

AN OVERVIEW OF CELEBRITY RIGHTS IN INDIA

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ABSTRACT

Celebrity rights are exclusive rights which are different from other rights. It is more of a property right than a personal right which each celebrity enjoys. The increase in consumer's demands and role played by media has not only led to development of entertainment industry but has also increased the craze for the celebrities. The enthusiasm among the public to know more about the celebrity brings in a question of protecting the right of the celebrity. Considering the celebrity right as a property, it becomes susceptible for unauthorized trespass. The paper tries to study the various aspects of celebrity rights especially focusing on Indian perspective vis-à-vis the laws existing in other countries. The method opted for the study is descriptive analytical in nature and depends mainly on the secondary sources of information which include books, articles, Acts etc. Thereafter, it seeks to identify the existing gaps in our legal regime and suggests areas which require more protection so as to strengthen the current legal framework in India in this regard.

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1. INTRODUCTION

In today's world, any person, whether he is an actor, singer, dancer, politician or any other professional who is capable of attracting the attention of the public becomes a celebrity. Public perception is the one factor for determining whether a person is a celebrity or not. The term celebrity is derived from a Latin maxim 'celebritatem', which means 'the condition of being famous'. The word celebrity has been defined in the Oxford Dictionary as "a famous person, especially in entertainment or sport". It was in the famous case of *Martin Luther King Jr. Centre for Social Change v. American Heritage Products Inc.*,¹ where the term 'celebrity' was interpreted in a broader sense so as to allow more than the long-established categories. Celebrity rights can be regarded as the result of the culture penetration of capitalist commercialism which can also be referred to as the residual product of growing cultural industry of the twentieth Century. The emergence of the modern consumer class is a result of the radiance of the celebrity culture. Thus celebrity is a person who receives status of fame and fortune which is accorded to him by the mass media. A celebrity can be an individual, a group (of people or animals) who have attained fame for some reason or the other. The status of being a celebrity is often associated with fame and fortune. Persons who have achieved great heights in their respective careers and whom the media portrays as public figures fall under this category.

¹ *Martin Luther King Jr. Ctr. for Soc. Change v. Am. Heritage Prod., Inc.*, 694 F.2d 674 (11th Cir. 1983).

The right of publicity, which is one of the rights of the celebrities is also called the personality right. It is the individual control over the commercial use of his/her own name, image or any other aspect which relates to his/her identity. It is generally considered as a property right than a personal right and has two classifications: first is the right of publicity which can be commercially exploited and other is the right to privacy which is not to be divulged without permission. In the common law countries, publicity rights fall under the realm of tort of passing off. A celebrity's personality right can be treated as a concept of common law which are similar to property, trespass, etc. Thus, these rights are judge-made in common law countries unlike the civil law countries where there exist specific civil code provisions to protect private information.

The growing importance of media in the present society and their advertisement of celebrities cannot be over-looked. In India there is no specific legislation providing for celebrity publicity rights. But there are various rights of a celebrity which can be classified under three heads. Firstly, the personal rights which refer to the individual contribution of that person to the society, secondly, the privacy rights relating to non-divulgence of personal information which is protected under Article 21 of the Indian Constitution and lastly, the publicity rights which are the value of the fame that is gained by a celebrity and can be commercialized. The Supreme Court, in the recent case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*,² recognized the concept of 'inviolable personality of an individual' as integral part of privacy. Similarly, in the case of *R. Rajagopal v. State of*

² Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

Tamil Nadu,³ the court recognized the right to privacy as a Fundamental Right. There are some other statutes which also deal with this issue namely the Copyright Act, 1957 and the Trade Marks Act, 1999. However, the law in India in this respect is yet to be developed completely. In order to regulate the growing commercialisation of celebrities, a viable legislative framework related to celebrity rights has become indispensable.

2. INTERNATIONAL PERSPECTIVES

In several countries around the world, there exists a plethora of legislations which protect the celebrity rights. In several cases, these rights are generally brought under the purview of trademark or copyright law. However, while celebrity rights have little to do with copyright law, they are closely connected to trademark law. The ‘right of publicity’, first recognized by Nimmer, is a form of intellectual property right that protects against the misappropriation of a person’s name, likeness and perhaps other indicia of personal identity for commercial benefit.⁴ It protects a celebrity’s interest in her name which is similar to the protection extended under trademark law to a business’s name and other trademarks.⁵ The right of publicity thus chiefly aims to reduce the use of the name of a celebrity in promotion of any particular product which may falsely suggest that he/she has endorsed the same.

³ Rajagopal v. State of Tamil Nadu, A.I.R. 1995 S.C. 264.

⁴ *Right of Publicity*, INT’L TRADEMARK ASS’N, <https://www.inta.org/Advocacy/Pages/RightofPublicity.aspx> (last visited Jan. 13, 2018).

⁵ Stacey Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

In U.S., law regarding the right to publicity is built on the edifice of the right to privacy. The concept of privacy is traditionally associated with the names of Samuel Warren and Louis Brandeis, who published the article titled ‘The Right to Privacy’ in Harvard Law Review.⁶ Following this, the right changed into the ‘right to be left alone’. William Prosser, further developed it into several categories including the personal right to privacy and remedies for appropriation, usually for commercial advantage, of one’s name and likeness.⁷ Developments in this regard mainly took place between the nineteenth and the twentieth centuries with two landmark cases, paving the way for recognition of such rights. The first case was *Haelan Laboratories v. Topps Chewing Gum*,⁸ in which it was recognised that along with the right to privacy, a man has a right in the publicity value of his photograph. Observing that well-known personalities may often feel deprived if they did not receive money for “authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways”, the right of publicity was recognised.⁹ In the second case, *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁰ the petitioner objected to televise his famous “human cannonball” act in the local news. An action was brought against the respondents for “unlawful appropriation” of his “professional property”. Recognizing the petitioner’s right to publicity, the court observed that the decision was to provide “an economic

⁶ M. KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO MUSIC INDUSTRY (10th ed. 2007).

⁷ D. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES (Praeger Publishers 2011).

⁸ *Haelan Lab. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

⁹ *Id.*

¹⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 563 (1977).

incentive for him to make the investment required to produce a performance of interest to the public”. The court recognized the petitioner’s right to publicity and rejected the respondent’s defence under the First Amendment. In doing so, the Court noted that the decision was not only for compensating the petitioner, but it was also to provide “an economic incentive for him to make the investment required to produce a performance of interest to the public”.¹¹

In a series of cases thereafter, the right to publicity has been recognised and established.¹² In the U.S., the right to privacy, though comprehensively protected, varies from state to state. At present thirty-eight states afford protection to publicity rights under the common law where an action for passing off is available. On the other hand, twenty-two other states have some form of statute governing the use of such a right. The state of New York was the first state to formulate a statute in this respect.

The United Kingdom had been slower in recognising the right to publicity. Adhering to the civil law traditions, the concern in European countries has mostly been related to the protection of personality rights. This approach is intricately connected with countries with civil law jurisdictions such as France and Germany. In France, personality rights are covered under the French Civil Code which protects the use of someone’s image, barring publicly known images. In Germany, the German Civil Code offers protection to personality rights including the right of privacy of a

¹¹ *Id.*

¹² *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1989); *see also* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 921 (9th Cir. 1974).

celebrity. Personality rights “recognise a person as a physical and spiritual-moral being and guarantee his enjoyment of his own sense of existence”.¹³ Publicity rights have been slower to develop in these regions and where they have developed, it has mostly been through the medium of personality rights, rather than as a property or quasi-property right.¹⁴ Although law in the U.S. has developed rapidly, the English courts, by virtue of their conservative nature refused to entertain notions which are generally associated with publicity rights. In *Edmund Irvine Tidswell Ltd. v. Talksport Ltd.*,¹⁵ the petitioner’s photograph was falsified to promote the defendant’s radio station. While doing so, the petitioner’s consent had not been obtained. The petitioner sued him for an action for passing off and succeeded. The recognition of his claim was undoubtedly deemed to be a positive step in this direction. In another important case, in *Douglas v. Hello! Ltd.*,¹⁶ the petitioners, prior to the day of their wedding, entered into a contract with a magazine giving it the exclusive right to publish their wedding photographs. The defendants were a rival magazine who were interested in publishing their pictures as well. However they had been unable to agree with the petitioners as to the rates of the contract. A paparazzo photographer gained access to the wedding and took fifteen shots of the wedding, including the bride and the groom. Soon the photos were sold to the defendant magazine and then they were published in both the magazines. Relying upon the Human Rights Act, 1998 which enforced the

¹³ Neethling, *Personality Rights*, in ELGAR ENCYCLOPAEDIA OF COMPARATIVE LAW (M. Smits ed. 2006).

¹⁴ *Id.*

¹⁵ *Edmund Irvine Tidswell Ltd. v. Talksport Ltd.*, [2002] EWHC 367.

¹⁶ *Douglas v. Hello! Ltd.*, [2007] UKHL 21.

European Convention on Human Rights into English law, the Douglas's' action against the defendants for breach of confidence and an invasion of privacy proved to be successful. Both these cases set important precedents in English law which had erstwhile been conservative in this regard till then.

In Canada, the right to publicity is limited in its recognition by the courts. In *Krouse v. Chrysler Canada Ltd.*,¹⁷ it was held that a person with marketable value in likeness which has been used in a manner so as to endorse a product, attracts grounds for an action in appropriation of personality. This principle was reaffirmed in *Athans v. Canadian Adventure Camps*,¹⁸ where both image and name of a person was included within the purview of personality.

3. INDIAN LEGAL FRAMEWORK

In today's world, life without media cannot be imagined. The role of media has become an essential part of our lives, especially by mobilization of public views with the assistance of television, internet, etc. This scenario gives rise to protection of some rights of the people being famous through media. The foreign countries have specialized legislations governing these rights. When compared to the other countries, India is far behind with regards to the protection of publicity rights. The Emblems and Names (Prevention of Improper Use) Act, 1950 is the only specialized Act which is extended for protecting some dignitaries. Therefore, an urge to immediately regulate the media laws, intellectual property laws and other related laws is to be recognized.

¹⁷ *Krouse v. Canada Ltd.*, (1971) 5 C.P.R. (2d) 30.

¹⁸ *Athans v. Canadian Adventure Camps*, (1977) 17 O.R. (2d) 425.

The rights protected by the Constitution of India under Article 19 and 21; and also by the intellectual property regime which include the Trade Marks Act, 1999 and the Copyright Act, 1957. Section 14 of the Trade Marks Act, 1999 lays down that in case a person tries to register a trademark which is directly or indirectly related to a celebrity and it falsely suggests a connection with the living person or a person whose death took place 20 years prior to the date of registration, shall be cancelled by the registrar if such application is unauthorized. Section 2 (qq) and Section 38 of the Copyright Act, 1957 recognizes performer's rights which may be applied in case of protecting the celebrity rights. Section 57 of the Copyright Act, 1957 recognizes the moral right of the author which is also used to protect the reputation of the author. This right of the author can also be of two types one identification right or attribution right and the other is divulgence or dissemination right.

The Supreme Court explicitly recognized the publicity rights in the form of right to privacy in the case of *R.R. Rajagopal v. State of Tamil Nadu*,¹⁹ where it was held that first aspect of violation shall be using a person's name or likeness for advertising without his consent. In the case of *I.C.C. Development (International) Ltd. v. Arvee Enterprises*,²⁰ the Delhi High Court held that the right of publicity has evolved from the right to privacy and can only be associated with people who have an identity of their own. In cases where the right of publicity is being taken away it shall be violative of Article 19 and 21 of the Indian Constitution. It was held by the

¹⁹ *Rajagopal*, A.I.R. 1995 S.C. 264.

²⁰ *I.C.C. Dev. v. Arvee Enter.*, 2003 (26) P.T.C. 245 (Del.).

court that no persona can be monopolized.²¹ For example, if any company or person advertises Kapil Dev or Sachin Tendulkar's name in relation to world cup then without authorization from the owner they may not be able to do so which if done may lead to valid and enforceable cause of action. In another case of *Sourav Ganguly v. Tata Tea Ltd.*, where the Tata Tea took advantage of Sourav's fame and popularity for promoting their 1kg tea packet by offering consumers chance to congratulate Sourav through a postcard which was inside the tea packet. In this case, the court held the Tata Tea liable for violating publicity rights of Sourav Ganguly.

4. A CRITICAL ANALYSIS OF THE DOMESTIC LEGAL FRAMEWORK

Although notable transitions have occurred in India in this respect, the current legal framework still remains at an embryonic stage. There lies an underlying need as well as potential for immense developments in several aspects of the legal protection for celebrity rights in India. Under the current Intellectual Property regime, some limited protection is afforded to celebrity rights including publicity and personality rights under the Copyright Act, 1957 and Trade Marks Act, 1999. The Emblems and Names (Prevention of Improper Use) Act, 1950, also, to a limited extent, protects unauthorised use of the names of any dignitaries by prohibiting the same in its schedule.²² However some glaring shortcomings can be singled out in this respect.

²¹ *Id.*

²² Emblems and Names (Prevention of Improper Use) Act, 1950, No. 12, Acts of Parliament, 1950, § 3.

First and foremost, the rights of a celebrity are often undermined in light of the freedom of speech and expression guaranteed under Article 19 of the Constitution of India. This is quite appropriately synonymous with the conflict observed between the publicity rights and the freedom of speech guaranteed under the First Amendment in the U.S Constitution. The primary concern is whether both of these are complimentary or incompatible to each other. In *I.C.C. Development (International) Ltd. v. Arvee Enterprises*,²³ the Delhi High Court observed that right to publicity has evolved from the right to privacy and can inhere only in an individual or in any indicia of the individual's personality like his name, personality trait, signature, voice etc.²⁴ Although an individual may acquire a right to publicity by virtue of his association with an event, sport, movie etc., the right does not exist in the event that made the individual famous, nor in any corporation that has brought about the organisation of the event. Therefore any effort to take away right of publicity from the individual, to the organiser/ non-human entity would violate Article 19 and 21 of the Constitution of India.²⁵

Moreover the Copyright Act, 1957 does not provide protection to performer's performances. Section 13(4) provides that separate creative portions in a film are subjected to copyright. In *Manisha Koirala v. Shashilal Nair*,²⁶ the question regarding an actor's on screen image's

²³ *I.C.C. Dev.*, 2003 (26) P.T.C. 245 (Del.).

²⁴ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (1996).

²⁵ *Id.*

²⁶ *Koirala v. Nair*, (2003) (1) A.I.I.M.R. 426.

protection was raised. In a later case,²⁷ it was decided that the acting did not fall in any particular category and thus left the actor's performance unprotected and vulnerable to exploitation. Moral rights are only given to authors within whose scope an actor is not included.

The copyright protection of cartoons or characters which are digitally made are also vague areas in the current legal regime. In case of a digital image of a celebrity, the conflict between the right of creation and the right of right in image is a disputable area. These are some of the several grey areas where the scope needs to be defined.

5. CONCLUSION

Celebrity right is a distinct right which requires special legislation due to its unique characteristic. The present scenario depicts that there is no specific legislation to deal with the issues arising out of the publicity rights of celebrities. It must be remembered that publicity of celebrity involves huge amount of money and public image with a tremendous value, this means that there is economic incentive that is involved. This also means that, if properly regulated, the government can also earn money in the form of tax from these rights. The problem with regards to this issue has only been solved through litigations. A legislation which, on top of protecting the right to privacy, statutorily recognizes the commercial aspects of celebrity rights may fill up the lacunae in the existing scenario and assist in rapid commercialization of celebrity status.

²⁷ Fortune Films v. Dev Anand, A.I.R. 1979 Bom. 17.