
INDIA'S PERSONALITY RIGHTS VACUUM: A CRITICAL EXAMINATION OF LEGAL SHORTCOMINGS AND REFORM NEEDS

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ABSTRACT

The protection of personality rights is an emerging issue in India because the commercial exploitation of personality has increased much more compared to the earlier period. The rights that people have over their name, likeness, reputation, image, and other facets of their identity are referred to as personality rights. If a third party without authorization tries to profit commercially from a person's reputation or such information, the person has the ability to file a case for infringement of rights. Celebrities cherish these rights since they could be improperly used in ads by other companies to boost sales using their names, photos, or even voices. When someone links celebrities to a product without their consent, they are abusing their well-earned fame for personal gain, making the work of these celebrities or personalities meaningless. The primary concern in India pertains to the inadequate safeguarding of personality rights, despite the judiciary's efforts to address these matters through existing intellectual property laws, including but not limited to trademark, passing off, and copyright. A modest attempt is made in this work to identify and elucidate a number of issues related to celebrity rights and IP protection. These rights have been explicitly or implicitly acknowledged by a number of international accords. It explicitly looks to trade mark and right of publicity laws for support, but it also evaluates how inadequate protection is provided by both for a "product" and an "identity". A conscious effort has been made to present an all-inclusive clause that would welcome any potential developments and improvements pertaining to personality characteristics.

Introduction

The notion of personality rights encompasses an individual's authority to manage the unauthorized utilization of their distinct personality attributes, such as name, image, voice, and likeness. This concept extends to both commercial and non-commercial dimensions. However, the interpretation of this right varies across different legal jurisdictions. Some jurisdictions perceive it as a unified right encompassing both commercial and non-commercial facets, whereas others differentiate between the two, treating them as distinct rights. Consequently, the specific terminology employed to describe these rights differs from one jurisdiction to another. For example, in India, the terms "personality rights" and "publicity rights" are utilized interchangeably, illustrating this variance in terminology and conceptual understanding.¹ These rights are designed to protect an individual's autonomy against the commercial or public misuse of these aspects, ensuring that individuals have control over how their persona is utilized in public and private domains.

However, the concept of personality rights is not new: in particular classical natural law, with its concept of innate and inalienable human rights that include a range of rights relating to individuals, forms the background to the modern concept.² The first general basis for the recognition of personality rights has been in modern times is art. 1382 of the Code Napoléon.³ The earliest origins of the right to publicity can be founded in the case of *Haelan Laboratories v. Topps Chewing Gum*⁴ where the court defined the right to publicity as "A man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made in gross i.e., without an accompanying transfer of a business or of anything else."⁵

Additionally, personality rights are essential for establishing an equilibrium between personal

¹ Agnes Augustian, *Protection of Personality Rights in India: Issues and Challenges*, 1.1 IPR J. 44, 44-53 (June 2023)

² Johann Neethling, *Personality Rights: A Comparative Overview*, 38 Comp. & Int'l L.J. S. Afr. 210, 210-245 (2005).

³ See G. Brügge-meier, *Protection of Personality Rights in the Law of Delict/Torts in Europe: Mapping Out Paradigms*, in *PERSONALITY RIGHTS IN EUROPEAN TORT LAW*, supra note 3, at 10; H. Coing, *Die Entwicklung der Persönlichkeitsrechte im 19. Jahrhundert*, in *FESTSCHRIFT FÜR WERNER MAIHOFFER ZUM 70. GEBURTSTAG* 75, 76-78 (Frankfurt am Main 1988)

⁴ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953)

⁵ Isha Ghai, *Personality Rights: Interpretation and Scope*, *LiveLaw* (Dec. 26, 2022), <https://www.livelaw.in/columns/personality-rights-amitabh-bachchan-protection-ex-parte-ad-interim-injunction-217539>.

freedom and the public good. These rights shield prominent people from being unfairly used by businesses while still permitting appropriate public dialogue.. For private individuals, personality rights defend against the unauthorized dissemination of their data, images, or likeness without consent, particularly in digital platforms, social media, and emerging technologies like artificial intelligence and deepfake technology.

Therefore, protecting personality rights is essential for ensuring individuals retain control over their identity, dignity, and reputation in both the physical and virtual worlds.

Understanding Personality Rights

American psychologists Randy Larsen and David Buss⁶, define personality as: “personality is a stable, organized collection of psychological traits and mechanisms in the human being that influences his or her interactions with and modifications to the psychological, social and physical environment surrounding them." Individuals engaged in fields such as the arts, music, cinema, television productions, politics, sports, and journalism, who gain recognition, popularity, or notoriety due to their frequent mention in everyday conversations, play a pivotal role in exerting a wide-ranging influence via their distinct personas. The right of publicity serves as a legal mechanism designed to safeguard against the illicit utilization of a person's identity by forbidding the unauthorized exploitation of an individual's semblance, name, vocal characteristics, or image.⁷

The right of publicity has two fundamental characteristics: descendibility and assignability. The first feature makes it possible to assign and transfer the right to publicity to another person. Thus, the individual whose identity has been breached may enforce the publicity right, as may, if applicable, the person to whom the right has been granted or the exclusive licensee.⁸ The second characteristic of the right of publicity is descendibility, also known as post-mortem right. A person's power to manage how their identity is appropriated even after they pass away is

⁶ Randy J. Larsen, David M. Buss, *et. al.*, *Personality Psychology: Domains of Knowledge about Human Nature* (McGraw-Hill Higher Education, 2013)

⁷ ROBERT POST and JENNIFER ROTHMAN, “*The First Amendment and the Right(s) of Publicity*”, YALE LJ, vol. 130, 86-172, 89 (2020).

⁸ Rosina Zapparoni, “*Propertising Identity: Understanding the United States Right of Publicity and Its Implications — Some Lessons for Australia*”, Melb. U. L. Rev., vol. 28, 690, 702 (2005).

known as their postmortem right.⁹

The legal framework for personality rights in India is primarily based on judicial interpretations and precedents and various provisions of different Indian laws. The Hon'ble Supreme Court has recognized the Right to Privacy under Article 21 of the Constitution of India, which serves as a foundation for protecting an individual's identity and persona from unauthorized commercial exploitation. Indian courts have emphasized the importance of consent in using a person's identity, particularly celebrities. The Copyright Act of 1957 offers protection against one's artistic, literary, dramatic, photographic, and musical works, and the Trade Marks Act of 1999 (which also acknowledges common law principles) extends protection over one's name, image, likeness, taglines, mottos, unique and exclusive characteristics, etc. Protection can also be granted to such categories if it can be demonstrated through a claim that the wrongdoer breached the rights to publicity and personality in addition to copyright.¹⁰

Prof J Thomas McCarthy stated, 'The right of publicity is not a kind of trademark. It is not just a species of copyright. And it is not just another kind of privacy right. It is none of these things, although it bears some family resemblance to all three.'¹¹ It is evident from this that while certain characteristics of personality are protected by current intellectual property rules in India, other components of personality are not covered by any of these laws.

Legal Shortcomings in India

The term "celebrity" is not defined in the Indian Copyright Act. However, the definition of a performer found in Section 2(qq) may be consulted. Not every performer is a celebrity, and celebrities aren't always performers either.¹² Celebrities make an effort to incorporate all the qualities that make them special and that the general public can easily identify with them. Public recognition and association play a critical role.

The doctrine of privacy put forth by Warren and Brandeis has played a pivotal role in shaping

⁹ VANDANA MAHALWA, "Burgeoning right of publicity...", cit., p. 34

¹⁰ Protection Of Publicity Rights in India- Chambers of Namrata Pahwa-2020 available at <https://www.chambersofnamratapahwa.com/post/protection-of-publicity-rights-in-india> (last visited on June 23, 2023)

¹¹ McCarthy J Thomas, The Spring 1995 Horace S Manges Lecture: The Human Persona as Commercial Property: The Right of Publicity, Columbia-VLA Journal of Law and the Arts, 19 (1995) 131.

¹² Tabrez Ahmad & Satya Ranjan Swain, Celebrity Rights: Protection under IP Laws (2011)

celebrity rights. They opined that the basic concept of personal freedom extended to every person's right 'to be let alone'.¹³ This was also reinforced by the judgment of the Supreme Court. Before 2017, personality rights were addressed by the courts mostly piecemeal, using the prisms of intellectual property, defamation, and privacy. The right to privacy in India was greatly enhanced by the seminal case of *R. Rajagopal vs. State of Tamil Nadu*¹⁴, popularly known as the *Auto Shankar* case. The Supreme Court ruled that Article 21 of the Constitution's guarantee of the right to life and liberty implicitly includes the right to privacy. While not specifically related to personality rights, the ruling emphasized how crucial it is to safeguard individual liberty against unapproved use. This case represented a sea change in the legal landscape because it recognized that anyone, including famous people, have a right to manage how their image is used for profit. The Court clarified that it was crucial to create a balance between the freedom of the press and the right to privacy, saying that "freedom of the press flows from the freedom of speech and was subject to reasonable restrictions provided in Article 19(2)." The Court ruled that everyone has the "right to be let alone" when it comes to their personal information, and that anything pertaining to someone's private life cannot be published without that person's permission unless it is based on public data.¹⁵

While, after the *Puttaswamy* judgment¹⁶, the right to privacy has attained the status of a fundamental right, the jurisprudence with regard to publicity rights is still in its nascent stages. Publicity rights or celebrity rights, as they are called, are not expressly recognized by any statute in India. Furthermore, no consistent rationale has yet emerged, despite the fact that courts in other foreign nations have taken differing stances in order to defend this privilege. However, this kind of right is not the same as the right against "adverse portrayal of one's personality" or the right against "invasion of privacy." A performer only had personality rights during their live performance prior to the development of sound and visual recording processes. These rights included the right to privacy, the right to likeness, the right to publicity, and the right to voice. However, the development of recording technology made it possible to fix performances, which gave rise to the issue of bootlegging (the unapproved recording of live performances). Additionally, because of advancements in animation, it is now feasible to

¹³ Louis Brandeis D & Warren Samuel D, The right to privacy, *Havard Law Review*, 4(5)(1890), http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html (11 January 2010).

¹⁴ *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 S.C.C. 632 (India)

¹⁵ A Look at the Evolution of Personality Rights in India, *TBA Law* (Aug. 11, 2021), <https://www.tbalaw.in/post/a-look-evolution-personality-rights-in-india>.

¹⁶ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India)

produce human-like computer-generated looks of performers or actors, including deceased movie stars. Unauthorized photography of celebrities and the digital alteration that follows to produce fresh photos and movie footage of the star present a serious risk. One of the biggest sources of confusion and defamation on the internet has been the usage of altered photos of celebrities on unsuitable websites.¹⁷

It was stated in *Fortune Films v. Dev Anand*¹⁸, that acting in motion pictures does not fall within any particular type of employment. "Once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of subsections (1), (2), and (3) shall have no further application to such performance," says Section 38(4), specifically excluding the performer's right. Only writers are granted moral rights; actors in motion pictures are not included in the concept of author.

The process by which people are becoming brands and the public's acknowledgement of this raises a legitimate demand for the creation of celebrity or famous person personality protection, beyond that which is provided by article 21 of the Constitution, breach of contract, or passing off laws under torts. Rather, the Indian legislature ought to focus on the subtle aspects that a person adds to their persona when they become famous. A celebrity's personality is everything to the public and is necessary to their existence. Remember that the economic side of personality grows out of one's reputation and the significance that society places on recognition. A healthy equilibrium between the public interest and personal information must be maintained.¹⁹

Need for Reform

The emergence of deepfakes and synthetic media has important ramifications for people's reputations, privacy, and celebrity personality rights. Deepfake technology is a severe danger because it allows bad actors to change content to deceive or slander individuals. Deepfake technology uses artificial intelligence to make incredibly convincing fake movies or audio recordings. Holding producers and sellers of deepfakes legally responsible presents significant questions about liability and accountability for the spread of deceptive or dangerous content.

¹⁷ Tabrez Ahmad & Satya Ranjan Swain, *Supra* note 12

¹⁸ *Fortune Films v. Dev Anand*, A.I.R. 1979 Bom. 17 (India).

¹⁹ T. V. Kumari, "Celebrity Rights as a Form of Merchandise – Protection under the Intellectual Property Regime," 9(2) *Journal of Intellectual Property Rights* 120 – 135 (2004)

In order to solve these concerns, regulatory solutions and ethical frameworks are essential, underscoring the necessity of comprehensive legislation that precisely targets.²⁰

The existing trade mark protection and Constitutional protection in the form of right to publicity or right to privacy are contingent on the strength of the celebrity's fame. The right to publicity is justified by trade marks, while the latter has evolved according to certain regulations intended to further particular objectives. There is a discrepancy between the laws and the extent of protection that they provide.²¹ The celeb world is not the only place where personality rights have limits. The Anil Kapoor vs. Simply Life India and Ors (2023) landmark case expanded the bounds of what was previously possible. Kapoor made a compelling case for his distinct demeanor, which included his distinctive walking gait and dialogue delivery, as well as his protected areas of his personality. This case represents a possible extension of protection to include non-conventional facets of a person's identity.²²

There are various legal frameworks dealing with personality rights on an international level. The right to publicity in the United States is commonly understood to comprise of two distinct categories of rights: (1) The right to publicity, which is the ability to prevent one's image and likeness from being used for commercial purposes without consent or payment under a contract; and (2) the right to privacy, which is the right to be left in peace.²³ The International Trademark Association notes that the right of publicity should be licensable, descendible, and transferable for a set amount of time following the death of an individual in its paper on the minimal standards for the right of publicity.²⁴

However, the components of celebrity rights that the Copyright Act may protect are not entirely clear. The court held in *Sim v. Heinz & Co Ltd.*²⁵ that voice, likeness, and other identity indicators are not protected by copyright. Additionally, personality right includes the sole

²⁰ Understanding Indian Laws Protecting Personality Rights, *Singhania & Co.* (Feb. 2, 2023), <https://singhanialaw.com/understanding-indian-laws-protecting-personality-rights/>.

²¹ Jayashree Shanta Ram, Personality Rights in India: Commercial Exploitation of Human Dignity, 53 *J. Indian L. Inst.* 5 (2011), <https://ili.ac.in/pdf/5.pdf>.

²² Personality Rights in India: A Statutory and Judicial Analysis, *IP & Legal Filings* (Sept. 22, 2021), <https://www.ipandlegalfilings.com/personality-rights-in-india-a-statutory-and-judicial-analysis/>.

²³ *Supra* at note 5

²⁴ Int'l Trademark Ass'n, Right of Publicity: Minimum Standards, *INTA* (Mar. 27, 2019), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf>

²⁵ *Sim v. Heinz & Co. Ltd.*, [1959] 1 W.L.R. 313 (Eng.)

authority to manage the commercialization of a person's personality traits. On the other hand, a trademark grants the owner of the mark the sole authority to use it to identify the commercial source of a certain set of goods or services.²⁶ To put it briefly, trademarks are issued to signify the origin and quality of a product, whereas personality rights serve a different purpose—namely, to restrict the use of personas. As such, it can be claimed that the trademark protection subject matter is insufficient. These challenges need comprehensive legislation that targets AI-generated content directly and provides clear standards for content platforms and developers to ensure the ethical use of AI technologies. Regulatory solutions and ethical frameworks play a critical role in tackling these difficulties.

Conclusion

When it comes to acknowledging publicity rights, India has fallen well short of its Western counterparts. Because the Supreme Court has not issued any definitive rulings on the matter, the jurisprudence surrounding publicity rights in India is not well established. There isn't any law on this topic because there isn't any jurisprudence. In addition to creating a path for the social evolution of trade mark law, modifications to allow for personality protection will also serve as a foundation for the development of many other legal fields, such as energy and artificial intelligence. Intellectual property protection jurisprudence will advance and protection will become stronger and wider thanks to this proposed synthesis. The creation of legislative frameworks that enable people to safeguard their identities and benefit financially from their reputation and other personality traits is therefore essential.

²⁶ Kusum Joshi & Vaidehi Pareek, “Character Merchandising: Right of Publicity and Its Relation with Trademark Laws”, 1 (43) *Specialusis Ugdyas / Special Education* 2022