinions about the ultimate issue before the court but I reject that submission. In my judgment those passages contained relevant evidence directed to the circumstances of this case. One sentence in paragraph 84 did amount to an opinion about the ultimate issue before the court (as did a parallel sentence in Mrs Svard's witness statement called by the defendants) and my earlier order applies to those two.
30. The exercise did identify a couple of paragraphs which I told Mr Hobbs he did not need to cross-examine on. One was paragraph 63 of Ms Perez's statement in which she stated her view about what Rihanna thinks her fans would do. If Rihanna wished to tell the court what she thought, she could have come and done so herself. Another was in paragraph 94, which was a matter of argument, starting with the words "thereby implying" and did not need to be cross-examined to.

The law

31. The law of passing off, as classically stated by Lord Oliver in **Reckitt & Colman v Borden**, requires the three elements of goodwill, misrepresentation and damage. Historically merchandising and endorsement have given rise to problems in passing off cases. In **Irvine v Talksport** [2002] FSR 60 Laddie J carefully reviewed this area of the law with a particular focus on endorsement. I cannot improve on Laddie J's analysis. His conclusion was that, provided the facts support it, there is nothing in the law to prevent a case of passing off being made out in a false endorsement case. He concluded on the facts that a famous racing driver Eddie Irvine had a property right in his goodwill which he can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party's goods or business.
32. In his analysis Laddie J was careful with terminology and distinguished between "endorsement" and "merchandising" (paragraphs 9 and 44). When someone endorses a product or service she tells the relevant public that she approves of it or is happy to be associated with it. On the other hand when, for example, a film company engages in merchandising, images or characters from that film are exploited by selling all kinds of products, such as clothing and toys. As Laddie J said, it is not a necessary feature of merchandising that members of the public will think the products are in any sense endorsed by the film makers or actors in the film. They are bought by members of the public who found the film enjoyable and want a reminder of it. Of course the same idea applies to images of pop stars.
33. **Irvine v Talksport** itself was a case of false endorsement. However, although the facts may be different, there is no difference in law between an endorsement case and a merchandising case as Laddie J used those words. The legal principles are the same in both. The claimant must have a goodwill to protect. If goods are then sold in circumstances in which the purchasers understand there to be a representation that the goods are authorised by the claimant or are in that sense "official" merchandise, but in fact that representation is a false one, then as long as the false representation is operative, the second element of passing off will be satisfied. To complete the tort the

activity has to be damaging, but in a case like this, if the first two elements are proved, it most likely will be.

34. In the 1970s there were a number of cases in which merchandising rights were not found to exist before the English courts. These included *Tavener Rutledge v Trexapalm* (Kojak Lollipops, the “unauthorised” local lollipop retailer succeeded against the makers of the television program) [1977] RPC 275, *Lyngstad v Anabas* (goods carrying photographs of the pop group Abba, injunction refused) [1977] FSR 62, and *Wombles v Womble Skip Hire* (skips for collecting rubbish branded Womble, injunction refused) [1975] FSR 488. However a change came in *Mirage Studios v Counterfeit Clothing* (the Teenage Mutant Ninja Turtles case) [1991] FSR 145 in which the Vice Chancellor, Sir Nicholas Browne-Wilkinson, accepted on the evidence before him that the claimant had proved that the public did expect goods bearing the image of a famous cartoon character to be licensed. This judgment has been seen as opening the way for character merchandising to be undertaken in England but it bears emphasising the issue is always one of fact. The issue will always depend on the nature of the relevant market and on the perceptions of the relevant customers. It is certainly not the law that the presence of an image of a well known person on a product like a t-shirt can be assumed to make a representation that the product has been authorised.
35. A critical problem is to distinguish between two different reasons why a person might be moved to buy the product in question. If when they buy the t-shirt, they simply wish to buy an image of the pop star, then no misrepresentation has taken place. Merely recognising that the image is an image of the celebrity can never be sufficient to make the claimant’s case. For passing off to succeed there must be a misrepresentation about trade origin. Mr Hobbs rightly referred me to the words of Jacob J (as he then was) in *Hodgkinson v Wards Mobility* [1995] FSR 169 and of the Court of Appeal in *Harrods v Harrodian School* [1996] RPC 697 about the significance of deception in passing off. Jacob J emphasised that the tort of passing off has never shown even a slight tendency to stray away beyond cases of deception. Millett LJ (as he then was) stated that it was not sufficient to demonstrate that the public would think there was a connection of some kind between the defendant and the claimant, if it is not a connection which would lead the public to suppose that the claimant has made him or herself responsible for the quality of the defendant’s goods or articles.
36. Both sides referred to the famous words of Lord Greene M.R. that no-one is entitled to be protected from confusion as such. They were spoken in the Court of Appeal in the 1940s in *Marengo v Daily Sketch* although the Court of Appeal judgment was not reported until [1992] FSR 1 because the case went to the House of Lords. Mr Howe submitted that what Lord Greene was talking about only applied to a case in which there were two independent rights, such as two parties each with their own goodwill but as Mr Hobbs pointed out, Lord Greene’s words referred to confusion arising from “the collision of two independent rights *or liberties*” (my emphasis). As Mr Hobbs submitted, traders are free to sell products which bear images of famous people on them as long as they do not commit the tort of passing off (leaving aside copyright and privacy law). I agree. Selling a garment with a recognisable image of a famous person is not, in and of itself, passing off. To be passing off, a false belief engendered in the mind of the potential purchaser must play a part in their decision to buy the

product. The point Lord Greene was making is essentially the same as the emphasis on deception I have already referred to.

37. After the trial Mr Howe drew my attention to paragraphs 16-23 of the judgment of Jacob LJ in *Phones 4U v Phone4U.co.uk* [2006] EWCA Civ 244 on “mere confusion”. I do not believe anything I have said above differs from what was said by Jacob LJ in that passage.

Apply the law to the facts

Goodwill

38. Rihanna is a world famous pop star. She has a cool, edgy image. Through her companies she runs a very large merchandising and endorsement operation. The second and third claimants are companies she uses to conduct her trading relevant to this case. She has or has had endorsement agreements with Nike, Gillette, Clinique and LG Mobile. Her merchandising business was managed by an independent company called Bravado but that changed in 2012 to Live Nation. Live Nation paid a significant sum for the right to sell Rihanna merchandise (including clothing) and expect to earn very large sums from conventional merchandise associated with her current world tour.
39. In 2010 and 2011, Rihanna authorised goods sourced via Bravado were available in Topman, Topshop’s brother store and part of same Arcadia group.
40. In the past and as a generalisation across the whole industry, garments sold as authorised merchandise associated with musicians and with their live performances and tours have been of a particular character. The underlying garments are called blanks. They are utterly conventional in form. The images presented on them use cheaper techniques like screen printing. A common example has an image of the star on the front in a block and the tour dates on the back. This kind of thing can be distinguished from the clothes sold in the high street fashion market. Fashion clothing is more design led, based on current trends and generally of higher quality. There was a suggestion that the public drew a sharp distinction between these two things and did not expect fashion garments to be artist authorised merchandise. Ms Kaikobad thought that although this distinction did exist in the past, perhaps ten years ago, today there was cross-over between these two market sectors. I accept that evidence. At the relevant time the public did not draw a sharp distinction between artist authorised goods and fashion garments. The fact that a garment is a fashion garment is not of itself an indication which makes it unlikely to be authorised or endorsed by someone. This is true generally but it is also case in relation to Rihanna herself. Mr Howe put a few examples of Rihanna authorised garments to Mrs Svard. She accepted that those garments were fashion garments and not traditional merchandising blanks. Mr Chatalos did not agree that all those garments were fashion garments but I preferred Mrs Svard’s evidence on that issue. It is also the case that I have little evidence of the scale of sales of all these garments, and some of them may never have been sold at all, but all the same I regard them as illustrative of the point.
41. Rihanna’s agreement with Bravado expressly did not give Bravado merchandising rights in relation to high end fashion. Consistent with that arrangement and separate from her relationship with Bravado, Rihanna has made the effort to promote a specific

association in the public mind between herself and the world of fashion. She promoted H&M's Fashion Against Aids clothing collection in January 2008, which involved her designing her own t-shirt, which was publicised as part of that exercise. In June 2008 through Combermere she entered into an agreement with Gucci in which she promoted Gucci goods including clothing, accessories and jewellery. She exercised control over which garments she would wear. In June 2011 she entered into an agreement with Armani relating to a women's wear collection for Autumn/Winter 2011 and Spring/Summer 2012. The Armani collaboration produced two capsule collections. Capsules are groups of garments produced by one designer which can be worn together in different combinations. One collection involved two styles of jeans, a leather biker jacket, a canvas bag and two t-shirts, one emblazoned with an image of Rihanna. The other had a similar collection of garments, with four t-shirts.

42. In 2012 Rihanna entered into an agreement with the established high street fashion store River Island. Under the agreement Rihanna will design clothing to be sold in River Island stores. Ms Kaikobad explained that although other stores are licensed to carry Rihanna's authorised merchandise, River Island were the only high street retailer for which Rihanna was designing and with which she has a direct endorsement relationship. The agreement was first publicised in July 2012 and its effect cannot therefore have had much impact on the public mind at the relevant time. However it was being considered and negotiated at the relevant time. The fact that River Island entered into the agreement shows that Rihanna's identity and endorsement in the world of high street fashion was perceived in 2012 to have a tangible value by an organisation well placed to know.
43. An important aspect of Rihanna's branding is a logo called the R slash logo:



44. This logo is used on a large scale on goods authorised by Rihanna. Nevertheless I accept that it is not used universally. The R slash logo is a clear indication that goods are authorised by Rihanna but its absence does not prove that the goods are not authorised. The same can be said for the word RIHANNA itself. It is a registered trade mark. If it appeared on the swing tag of an item of clothing then no doubt it would be taken as a clear indicator of origin but again, its absence does not prove that the goods are not authorised. I am not satisfied that customers would assume from the perceived absence of either sign (the R slash or the name) that the goods were unauthorised. An example of an artist authorised Rihanna garment was put to Mr Chatalos which did not bear the R slash logo and which made no prominent use of the word RIHANNA. The fact the word was present in small writing above the bar code was not significant.
45. I find on the evidence that in 2012 Rihanna was and is regarded as a style icon by many people, predominantly young females aged between about 13 and 30. Such

people are interested in what they perceive to be Rihanna's views about style and fashion. If Rihanna is seen to wear or approve of an item of clothing, that is an endorsement of that item in the mind of those people.

46. The claimants have and had in 2012 ample goodwill to succeed in a passing off action of this kind. Furthermore in 2012 the fact that an item of clothing was a more design led fashion garment, rather than a lower quality simple plain t-shirt, would not be understood to rule out, in the mind of a purchaser, the idea that it was a Rihanna endorsed product or an item of authorised Rihanna merchandise. The scope of her goodwill was not only as a music artist but also in the world of fashion, as a style leader.

Misrepresentation

47. Misrepresentation is the real issue in this case. Topshop's case is simple. The item is a t-shirt bearing a large image of Rihanna on it. Customers buy it because they like the product and the image for their own qualities. No doubt in many cases they will like Rihanna. There was at the time a trend for image t-shirts. There is nothing on the t-shirt which represents it is an item of official Rihanna merchandise and customers do not think it is. It is a high quality fashion led garment, a "boyfriend style tank" (i.e. an oversized sleeveless t-shirt). The image has been printed using sublimation rather than screen printing, an expensive process which enhances its high quality nature. That is very different from standard pop star merchandise. Nothing on the swing tag or other labelling makes any suggestion it is a Rihanna authorised garment. There is no R slash logo. Topshop sell many garments like this. The public has no expectation that the garments are authorised by the person shown in the image.
48. The defendants also submit that there are many images on sale which are in Mr Chatalos' third party image category and also that there are vast numbers of "unauthorised" garments on sale bearing images of Rihanna.
49. The claimants' case is to the contrary. Mr Howe accepts that as a general proposition it is not the case that the presence of an image of Rihanna on a product necessarily makes a representation that the product has been authorised by her or her companies. However he submits that in the particular circumstances of this case customers will be misled. He relies on the particular image, the way it is presented and the nature of the t-shirt itself as well as the position of Topshop as a major reputable high street retailer. These things go together to create a real likelihood that a substantial number of customers will be deceived into thinking it is an authorised image and will buy the product as a result in that mistaken belief.

Assessment

50. None of the comments on the Topshop website indicate that anyone bought the t-shirt in the belief it was authorised by Rihanna and there is no other evidence in this case of any actual confusion. The absence of such evidence is a relevant point in the defendants' favour but not determinative.
51. Mr Howe submitted that I should draw an adverse inference from the fact that Topshop did not call the member of staff who was responsible for buying the t-shirt from Knitmania (Victoria Lowe) and that her boss, Madelaine Evans, also did not

attend court. I reject that. There is no plea of an intention to pass off by Topshop. I do not see how in this case the emails passing between Topshop and Knitmania shed any light on the issues I have to decide. A point in them was the use of the word “Mickey’s” which Mrs Perez thought was American usage and referred to a fake or knock off but Mr Chatalos explained, and I accept, referred to Mickey Mouse branded t-shirts he was selling to Topshop.

52. I will now address various particular aspects of the circumstances and then pull things together and consider the issue as a whole.

Circumstances generally

53. The case is concerned with the specifics relating to this t-shirt and how it was sold, but the overall context is also relevant. As Mr Hobbs submitted, the relevant public are not fools. They have thoughts and views of their own and do not simply react in a Pavlovian, unthinking, fashion to whatever is presented to them. In my judgment, customers today are well aware of authorised merchandising by music artists and are well aware of the idea that a celebrity such as a musician might seek to engage in endorsement and merchandising activity in the clothing market. However none of this means that customers always want to buy artist authorised products; they will often simply want to buy something with a picture on it because they like the look of it. It also does not mean that customers expect that any garment bearing the image must have been authorised by the artist - after all, many garments today on sale in the high street carry images of famous pop stars in Mr Chatalos’ third party image category.
54. It is clear that there are many garments on sale bearing Rihanna’s image which have not been authorised by the artist but I find that a large proportion of the ones in the schedule referred to in the evidence bear images which fans would be likely to recognise as related to album covers. Those are likely to be infringements of copyright controlled by the claimants. Images recognisable as deriving from album covers are also likely to be thought to be officially authorised. I accept the claimants’ evidence that they try to police sales of goods associated with Rihanna as best they can but cannot chase everything and seek to take a proportionate approach. I also accept that a number of the examples on the list were the subject of letters from Rihanna’s lawyers leading to withdrawal of the goods from the market although the fact that that happened may simply be because the retailer did not regard the matter as worth fighting. Taking the examples as a whole, I do not accept the existence of the various garments relied on is sufficient to have led customers or potential customers to believe that any garment bearing any image of Rihanna will necessarily be unauthorised by the artist.

Topshop

55. It is clear that Topshop sells some clothing which carries images which are third party images in Mr Chatalos’ terms and also sells artist authorised products. I reject the claimants’ suggestion that Topshop’s customers think that any garment bearing an image of a famous person and on sale in Topshop will be authorised by that person. Nevertheless Topshop is not a market stall. It is a leading high street fashion retailer and purchasers would not be surprised to find goods on sale in Topshop which have been endorsed or approved by celebrities. In the past Topshop has had a very public

collaboration with Kate Moss in which exactly that took place. Parts of the evidence from Topshop's witnesses seemed to suggest that its customers understood that some of its t-shirts with images of famous celebrities or famous music artists like Prince were not licensed by the artist in question. In my judgment Topshop's customers have no positive expectation either way when they look at garments in the stores which carry recognisable images. Customers do not assume these goods are necessarily artist authorised and do not assume they are not; such garments may or may not be licensed by the person depicted in the image.

Topshop and Rihanna

56. Topshop makes a considerable effort to emphasise connections in the public mind between the store and famous stylish people. It has done so in the case of Rihanna, placing emphasis on her public persona as a style leader. The important example was a shopping competition in 2010. There Topshop offered the entrants the chance to win a personal shopping appointment with Rihanna at the flagship Oxford Circus store. In doing this Topshop was providing a vehicle whereby Rihanna's styling services were being put on offer to the public. Mrs Sauvaire sought to play down the significance of this event. I am sure it is true that Topshop engages in many larger promotional activities but I do not accept this event was a minor matter. The competition was run through Topshop's website. Entry was open for four days. The entrants had to write (by email) and tell Topshop why they wanted a style consultation with Rihanna and their answers have to be seen with that in mind. Nonetheless a large number of very excited (presumably teenage and female) potential customers entered it. It was a success and will have had a public impact.
57. Mr Howe put a few other examples to Mrs Sauvaire in which publicity material emanating from Topshop referred to Rihanna. In them Topshop sought to point out to the world that Rihanna was wearing or choosing Topshop items. A good example arising a week or two before the t-shirt was on sale related to the visit by Rihanna to Topshop in February 2012. Whether, as the claimants submit but various Topshop witnesses denied, the event was leaked to the press by Topshop I will not decide because it does not matter. What is clear however is that Topshop's staff in charge of its Twitter feed sought to take advantage of the event. The tweet, from @Topshop, reads:

“Ridiculously excited! @Rihanna is in our Oxford Circus store as we tweet. Ah, wonder what she'll buy...”
58. Mrs Sauvaire estimated that Topshop's Twitter account had something of the order of 350,000 followers at that time. Given the nature of Twitter, that does not mean that 350,000 people read this tweet but it is an indication of the scale of the distribution.
59. Mrs Sauvaire emphasised that the statements made by Topshop were factually true and I accept that. However although there have not been many occasions on which such statements have been made, they are telling nevertheless. The fact they were not part of a formal endorsement agreement does not matter. Topshop was seeking to emphasise the fact that Rihanna was wearing or thinking of wearing Topshop clothing.

60. Mr Hobbs submitted this sort of internet based blogging and activity on Twitter in which each other's names were mentioned was simply chatter and gossip. His point was to suggest it was of little significance. I do not agree. Particularly bearing in mind the age and nature of the relevant customers in this case I am sure the internet and the social media available on it are an important part of the business of both the claimants and the defendants. They will be some of the key channels by which both the claimants and the defendants communicate with their customers and fans. Topshop is not mentioning Rihanna as a public service news gathering organisation. These events took place because Topshop thinks it would sell more products by doing so. The clothing retailer is there recognising and seeking to take advantage of Rihanna's public position as a style icon. I should say that I am not criticising anyone for doing this and I recognise that no doubt the true relationship between celebrities and stores like Topshop is a symbiotic one. Each needs the other in order to advance their interests.
61. Mr Chatalos said that purchasers of the t-shirt were likely to be far bigger fans of Topshop than Rihanna. The point of this evidence was to seek to emphasise Topshop's reputation as a fashion leader and downplay Rihanna's reputation insofar as it relates to fashion. Of course Topshop has an unrivalled reputation as a leader in fashion but despite Mr Chatalos' experience of retailing, I do not accept his characterisation of the purchasers. The purchasers will be female, mostly aged 13 to 30. Although you do not have to be a fan to buy the t-shirt, a large number of the purchasers will be both fans of Rihanna and fans of Topshop. They are not mutually exclusive categories. Moreover I find that a substantial number of purchasers will have been aware of the shopping competition from 2010 and I think some may well have been aware of the fact that Rihanna was shopping at Topshop in February 2012 either directly as a result of Twitter or via the newspapers (online or on paper).

Manner of sale

62. The t-shirt was sold in Topshop stores throughout the UK and online. I do not think anything much turns on the way the t-shirt was hung or sold in stores. I do not accept it was placed in such a way as to either increase or decrease any likelihood that a purchaser might think it was authorised or endorsed by the artist. The same goes for the sales online save for the first few days of online sales, when the product was called RIHANNA TANK. The claimants said that this would increase the likelihood of misrepresentation. That is a specific point relevant only to a few days of trading.

The garment

63. Next I will consider the t-shirt. As a garment it is not like standard merchandise. (Nor does it look like tour merchandise with a list of dates on the back.) It is clearly a fashion garment, well up with what were then the current trends. Given Rihanna's status in fashion and given my general findings, the fact it is fashionable is neutral. It could be authorised but it need not be.
64. A very important point in Topshop's favour is that the swing tag and label on the t-shirt makes no mention of Rihanna. There is no R slash logo anywhere. There is no express assertion that the garment is authorised by the artist. Also, apart from a few days online, the word RIHANNA is not used.

The image on the t-shirt

65. The photograph on which the image is based was taken during the video shoot for her single “We Found Love” from the 2011 “Talk That Talk” album. The video was filmed in Northern Ireland and received a lot of press attention in the UK because the landowner complained about parts of the video. The video shoot became famous and was widely reported because Rihanna was thought to be wearing risqué clothing.
66. I will now consider the image itself. One of the debates was about whether the image on the t-shirt was flattering or not. The claimants’ witnesses said the image was unflattering. On the other hand witnesses for Topshop contended that the image was a flattering one. I do not believe the question of whether this particular photograph of a young woman is flattering or not has much to do with the key issues I have to decide. Indeed if anything the less flattering the image the less likely it is that it would be thought to be authorised. However in case it matters, I will state my view having heard the witnesses. It is not an unflattering image, albeit no doubt if Rihanna had authorised it, the image might have been touched up before it was released.
67. The image is a striking one. On the garment it is oversized and shows the artist’s face and shoulders. She is looking directly at the viewer with her hair tied above her head with a headscarf. The images for the Talk Talk album show Rihanna with the same hairstyle and headscarf. Mrs Perez thought that her fans would be likely to think the image came from promotional material from the We Found Love video shoot. The fact Mrs Perez did not know much about the UK high street does not mean she was unable to give that evidence.
68. When I first saw the t-shirt I assumed the clothing being worn was a pair of denim dungarees although in fact the garment is a “bralet” albeit the image is placed in such a way that her midriff is not visible. Mr Howe submitted that the clothing visible in the t-shirt image was worn in the We Found Love video itself and would also be recognised. He invited me to watch the video. I watched it. I reject that point. There are many costume changes in that video and the garment is not prominent.
69. Nevertheless I think the relationship between this image and the images of Rihanna for the album and the video shoot would be noticed by her fans. This is an important point. This image is not just recognisably Rihanna, it looks like a publicity shot for what was then a recent musical release. To someone who knew Rihanna but did not know her current work, the image is simply one of the person concerned. However to her fans who knew her work, I think this particular image might well be thought to be part of the marketing campaign for that project.

Pulling things together

70. I will first consider the case for sales in which the word RIHANNA does not appear.
71. The prospective purchasers will look at this garment on sale in Topshop (or on Topshop’s website). The nature of the image itself seems to me to be a fairly strong indication that this may be an authorised product, an item approved by Rihanna herself. The fact it is fashion garment and not a cheap simple merchandising blank does not act as a sign pointing against authorisation but nor is it a pointer in that direction. The fact it is on sale in a high street retailer is neutral. The fact the high

street retailer is Topshop is not neutral. The public links between Topshop and famous stars in general, and more importantly the links to Rihanna in particular, will enhance the likelihood in the purchaser's mind that this garment has been authorised by her.

72. The fact there is no indication of artist authorisation on the swing tag or neck label points firmly against authorisation but in my judgment that is not strong enough to negate the impression the garment is authorised. Although I accept that a good number of purchasers will buy the t-shirt without giving the question of authorisation any thought at all, in my judgment a substantial portion of those considering the product will be induced to think it is a garment authorised by the artist. The persons who do this will be the Rihanna fans. They will recognise or think they recognise the particular image of Rihanna, not simply as a picture of the artist, but as a particular picture of her associated with a particular context, the recent Talk That Talk album. For those persons the idea that it is authorised will be part of what motivates them to buy the product. I am quite satisfied that many fans of Rihanna regard her endorsement as important. She is their style icon. Many will buy a product because they think she has approved of it. Others will wish to buy it because of the value of the perceived authorisation itself. In both cases they will have been deceived.
73. I do not need to consider the few days of online sales with the title RIHANNA TANK. Even without those words present I consider a misrepresentation was being made.

Damage

74. If, as I have found, a substantial number of purchasers are likely to be deceived into buying the t-shirt because of a false belief that it has been authorised by Rihanna herself, then that will obviously be damaging to the claimants' goodwill. For one thing it amounts to sales lost to her merchandising business. It also represents a loss of control over her reputation in the fashion sphere. The fact the garment is a high quality product does not negate that aspect of damage. It is a matter for the claimants and not Topshop to choose what garments the public think are endorsed by her.

Conclusion

75. The mere sale by a trader of a t-shirt bearing an image of a famous person is not, without more, an act of passing off. However the sale of this image of this person on this garment by this shop in these circumstances is a different matter. I find that Topshop's sale of this Rihanna t-shirt without her approval was an act of passing off. I find for the claimants.