

PROTECTING CELEBRITY RIGHTS UNDER INTELLECTUAL PROPERTY

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INTRODUCTION

Protecting celebrity rights under intellectual property (IP) laws is a significant development in the field of intellectual properties rights. Celebrities can flaunt their popularity and are permitted to make riches out of their identity. Though celebrities have often lend their voices, faces and names to various commercial and non-commercial endeavours for free, there have been instances where photographs of celebrities have been used in advertising and for other purposes without their permission, leading to a scenario where celebrities are unable to make choices regarding the exposure which is acceptable to them as well as monetary benefits that they wish to acquire. In the contemporary age the media is having growing importance in various sectors of our economy and especially with regard to mobilizing the public opinion. We have regular interface with the media in the form of newspapers, TV, Internet etc. Therefore, presently it is absolutely impossible to imagine a life without the role of media. Hence, we see that media has become an important part of our society and therefore, there is an urgent need to regulate the affairs of the media through effective laws. One such law which has got huge significance in regulating media is the Intellectual Property Law, since most of the creation and the services provided by the media is in intangible form and is a result of the intellectual creation of the human intellect. Therefore, a major chunk of the media related activities are regulated by the Intellectual Property Law regime.

CELEBRITY RIGHTS

In recent times media has grown in importance which has resulted in the need of regulating the dealings of the media through effective regulations.

The various rights of a celebrity are stated as under:

- **Personality Rights:** An individual's contribution to society is his right and such personality rights are protected
- **Privacy Rights:** Celebrities try to keep their personal information as private as possible in order to avoid embarrassment the Constitution under Article 21 recognizes this Right to Privacy as a fundamental Right. Celebrities may also find recourse in an action of invasion of privacy.

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- **Publicity Rights:** The right to use the value of the fame of a celebrity is known as publicity rights. In this regard it would be pertinent to mention that fame is an act projected to augment sales. This is one of the contemporary issues in the media which is sought to be protected by the IP law regime. The concept of celebrity rights though protected by the IP law regime, it is an important area in the field of media because:-

a) The regular interface of the celebrities with the media.

b) The media more often than not provides the medium through which the various rights of the celebrities are exploited.

Celebrity is sought by many as honour. In a democracy it is normally a reward for success. Sportsmen and artist earn it by skill. Businessman and TV personality earn it by wit. Politicians earn it by votes. Anyone can aspire to it. It is the public that confer celebrity. The public are stipulated by the media. But in the end celebrity is conveyed by the public's choice as the consumer and electors. There is also a class of celebrity which is more or less involuntary. Princes and princesses acquire it by birth or by marriage. Other acquire by their chance involvement in newsworthy events. Protecting Celebrity rights under IP laws is a significant development in the field of IPR. The identity of an individual refers to all distinct, recognizable elements which make up a particular persona, including the individual's physical appearance, image or likeness, name, voice, signature, style, photograph, gestures, recognizable attire, look and facial features .A public persona generates an enormously lucrative brand equity, instantly encashable in the form of endorsement contracts. So stupendously lucrative are endorsements that often the earnings of a celebrity from the professional pursuits, whether sports or acting, is a small fraction of his earnings from endorsements.

A celebrity enjoys what are known as rights of publicity or image rights which enable them to commercially exploit the goodwill associated with their star status.

There are several ways in which the image of a celebrity can be used in advertising. The most obvious manner is tools of the trade& endorsements of products that are closely related to a celebrity's field of activity. For instance, sportsmen routinely endorse sports equipment or clothing. Another is non-tools Endorsements where a celebrity's image is used in connection with goods or services that are completely unrelated to his field of activity, for instance a film star endorsing a bank or a telecommunications company.

Along with the celebrity status they also earn a few rights and the scope of these rights would be the subject matter of discussion in this chapter. These diverse rights of the celebrities are frequently encroached upon by the media. These rights which, are encroached by the media frequently, can be classified under three major categories:-

1) Moral/ Personality Rights:-

An individual's personality is a means by which one individual recognizes other and identifies his place in the society. Through the creation of one's personality an individual creates an expectation of himself in the eyes of other and the way in which he is expected to behave in the society. Each of these personalities contributes differently to the society according to their individual talents. Such personality rights are also justified by the Hegelian Meta-physical concept of property which says that - "An individual's property is the extension of his personality" similarly an individual's contributions in the society is also an extension of his personality.

2) Privacy Rights:-

Since, the celebrities have a popular image in the society, people generally tend to personalize them as their friends and become curious about every personal aspects of their lives ranging from their personal affairs in lives to something as trivial as to the clothes that they wear, the cosmetics that they apply, the places they visit. However, the celebrities don't know the public and hence there is no natural exchange of information. Therefore, the celebrities try to control their personal information since the disclosure of the same might put them in a situation of embarrassment, humiliation and thus make them feel insecure.

One of the most popular judicial opinions has been given in the case of Barber vs. Times Inc wherein a photographer took pictures of Dorothy Barber giving a pregnancy delivery to a baby boy. Ms. Barber had filed a suit of "Invasion of Privacy" against Time inc. for unauthorized and forceful entry in to her hospital room and for photographing her despite her protests. Ms. Barber was successful in her suit and the court while awarding damages of 3000\$ opined:-

"In publishing details of private matters, the media may report accurately and yet - at least on some occasions – may be found liable for damages. Lawsuits for defamation will not stand where the media have accurately reported the truth, but the media nevertheless could lose an action for invasion of privacy based on similar facts situations. In such instances the truth sometimes hurts."

Therefore, in this case also we see that there has been a remedy available to the celebrities either in the form of an action of "invasion of privacy" or in the form of assertion of the fundamental right of "Right to Privacy" as a part of Article 21 of the constitution.

3) Publicity/ Merchandising Rights:-

The right to exploit the economic value of the name and fame of an individual is termed as publicity right. To claim this right it is necessary to establish that fame is a form of merchandise i.e an act intended to promote the sale/ popularity of a commodity or an activity. Hence, if someone uses the fame of a celebrity to promote his goods it would be termed as an unfair trade practice, misappropriation of the intellectual property of the celebrity, an act of passing off etc..

Instances of such cases in the media world are very common. Taking as an instance the case of Sourav Ganguly v. Tata Tea Ltd. wherein Sourav Ganguly who returned from Lords after scoring magnificent centuries found himself extremely disturbed when he realized that Tata Tea Ltd., in which he was employed as a manager, was promoting its 1 kilo tea packet by offering the consumers a chance to congratulate Sourav through a postcard which was there inside each packet of tea. In a way indirectly what the company intended was to promote the sale of its tea packet in the Indian market where Sourav had earned considerable amount of popularity. The court ruled in favour of Sourav by accepting that his fame and popularity is his intellectual property.

However, the law with this regard i.e publicity/ merchandising rights of the celebrities is still not fairly developed, especially in India. Courts in the various foreign countries have adopted different approach to justify this right and no uniform justification has crystallized yet. Thus in this context we should understand the theory of the right to publicity.

THE "RIGHT TO PUBLICITY" :

Brook LJ in *Douglas and Zeta Zones v. Hello Ltd*⁴⁹⁶ has defined the "Right to Publicity" as "An exclusive right of a celebrity to the profits to be made through the exploitation of his fame and popularity for commercial purpose"

Therefore, such a right is distinct from the right against "invasion of privacy" and also a right against the "adverse portrayal of one's personality" or in other words the moral rights of the celebrities over his personality. In the same case Sedley LJ. Opined that the damage to the reputation of an individual (or intrusion of privacy) is not normally understood to be a form of financial or economic loss. In this case the plaintiff would suffer loss in the

⁴⁹⁶ [2005] EWCA Civ 595,

sense that their reputation would be of lesser value as commodities to be exploited by licensing and assignment. Hence, the publicity right concerns with an intangible or non-physical harm and ownership of intangibles. It is in the form of a proprietary right with an individual as different from a right against harm.

The importance of the recognition of this right in the favor of celebrity is to secure them a form of Intellectual Property which is meant not for protecting them against any harm but to secure him some financial benefits to be gained from the use of the property, and this is generally understood to be justified as a reward or incentive for the claimant's work in creating the intellectual property. Apart from this the right is important because it is assignable and licensable to the players in the media world for commercial gains and benefits. Thirdly, the right to publicity is inheritable therefore; the descendants of the celebrity could also gain from the popularity which the celebrity has created during his lifetime. Thus we see that right to publicity becomes an integral part and parcel of celebrity rights.

But our effort of trying to define the celebrity rights would not be complete if the emergence of the most significant instrument for infringement in celebrity rights- The Internet arena is not taken in consideration. Thus taking into consideration the increasing and menacing effect of the necessary evil; the Internet in the field of "Encroachment in celebrity rights".

IMPORTANCE OF CELEBRITY RIGHTS IN THE ERA OF INTERNET:

In the age of internet and other faster and developed means of communication the theory of celebrity rights has gained added relevance and subject matter of discussion. The people of the country are interfacing with the media like never before. The media has become faster and a celebrities' image can be used for publicity, invasion of privacy or for moral defamation much more easily and quickly.

An instance would be the case of Julia Roberts ⁴⁹⁷(A recent ruling given by WIPO Complaint and Arbitration Centre) wherein the defendant ran a website named Julia Roberts.Com and through the same website the defendant used to run an online auction programmer to sell his goods. Julia Roberts claimed that the defendant used her fame to promote his auction through the Internet since the public would be inquisitive to know greater personal details of the celebrity and would visit the website from across the globe and hence his auctions would be popular in the entire world in a very short duration.

⁴⁹⁷ Case No. D2000-0210

Therefore, we see that in the present age the concept of celebrity rights has become much more contextual and relevant because of the following reasons:-

- a) Increasing popularity of the media – hence more creation of celebrities.
- b) Faster and easier global communication through the Internet.

But while enumerating the characteristics of Celebrity Rights, we see that Celebrity Rights limits the purview of the Fundamental rights enshrined in the Article 19 of the Constitution of India⁴⁹⁸. Also confusion arises whether to treat the celebrity rights as a commercial property of the individual devoid of the concept of human dignity.

Thus we face the following problems while envisaging the characteristics of celebrity rights:
A) the inherent conflict between the Celebrity Rights and The Fundamental rights enshrined in Indian Constitution.

A) The Inherent Conflict: Celebrity Publicity Rights v/s. Part III of the Constitution

Enumerating further, let's try to depict the scenario of the inherent conflict between celebrity Rights and the Fundamental rights as enshrined in the Indian constitution. To understand the Theory of Conflict better we will take into consideration the landmark judgments of some international jurist on these topics.

The media considers that it is their fundamental right to publish and inform the public about all the matters that are of "public interest" or "public concern" under Article 19 of the constitution wherein the "freedom of press" is embedded. At the same time the citizens have the "Right to Information" or "Right to Know" under Art 19. This freedom has been consistently been challenged by the celebrities on the ground that the media has misused their freedom and under the guise of giving news "in the public interest" has interfered with the privacy of the celebrities. The courts have however, restricted the right of privacy of the celebrities in case the event reported is newsworthy or if the public has got legitimate interest in the event.

For instance, in *Montano v. San Jose Mercury News*⁴⁹⁹ ; Montano's suit against the newspaper for the invasion of privacy and misappropriation of the celebrity persona failed on 1st Amendment Grounds, with the California Court of Appeal, concluding that:-

".... The first amendment protects the posters complained about for two reasons: First because the poster themselves report newsworthy items of public interest, and second because a newspaper has constitutionally

⁴⁹⁸Right to freedom

⁴⁹⁹ 40 Cal. Rptr. 2d 639 (1995)

protected right to promote itself by reproducing its originally protected articles or photographs. Our conclusion on the First Amendment makes it necessary to discussthe claim that the applicable statute of limitation bars recovery."

Again in another case *Ann Margaret v. High Society Magazine* wherein the plaintiff who was a super cine star sued the defendant who used to publish the popular High Society Magazine. The contention was that the defendant used her photo in the "celebrity skin" publication, without her consent, was for the purpose of trade and invaded her right to publicity. Judge Goe tell held as follows:-
"...Ann Margaret who has occupied the fantasy of many movie goers over the year, choose to perform unclad in one of her films; that was the matter of public interest."

The court further went on to express the meaning of "newsworthiness" as a defence generally useful in "privacy actions" against the media by the celebrities by stating that:-
"...and while such an event may not appear overtly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of "entertainment and amusement", concerning interesting phases of human activity in general"

Therefore, we see that the "publicity right" of a celebrity is limited and subservient to the larger public interest and the right of the citizens to know. As a result, closer to home Amitabh Bachhann would be unsuccessfully in bringing about a suit for invasion of privacy, if the newspaper has reported about his ill health and the fact of hospitalization. Nor would Sachin Tendulkar be successful in bringing about a suit for using his face on the cover page of a sports magazine.

B) Right to Human Dignity v/s. Commercial Property Right:

A brief survey on publicity rights in different jurisdictions of the world has reveal that in common law countries like U.K., Australia and common law provinces of Canada, publicity rights are based on the concept that such rights are commercial property of the individual devoid from the concept of human dignity. Indeed, the jurisdictions treat cases of violation of publicity rights analogously to the doctrine of passing off. We also saw that in U.S.A., publicity rights emerged from the concept of privacy and human dignity but later got transformed into a concept of separate intellectual property. Even today some states of U.S.A. consider publicity rights as property while others derive it from human dignity.

There are certain inherent problems in an approach, which treats publicity rights as mere property. These are:-

- i) It does not take into account the inherent uniqueness of the human personae.
- ii) The second major dilemma of the publicity right is its transferability. By definition a commercial property right even in the nature of an intellectual property right can be licensed or transferred. This might lead to conflicts between licensor and licensee in fundamental areas of personality. For instance, if a former porn actor embraces religion at a later point in his life, dignity and commerce will battle over the remaining in force of the publication rights in his old movies.

Thus, the approach taken by the Delhi High Court is laudable as it has kept in mind the constitutional imperatives and interpreted publicity rights as "flowing from human dignity in Arts. 19⁵⁰⁰ and 21.⁵⁰¹

However, merely holding publicity rights as a facet of privacy and human dignity may also be problematic for the following reasons:-

- i) The first problem would be that fundamental rights are generally only enforceable against the state within the meaning of Art.12⁵⁰² of the Constitution. Even though a liberal approach has been followed in this regard a citizen might find it difficult to enforce his publicity rights against private entities.
- ii) Secondly, fundamental rights cannot be waived. So, a person would find it difficult to engage in commercial transactions with his publicity rights.
- iii) Thirdly, it has been held that the rights under Art. 19 and 21 are extinguished once a person dies. One's personae may be a valuable property that a person might wish his successors to protect and commercially exploit just like any other intellectual property.

However, under the present regime based on dignity rather than property right, such a case would not be possible.

This dilemma can be solved by taking a dual approach. Thus lets enumerate the possible solution of dual approach.

THE DUAL APPROACH:

At the outset it has to be realized that publicity rights are a confluence of both dignitary aspects as well as property rights aspect. One cannot be applied in the absence of the other. In this regard the approach of the civil law countries is the most advanced. All the civil law countries accept publicity rights as emerging from the right to human dignity in their constitutions but also have separate statutory provisions for protecting and regulating these rights. This solves the problem of succession of the rights. For instance, California enacted seventy years and

⁵⁰⁰ Right to freedom, Constitution of India

⁵⁰¹ Right to life , Constitution of India

⁵⁰² State define in our Constitution of India

Germany ten years for continuance of publicity rights after death just like copyright. Further recognizing the property aspects would allow transfer and commercial exploitation of the rights for the benefit of the owner. On the other hand a dual approach based on property and dignity would ameliorate the problems associated with pure commercial concept of publicity. Now let's depict the Indian scenario in matter of publicity rights and the stance taken by Indian jurist while dealing with the Celebrity rights.

THE INTERNATIONAL SCENARIO

In a world rapidly changing itself into a consumer driven global market where consumers are bombarded with information and "inspiration" at an unprecedented level through the audio-visual media. In the process, publicity has a very high value and a famous person has the potential to earn big bucks by exploiting his image and publicity. Therefore, globally the concept of publicity rights has emerged in different jurisdictions through a gradual process of evolution. Where accepted, so-called "publicity rights" allow for the exclusive commercial use of a person's publicity values. A tradable worth can be found in many personal characteristics such as voice, signature or pseudonym. The present section is an attempt to study publicity rights as they have emerged in different jurisdictions and finally comes back to India to highlight the urgent need for a suitable legal regime to govern publicity rights.

1) "**Publicity Rights**" in U.S.A:- In the U.S.⁵⁰³, the law of publicity, historically, is closely linked to the concept of privacy. Mrs. Roberson in the case of *Robertson vs Rochestor Folding Box*, NY (1902)⁵⁰⁴ was the first to invoke this right before a New York court, complaining that the defendant company had used her likeness as a decoration for flour bags and used them for commercial advertising. The court rejected the claim. However, at its next session in 1903, the New York legislature created a statutory right of privacy that established both criminal and civil liability for violations. Two years later, in *Pavesich v. New England Life Ins. Co.*, the Georgia⁵⁰⁵ Supreme Court unanimously held that the unauthorized use of an artist's photograph in an advertisement for life insurance violated a new common law right to privacy.

During the opening decades of the Twentieth Century, a confluence of new technologies such as radio and motion pictures converged with popular magazines and newspapers to "commodity" celebrities. However, the common law principle of privacy was found to be inadequate to deal with this modern phenomenon. Unlike the relatively

⁵⁰³ Sec 43 A (1) [false representations](#) regarding the origin, endorsement or association of [goods](#) or services through the wrongful use of another's [distinctive mark](#), name, [trade dress](#), or other device ("[false endorsement](#)" or "[false association](#)"), and (2) [false representations](#) in [advertising](#) concerning the quality of [services](#) or [goods](#) ("[false advertising](#)")

⁵⁰⁴ 171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).

⁵⁰⁵ 122 Ga. 190, 50 S. E. 68, 69

unknown plaintiffs in *Roberson* and *Pavesich*, who simply wanted to be left alone, celebrities consciously put themselves in the public's eye and had already achieved a certain degree of recognition. Courts interpreted the right of privacy narrowly and rejected any contention that a celebrity suffered from indignity or mental distress as a result of an unauthorized use of his identity. Thus, courts effectively precluded celebrities from claiming that a misappropriation of their identity invaded their "right to be left alone".

Finally, a few years later, a court in Georgia characterized publicity as a property right based on commercial considerations, thus separating it from the dignity-based concept of privacy. Today in the U.S., twenty-eight states currently recognize the right: eighteen by statute, eighteen by common law, and eight by a combination of the two.

2. **Publicity Rights in U.K.:**- However, the decisions were based on the law of breach of confidence and contract. English law has strongly resisted the creation of a concept of publicity rights. This is mostly because of the importance placed on freedom of speech and expression. It was considered that publicity rights lead to private benefits with little tangible benefits to the public.

However, there has been a gradual evolution of the concept of publicity rights. In the case of performing artists, English law was compelled to develop by international treaty. This was because of the European Convention on human rights. In a series of cases the Court at Strasbourg has recognized that the taking of photos without consent was an interference with Art 8 rights under the ECHR. This was held to be so, even if the photographs were taken for police purposes, or for journalistic purposes.

Further judicial developments took place after 2000. By a decision made in June 2000 in the case of *Sports Club plc vs Inspector of Taxes*,⁵⁰⁶ the UK tax court, decided that the money paid under contracts for the promotion of image rights of international footballers should be recognized as reflecting their image rights and not as salaries. Next, the possibility for a claim for substantial compensation was recognized when photographs taken of the wedding of Michael Douglas and Catherine Zeta-Jones, were published by Hello! magazine without their consent. In a recent decision award of compensation of £3,500 was made under the Data Protection Act to Naomi Campbell for a publication of her photograph in a story about her drug therapy.

Finally, the concept of publicity rights may be considered to be settled in U.K. in the case of *Irvine v Talksport*⁵⁰⁷. In the case a successful Formula I driver, Edmund Irvine, saw his image used without his consent in an

⁵⁰⁶ [2000] STC (SCD) 443

⁵⁰⁷ [2003] EWCA Civ 423

advertisement for a radio station. The court held that he had a property right in the goodwill attached to his image, and he was entitled to compensation on the basis of a reasonable endorsement fee.

However, there is no statute to regulate the celebrity rights in U.K.

3. Personality Rights in Civil Law Jurisdictions:- In contrast with common law jurisdictions most jurisdictions have specific statutory provisions that protect an individual's image, personal data and other generally private information. Exceptions have been carved out of these general, broad privacy rights when dealing with news and public figures.

In France personality rights are protected under Article 9 of the French civil code⁵⁰⁸. While publicly known facts and images of public figures are not generally protected, use of someone's image or personal history has been held actionable under French law.

In Germany personality rights are protected under the German civil code. The concepts of an "absolute person of contemporary history" which allow the depiction of individuals who are part history but still gives them some protection of their rights of privacy outside the public sphere.

A succinct statement of the German law can be found in the following judicial statement from the Marlene Dietrich case⁵⁰⁹ :

"The general right of personality has been recognized in the case law of the Bundesgerichtshof since 1954 as a basic right constitutionally guaranteed by Arts 1 and 2 of the Basic Law and at the same time as an "other right" protected in civil law under S. 823 (1) of the BGB (constant case law since BGHZ 13, 334, 338 - readers' letters). It guarantees as against the entire world the protection of human dignity and the right to free development of the personality. Special forms of manifestation of the general right of personality are the right to one's own picture (Ss. 22 ff. of the KUG) and the right to one's name (S. 12 of the BGB). They guarantee protection of the personality for the sphere regulated by them."

There are certain provisions on rights in the new civil code of cubec that enshrines the right to privacy as an attribute of personality. This right is set forth in Article 3:-

⁵⁰⁸ "everyone has the right to respect for his or her private life". Protection for "the intimacy of private life" is strengthened by the article's second paragraph, which provides in addition that a court can make an interlocutory order directing whatever steps may be necessary to put a stop to violations of this right.

⁵⁰⁹ BGHZ 13, 334, 338

"Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable."

The chapter in the new Code dealing with respect of reputation and privacy defines the invasion of privacy in article 36:

The following acts, in particular, may be considered as invasions of the privacy of a person:

- (1) Entering or taking anything in his dwelling;
- (2) Intentionally intercepting or using his private communications;
- (3) Appropriating or using his image or voice while he is in private premises;
- (4) Keeping his private life under observation by any means;
- (5) Using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) Using his correspondence, manuscripts or other personal documents

NEED TO PROTECT CELEBRITY RIGHTS:

Firstly ,to protect performers by alleviating a sense of insecurity in performers due to fear of “technological unemployment” including replacement of musicians by recorded music, Controlling exploitation of performers who cannot manage the situation.

Secondly the right to publicity is inheritable. Therefore descendants of celebrity can gain from the popularity created by celebrity during his/her lifetime

Thirdly, Celebrity Rights are assignable & licensable for commercial benefits. In the present times publicity involves immense amount of money& the public image of a celebrity is of tremendous value. Thus, this creates an economic incentive of the public & celebrities are adequately rewarded due to their moral claim over money arising out of their fame.

VIOLATION OF PUBLICITY RIGHTS

Use of a person's persona for commercial gain in an unauthorized manner amounts to violation of publicity rights of the person. Any person must therefore take permission of a celebrity for using his persona for commercial gain. The unauthorized use of a celebrity's personality can be call for an action of passing off, of unfair

competition, of misrepresentation and can cause damage to their reputation. It can also amount to a breach of confidence or a violation of privacy.

The right of publicity encompasses the right to initiate action to prevent the wrongful appropriation of an individual's identity for commercial purposes without his or her consent; or seek compensation.

JURISPRUDENCE IN INDIA: PROTECTION THROUGH IP RIGHTS IN INDIA

The jurisprudence on publicity rights is in its nascent stages in India. It was first recognized by the Supreme Court of India in *R.R. Raja Gopal v. State of Tamil Nadu*⁵¹⁰, where the Supreme Court recognized right of publicity in the form of right of privacy as follows: “the first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising - or non-advertising - purposes or for any other matter”.

Right of publicity as an independent right, was first time recognized by the Delhi High Court in *ICC Development (International) Ltd. v. Arvee Enterprise*^{511s}, where the Delhi High Court held that the right of publicity does not extend to events and is confined to persons.

THE INDIAN SCENARIO:

The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not in here in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event

India has been lagging behind in regard to publicity rights, as neither is there a considerable body of case law, nor any statute governing, image or publicity rights of individuals. Thus, the legal system in India at present is quite inadequate to deal with the modern phenomena of endorsement advertising. But the market has its own forces and does not wait for the law to catch up. The rate at which advertising using celebrities has increased as well as an increase in the amount of money involved in the entire process, possible abuses are likely to arise in the near future. A beginning has been made by the Hon'ble Delhi High Court, in *ICC Development (International) Ltd. v.*

⁵¹⁰ (JT 1994 (6) SC 514)

⁵¹¹ (2003 (26)PTC 245 Del)

Arvee Enterprises,⁵¹² and its statement on publicity rights is the only authoritative discussion of publicity rights in Indian case law:

"The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organizer /non-human entity of the event would be violative of Articles 19 and 21 of the Constitution of India - No person can be monopolized. 'The right of Publicity' vests in an individual and he alone is entitled to profit from it. For example if any entity, was to use Kapil Dev or Sachin Tendulkar's name persona/ indicia in connection with the World Cup without their authorization they would have a valid and enforceable cause of action."

The Image Rights in India as conceived by the Delhi High Court arises from the right of privacy which has emerged through a case-by-case development in India and flows from human dignity as enshrined in articles 19 and 21 of the Constitution. This approach has to be contrasted to the approach of treating publicity rights as commercial property.

But there is a need for a dual approach in India as opposed to the purely dignitary approach of the Delhi High Court. There is an urgent need in India for recognizing property rights in one's personae.

The right to property is a creature of the law and anything is property so long as law gives to a particular item, the status of property. Thus, after the Hon'ble Delhi High Court has taken the laudable step of recognizing the dignitary aspects of publicity rights, it rests with the legislature to statutorily recognize the commercial and property rights aspects of publicity rights to fill up the lacunae in law and keep in pace with the rapid commercialization of personality and the development of the Internet. While doing so the legislature should also adequately balance between the public interest and the individual interest of the celebrity. In other words the legislature while granting the celebrity the right to publicity should also make adequate exception for freedom of speech & expression and other bona-fide uses as done by the Copyright Act. The statute should also reflect the need of preserving human dignity and the need for efficient commercial utilization of property beyond a person's lifetime. In fact, true heroes live on beyond their lives.

⁵¹² (2003 (26)PTC 245 Del)

THERE ARE FURTHER REASONS FOR RECOGNIZING PUBLICITY AS A STATUTORY PROPERTY RIGHT FOR THE FOLLOWING ADVANTAGES:-

- i) Nowadays publicity involves immense amounts of money and the public image of a celebrity is of tremendous value. Recognizing this valuable asset as a property would mean that the same would be subject of taxation as a capital asset just like any other intellectual property.
- ii) This gives economic incentive to the public for carrying out socially enriching activities.
- iii) The celebrities are adequately rewarded for their moral claim over any money flowing from their fame which they have crated by putting in enough time and effort.

Trademark

Trademark registration has a two-fold significance as far as rights of celebrities are concerned. Firstly, trademark registration of any aspect of a celebrity's personality is indicative of the fact that the celebrity is open to the authorized assignment or licensing of his or her personality for merchandising purposes in the class of goods and services for which registration has been sought. Secondly, the celebrity obtains a means of defending those aspects of their personality against unauthorized use. Unlike action under the tort of passing off or the Trade Practices Act 1974, trademark registration is unique in providing a prospective form of protection for celebrity personality.⁵¹³ In India, celebrities and commercial partners can obtain some protection from trademark law but such protection may be limited in scope. Section 2(1) of the Indian Trade Marks Act, 2000, allows registration of any 'sign capable of distinguishing goods and services of one person from another, any word (including personal names), design, numeral and shape of goods or their packaging' as trademark. Courts in India have accorded protection to film titles, characters and names under trademark laws.⁵¹⁴ The first case that dealt with character merchandizing in India was *Star India Private Limited v Leo Burnett India (Pvt) Ltd*⁵¹⁵, but jurisprudence is still emerging and character merchandising is an area yet to develop in India.

CONCLUSION

⁵¹³ Black Hilary May, The role of trademark law in the\ protection of celebrity personality, *Media & Arts Law Review*, 7 (2) (2002) 105, 106.

⁵¹⁴ Titus & C Advocates 2008, India guide: Character merchandising in India, <http://www.asialaw.com/Article/1970665/Channel/16681/India-Guide-Character-merchandiingin-India.html>

⁵¹⁵ *Star India Private Limited v Leo Burnett India (Pvt) Ltd* (2003) 2 B C R 655.

The protection of publicity and image right is expanding in a celebrity obsessed culture of India .Recent cases where legendary Bollywood actor Amitabh Bachchan spoke out against the unauthorized use of a sound-alike of his distinctive deep baritone in an advertisement promoting a brand of *gutka* (chewing tobacco), an association which was detrimental to his image and of the famous Indian actor Rajnikanth ,published a legal notice in various magazines before the release of his latest film prohibiting anyone from damaging his screen persona or from using his character in the film for any financial gain including advertisements ,and impressions by comedians ,clearly suggests that Right of publicity has emerged as an individual class of IP protection.

While Indian celebrities have intermittently attempted to protect their personality rights, the law on this aspect has taken a long time to develop. In light of the increase in celebrity endorsements and with celebrities eager to prevent unauthorized exploitation of their rights it is high time for legislature to recognize publicity rights in a statutory manner. In India, the exclusive right to authorize public performances and broadcast them does not exist. There is provision, merely, for secondary rights to prevent public performance or broadcasting or recordings made without the performers' consent and to receive equitable remuneration. Thus, though economic rights are available, moral rights do not exist. No protection is given against 'substantial similarity' which is a necessary element in protection of celebrity rights. It is only through litigation, this growing problem can be disciplined. Award of huge damages and multi-million dollar settlements, may stop infringement or violation by those who have in the past failed to respect the privacy of celebrities and employers. Whereas, the judiciary has repeatedly recognized existence of various aspects of the celebrity rights, it rests with the legislature to statutorily recognize commercial aspects of celebrity rights to fill up the lacunae in law and keep pace with rapid commercialization of celebrity status.

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