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# Indian Perspective of Publicity Rights of Celebrities in Modern Times

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## ABSTRACT

*In the time of technology and social media, any person can be regarded as a celebrity who has become well-known among the public at large, not only for the occupation which one performs but also for the personality which one carries through. These celebrities have rights in terms of privacy and publicity and such rights are protected by intellectual property law regime because of their intangible nature. This paper reflects the economical perspective of such publicity rights as merchandising rights and highlights the Indian context related to it. The first part gives a brief account of celebrities' rights and their evolution while defining celebrities and the importance of media and global communication behind it. The second part discusses the right of publicity as a form of IPR. The third part analyzes celebrities as marketable commodities and development of publicity rights as merchandising rights through the lens of economics along with the relevant case laws. The fourth part analyzes the current position of Indian laws for the protection of the rights and lays down the justifications for the need of protecting the publicity rights. Lastly, the article highlights the lacunae in the current regime and concludes with the opposite protocols for the current framework.*

**Keywords:** *Celebrities, Indian perspective, Publicity rights, Economic Interest, Merchandising.*

## I. INTRODUCTION

Every person leads a private life and has a right to be left alone<sup>2</sup>. This right is referred to as the right to privacy and has been given the status of a fundamental right under the Constitution of India.<sup>3</sup> While every person has the right to privacy, the scope of that right dwindles with an increase in person's popularity and public recognition. Eventually, such elevation in popularity

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<sup>2</sup> *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

<sup>3</sup> *Justice K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1.

reaches a point where the public, without any liability, may intrude into certain aspects of the life of a popular person or celebrity.<sup>4</sup>

The dictionary definition of a celebrity is “a widely known person; one popularly honored for some signal achievement.”<sup>5</sup> A celebrity is a person who has achieved considerable amount of fame during his/her course of time and has become known to the eyes of public and media. It may include actors, sportspersons, artists, political leaders and members of royal families. However, this definition is not mutually exclusive as even a character portrayed by and associated with just one actor, a news media or corporate executive, an infamous person on death row, a lawyer who has obtained some degree of fame can be regarded as a celebrity. As long as a person’s name, likeness, and other personal characteristics are worth marketing, they seem worth protecting under the right of publicity.<sup>6</sup>

In contemporary times, the domain of intellectual property rights (hereinafter IPR) has been expanded to afford protection to modern rights such as the ‘right to publicity’ a corollary of the right to privacy, and the bundle of rights that emanate from ‘celebrity rights’.

By virtue of their popularity, celebrities play a very important role in influencing society and culture. The general public follows the lives of celebrities very keenly and their behavior and actions influence social behavior in many ways. Considering the popularity among general public, it is important that a celebrity’s rights are clearly defined so as to prevent the infringement. Certainty with respect to publicity rights is necessary to ensure protection of a celebrity’s endorsement interests, prevent consumer deception, and avoid unjust enrichment. Therefore, a need has arisen to protect the economic interests of celebrities and simultaneously, prevent others from infringing them.

Moreover, the evolution of modern technology, media and global communication has time and again, defined and redefined the ambit of celebrity status,<sup>7</sup> resulting into the legal ambiguities and uncertainties to the scope and extent of such right. Thus, this article analyses the celebrity’s rights on the contours of the right of publicity with an economic perspective and the position of Indian law regime in terms of protection of the said rights.

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<sup>4</sup> Kalyan C. Kankanala, Sandeep Hegde M., *Publicity Rights in India*, 39 NORTHERN KENTUCKY LAW REVIEW, 247-266 (2012).

<sup>5</sup> WEBSTER’S THIRD INTERNATIONAL DICTIONARY, p. 359 (1961).

<sup>6</sup> Gary M. Ropski, *The Right of Publicity – The Trend towards Protecting a Celebrity’s Celebrity*, 72 THE TRADEMARK REPORTER, 251-274 (1982).

<sup>7</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIFORNIA LAW REVIEW 125, 128 (1993).

## II. PUBLICITY RIGHTS

The right of publicity is a form of IP. It is the right of celebrities to prevent others from using their name, likeness, voice, image or any other characteristics associated with them for the commercial purposes without their consent. A person may acquire the right of publicity by virtue of association with any event, sport, movie, profession or any other activity.

This right can also be considered as a right to use the economic value of the fame and name of a celebrity. The condition to possess such a right is the recognition of the celebrities among the general public in a manner through which the public can identify them based on their persona. One cannot curtail another person's freedom of speech and expression even in existence of publicity rights. Activities such as caricature, lampooning, and parody, all of which qualify as free expression, are permitted and are not considered a violation of publicity rights.<sup>8</sup> However, if someone uses the fame or name of the celebrity to promote their goods or services, then it is termed as unfair practice, commercial tort, misappropriation of intellectual property and an act of passing off.

Although celebrities lose the right of privacy to a certain extent, they gain the right of publicity which includes the right to prevent the commercial use of their persona.<sup>9</sup> The right of publicity is "*the inherent right of every human being to control the commercial use of his or her identity*".<sup>10</sup>

## III. DEVELOPMENT OF PUBLICITY RIGHTS AS MERCHANDISING RIGHTS

In today's time, the publicity rights can be seen as merchandising rights as these are economic rights of a celebrity to prevent others from using a celebrity's persona. It is a form of merchandise which refers to an act intended to promote the sale and popularity of a commodity or an activity.

The first case to explicitly recognize the value of a celebrity's characteristics was *Haelen Laboratories Inc. v. Topps Chewing Gum Inc.*<sup>11</sup>, which involved baseball players licensing their statistics and images for baseball playing cards. In coining the term 'right of publicity', the court stated:

*"It is common knowledge that many prominent persons [...] would feel sorely deprived*

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<sup>8</sup> *Husteler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>9</sup> *Justice K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1, 247.

<sup>10</sup> Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARVARD JOURNAL OF LAW AND TECHNOLOGY 401 (1998).

<sup>11</sup> 202 F.2d 866, 868 (2d Cir.).

*if they no longer received money for authorizing advertisements [...] This right of publicity would unusually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their picture.”*

The characteristics or the persona of celebrities is their property since they have used their skills, talent and put in conscious efforts to build the image and the name among the general public to create the popularity in the society.<sup>12</sup> It is only that celebrities’ right to exploit their popularity for commercial benefits and prevent others from using it.

Furthermore, in case of *Zachhini v. Scripps-Howard Broadcasting Co.*<sup>13</sup>, the US Supreme Court went ahead and addressed the issue of unjust enrichment and economic value of the right of publicity. The Court held that the media cannot be granted a license to broadcast a unique performance without adequate remuneration to the performer. This case led to development of the right to publicity as a property based doctrine and exclusive right of a celebrity to commercial use of fame acquired by him.<sup>14</sup>

Celebrities have now become a commercially marketable commodity as they constitute distinct and recognizable persona. Their physical appearance, signature, style, photograph, likeness, recognizable attire, look, voice, gestures are considered as the merchandising entities.

#### IV. CURRENT INDIAN LAW REGIME

Since the concept of publicity rights is novel, the laws pertaining to it and merchandising rights of the celebrities are in their rudimentary stage in India. However, with the recent cases pertaining to publicity rights, the current Indian law regime has started to outline a legal framework for its protection.

In the current Indian law regime, the economic interest and commercial use can be safeguarded under Trademarks Act 1999, Emblems and Names (Prevention of Improper Use) Act 1950, Copyright Act 1957, and under few articles of Constitution of India 1950. Many Indian celebrities like Shah Rukh Khan, spiritual guru Baba Ram Dev and many more have been relying on trademark and copyright law to protect their publicity interests. The meaning of publicity rights have been expounded by few courts but the ambiguity in terms of scope and extent of these rights still remains as this concept is a recent development in India.

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<sup>12</sup> *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392 (NJ Ch. 1907).

<sup>13</sup> 433 US 562 Ohio (1977).

<sup>14</sup> T. Vidya Kumari, *Celebrity Rights as a Form of Merchandise – Protection under Intellectual Property Regime*, 9 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 120-135 (2004).

In 2001, the great grandson of Mahatma Gandhi, Tushar Gandhi, proposed to grant the right to use the name of “Mahatma Gandhi” for exclusive marketing rights to a multinational company, CMG Worldwide. His contract was seen as a blasphemy since public revered Mahatma Gandhi as a Father of the Nation. Moreover, the use of the name Mahatma Gandhi is specifically prohibited under the Emblems and Names (Prevention of Improper Use) Act 1950. Tushar Gandhi had to ultimately withdraw his contract with CMG Company.

This act was enacted to prevent improper use of certain emblem and names for the professional and commercial purposes.<sup>15</sup> Section 3<sup>16</sup> of this act prohibits the improper use of certain emblems and names and section 4<sup>17</sup> prohibits the registration of the companies which bears the name stated in section 3, except in the cases where it may be prescribed by the Central Government.

Further, the case of *ICC Development International v. Arvee Enterprises and Anr.*<sup>18</sup>, elucidated the protection of non-living entities under publicity rights, where the Delhi High Court held that non-living entities were not entitled to the protection of publicity rights as it is derived from the persona of an individual, therefore, it can only be attached to an individual or indicia of an individual personality, like a name, voice, signature etc.<sup>19</sup> The court further observed that any effort to transfer the right of publicity from an individual to the organizer (non-human entity) would be a violation of Article 19<sup>20</sup> and Article 21<sup>21</sup> of the Indian Constitution. They also held that publicity right is personal and not a commercial right. Nevertheless, it can be assigned or licensed to someone as a business entity.

However, the first case in India to comprehend the right of publicity was *D.M. Entertainment v. Baby Gift House and Ors.*<sup>22</sup>, where Daler Mehndi, who is a popular music composer, lyricist and singer in India, had incorporated D.M. Entertainment to Mehndi’s advancing career and assigned all his publicity rights, including commercial endorsements to the company. The defendant, Baby Gift House, was a company that owns toy and gift shops throughout Delhi. It sold dolly and toys which had features of Daler Mehndi and even some song lines of his compositions.

The court granted permanent injunction to defendants and noted that right of publicity can be

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<sup>15</sup> Emblems and Names (Prevention of Improper Use) Act, No. 12 of 1950, Preamble.

<sup>16</sup> *Id.*, §3.

<sup>17</sup> *Id.*, §4.

<sup>18</sup> 2003 SCC Online Del 2.

<sup>19</sup> *ICC Development International v. Arvee Enterprises and Anr.*, 2003 SCC Online Del 2, ¶¶13-14.

<sup>20</sup> Constitution of India, 1950, Article 19.

<sup>21</sup> *Id.*, Article 21.

<sup>22</sup> CS (OS) 893/2002 (High Court of Delhi dec. on. Apr. 29, 2010).

located within the individual's right and autonomy to permit or prohibit the commercial exploitation of his likeness or some attributes of his personality.<sup>23</sup> However, the court observed that in a free and democratic society where every individual's right to free speech is assured, over-emphasizing a famous person's publicity rights tends to chill the exercise of such an invaluable democratic right.<sup>24</sup> Thus, caricature, lampooning, parodies and the like, which may tend to highlight some aspects of the individual's personality traits, may not constitute infringement of such individual's right to publicity.<sup>25</sup>

To succeed in an action for passing off the plaintiff has to prove (1) the goodwill enjoyed by him, (2) misrepresentation by the defendant, and (3) resultant damage to the plaintiff's goodwill. The Delhi High Court concluded by stating that it is for the courts to determine whether the selling of good or services by the defendants is leading the public to believe that they have originated from the plaintiff.

Similarly, trademark law in India recognizes the rights of the celebrities to prevent use of trademark that are aimed at taking advantage of the celebrity's identity.<sup>26</sup> Section 14<sup>27</sup> mandates the acquisition of consent from a person or his descendants in order to register the trademark.<sup>28</sup> Moreover, section 35<sup>29</sup> recognizes the use of personal name and protects against any trademark infringement. Names of celebrities have been recognized as distinctive, famous, and said to be on a higher pedestal under the Indian trademark law than other well-known marks.<sup>30</sup> Therefore, using a celebrity's name as a trademark for any business has been considered likely to deceive the public, and therefore constitutes passing off.<sup>31</sup>

In addition to it, the importance of the copyright act was highlighted in the case of *Miss. Kajal Aggarwal v. The Managing Director, M/s V.V.D. & Sons*<sup>32</sup>, where even after the expiration of the agreement between the two parties, which was to use plaintiff's i.e., Kajal Aggarwal<sup>33</sup> profile for advertising and promoting defendant's products, defendants continued using the video and photographs of the plaintiff. The Madras High Court noted that the defendants had the right to use video film for promoting the products because it held copyright of its work.<sup>34</sup>

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<sup>23</sup> *Id.*, ¶14.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Justice K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1, 256.

<sup>27</sup> The Trademarks Act, No. 47 of 1999.

<sup>28</sup> The Trademarks Act, No. 47 of 1999, §14.

<sup>29</sup> *Id.*, §35.

<sup>30</sup> *Mr. Arun Jaitley v. Network Solutions Private limited and Ors.*, 2011 SCC Online Del 2660, ¶¶28-30.

<sup>31</sup> *Id.*

<sup>32</sup> 2011 SCC Online Mad 2533.

<sup>33</sup> Popular film actress in India.

<sup>34</sup> *Miss. Kajal Aggarwal v. The Managing Director, M/s V.V.D. & Sons*, 2011 SCC Online Mad 2533, ¶4.

However, copyright ownership does not permit the company to use the video for advertising or promotional purposes. To this, the court added that a celebrity's profile for advertising or promotion may be only used after obtaining appropriate authorization.<sup>35</sup>

The concept of celebrity rights has become more contextual and relevant because of increasing popularity of the media and faster and easier global communications through the internet. Judicial decisions given by Delhi or by Madras High Court in cases of Daler Mehndi or ICC Development case and in Kajal Aggarwal's case respectively have only persuasive value and are not binding on other States. Therefore, a national law would not only mitigate the problem but also define the scope and extent of the publicity rights.

The persona of celebrities is the main ingredient of their worth in the commercial market. Celebrities invest time and money to build and develop their persona which is appraised or at times, followed by the general public as a culture. Thus, there is need to protect the individual interest of the celebrity and following are the two justifications that highlight the need.

#### 1. Moral Justification

It is deduced from John Locke's Labor Theory<sup>36</sup>, where Locke argued that "*a person enjoys a natural right in the fruits of his labor in transforming raw materials that are held in common into a finished product of enhanced value*". This illustrates that celebrities deserve all the rewards because they have worked hard, invested their time and money and created a persona that has a value. The theory conceptualizes the notion of unjust enrichment, where a company should not be able to accrue benefit out the celebrities' persona without compensating them.

#### 2. Economic Justification

It enshrines that if celebrities are not able to control their publicity, companies will be able to use them and con the public into believing that the celebrity is merchandising their products. It also emanates the incentive argument<sup>37</sup> that is if celebrities cannot fully exploit the commercial value attached to them by virtue of their popularity, the celebrity will lack the incentive to create a valuable persona.

Richard Posner while analyzing IPR through an economic perspective had analyzed that "*the traditional focus of economic analysis of intellectual property has been on reconciling incentives for producing such property with concerns about restricting access to it by granting*

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<sup>35</sup> *Id.*, ¶22.

<sup>36</sup> John Locke, *The Second Treatise of Government and a letter concerning Toleration*, Dover Thrift Editions, 1, 13 (Tom Crawford ed., Dover Publications) (2002).

<sup>37</sup> Madow, *supra* note 6.

*exclusive rights in intellectual goods—that is, by “propertizing” them—thus enabling the owner to charge a price for access that exceeds marginal cost”*.<sup>38</sup>

This can also be seen through the lens of utilitarianism, as many celebrities have consistently helped raise awareness for global problems such as war, hunger and pollution of the environment. According to Bentham, “the greatest happiness of the greatest numbers”, with this context, intellectual property is justified for the utilitarian, if it helps to promote some similar value. Thus, IPR can be seen as a reward, granted to creators of things that will help contribute to an increased overall good or social utility.<sup>39</sup> Indian celebrities like Nana Pathekar, Priyanka Chopra have helped India in social causes like welfare of the farmers and promoting education of girls in India, therefore, individuals are incentivized by exclusive rights which motivate them to create culturally valuable works.<sup>40</sup> However, this view was criticized by some who note that the publicity right encourages people but once they become celebrities, they would discontinue providing the public the services that made them famous.

In this instance, the incentive argument would apply that the celebrities need to work for money otherwise they would be forced to do something else and social welfare would be diminished.<sup>41</sup> The race for the money is incentivizing them to continue working and furthering their interest to augment the value of their persona for the social welfare. Therefore, these rights should be protected as the celebrities should benefit out of their hard work and labor that they had put in to build their personae. Hence, it is upon the legislation to fill up the gap though legislations and make a balance of the publicity interest and the individual interest of the celebrity.

## V. CONCLUSION

The central idea for the protection of the publicity rights of the celebrities is that it is praise the efforts put in by the celebrities and further incentivize them to augment their reach and provide maximum happiness to maximum numbers either through their profession or by awareness. It is also true that the exclusive right would delink them from their ardent fans that have raised them on a high pedestal.<sup>42</sup> They would also take the advantage of their popularity and would charge more money in return.

But that is how an economy works, higher the demand, higher the price would be and

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<sup>38</sup> Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 JOURNAL OF ECONOMIC PERSPECTIVES, 57-73 (2005).

<sup>39</sup> Corinna Coors, *Morality, Utility, Reality: Justifying Celebrity Rights in the 21<sup>st</sup> Century*, 44 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 215, 224 (2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Zachhini v. Scripps-Howard Broadcasting Co.*, 433 US 562 Ohio (1977).

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.<sup>43</sup> Therefore, everything will be leveled by the end of the day.

As discussed in Part IV, the publicity rights might resemble their use under the stated legislations. However, India still lacks a legal standpoint which addresses the present scenario of infringements to publicity rights of celebrities. These legislations do not deal with the celebrities and their publicity rights *in toto*.

The Emblems and Names (Prevention of Improper Use) Act of 1950, restricts its ambit only to iconic names or persons related to Indian history and era of independence. The said act does not correspond to the present times and hence, celebrities and their publicity rights are not covered and hence, unprotected. Moreover, the Trademarks Act of 1999 only includes registered users or proprietors, it, however, fails to include the celebrities since the names of celebrities are at a higher pedestal than the other trademarks.<sup>44</sup> Thus, the said act needs to be amended to include the celebrities and their economic rights over their personae.

In the light of modernization and the influence of celebrities over the general public, a codification of laws related to economic rights, infringement and protection of publicity rights of celebrities is the need of the hour.

This can be done either through legislative enactments or incorporations of this issue either into Privacy Bill 2011<sup>45</sup> or into Personal Data Protection Bill 2019<sup>46</sup>. The privacy bill which deals with the protection of personal privacy in public life, encapsulates the IT Act<sup>47</sup>, Telegraph Act<sup>48</sup>, Wireless Act<sup>49</sup> and provisions of Cr.P.C.<sup>50</sup> as the primary legislations. The purview of the bill is the confidentiality of data and the protection of communication from interception and defines an 'individual' as a citizen of India. The bill could consider the IP laws, which also aids in protecting data, and cover the concept of celebrities since the infringement of data privacy of a celebrity would be more pernicious than an individual's as it would not only affect the celebrity but also the general public. Secondly, the Personal Data Protection bill, which not only deals with the protection of privacy of individuals and create a relationship of trust

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<sup>43</sup> Abhay Lunia, Itishri Upadhyay, *Protecting Celebrity Rights under Intellectual Property*, 1 INTERNATIONAL JOURNAL FOR LEGAL DEVELOPMENTS AND ALLIED ISSUES, 148-163 (2015).

<sup>44</sup> *Mr. Arun Jaitley v. Network Solutions Private limited and Ors.*, 2011 SCC Online Del 2660.

<sup>45</sup> The Right to Privacy Bill, 2011, Working Draft 3, Legislative Department, Parliament of India.

<sup>46</sup> The Personal Data Protection Bill, 2019, referred to Standing Committee, Parliament of India.

<sup>47</sup> Information Technology Act, No. 21 of 2000.

<sup>48</sup> Indian Telegraph Act, No. 13 of 1885.

<sup>49</sup> India Wireless Act, No. 17 of 1933.

<sup>50</sup> The Code of Criminal Procedure, Act No. 2 of 1974.

between persons and entities processing personal data but also lay down the norms for social media intermediaries, could include the a framework of rules and regulations for celebrities and their publicity rights protection in social media.

With the rapid development of publicity rights, provisions for the protection, exemptions and remedies should be formulated as that will not only harmonize the law but also create uniformity in its applications in all the states of India. Till then, the Indian courts can adopt and incorporate the tests which U.S. follows – *Roger's Test*, The Predominant Use Test and the Transformative Test. The three tests combine lay down a framework: The *Roger's Test*<sup>51</sup> aims to prevent consumer confusion supported by the Predominant Use Test<sup>52</sup> which furthers that if a product is primarily exploiting the commercial value of an individual's identity, then the product should be held to violate the right of publicity. Lastly, the Transformative Test which states that if there is a significant addition to the creative elements that transforms into something more than a mere celebrity likeness or imitation, then it would not challenge the celebrity's economic interest, for example, parodies.<sup>53</sup>

The incorporation of the aforementioned tests would act as a framework to protect the economic interests of celebrities as well as of the creators. The protection would not only give celebrities an incentive for carrying out socially enriching activities for the public but they also can be adequately rewarded for their moral claim<sup>54</sup> over any money flowing from their fame which they have created by putting in enough time and efforts.

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<sup>51</sup> *Rogers v. Grimaldi*, 875 F.2d 994, 996-97 (2d Cir. 1989).

<sup>52</sup> *Doe v. TCI Cablevision*, 110 S.W. 3d 363, 365 (Mo. 2003).

<sup>53</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807-08 (2001).

<sup>54</sup> Garima Budhiraja, *Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime*, 6 NALSAR STUDENT LAW REVIEW, 85-108 (2011).