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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

PUBLICITY RIGHTS

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Abstract:

The International Trademark Association defines the right of publicity as an intellectual property right that protects against the misappropriation of a person's name, likeness, or other indicators of their identity—such as their voice, signature, likeness, or photograph—for the benefit of another party for financial gain.

John Locke believed that a celebrity should be given the commercial value of their identity because the celebrity's efforts are what initially created that value. Identity theft is regarded by the theory of unjust enrichment consideration as being the same as stealing goodwill. The goal of the publicity right is allegedly to provide financial support for an individual's initiative, inventiveness, and success.

The field of intellectual property laws has given publicity rights a great deal of recognition in the last few years. Because they are linked to a person's personality, these rights are occasionally also referred to as celebrity rights. They can be defined as a person's right to limit how their identity is used for profit. A celebrity's public persona is extremely valuable in and of itself and costs a significant sum of money. As a result, it becomes extremely important for a celebrity to protect their rights to prevent others from abusing them or making unapproved profits from them.

The ability to safeguard, manage, and make money off of one's name, likeness, or image is known as the right to publicity. Most people agree that this right is a component of the right to privacy. The purpose of this article is to examine the right to publicity in several legal systems, including the US, the UK, and India. It has been noted that the right to publicity in the US has evolved into a separate right from the right to privacy. The UK, on the other hand, does not acknowledge a right to publicity. This article's primary goal is to comprehend how India's right to publicity has evolved. The acceptance

of the right to publicity as a component of the right to privacy is still in its infancy, despite the fact that Indian courts have recognized the right to publicity within the framework of intellectual property rights.

Key Words: Publicity rights, Trade mark, Copyright, Privacy, Infringement.

Introduction:

In its most basic form, the right to publicity—also referred to as personality rights—is the right to safeguard, manage, and make money off of one's name, image, or likeness. Publicity rights have two distinct aspects: first, the right to treat commercial exploitation of one's image without permission as a tort of passing off; and second, the right to privacy, which includes the right to privacy and solitude. Between these, harm to a person that is not of an economic nature and that is not covered by the torts of passing off, misrepresentation, etc. is covered by the right to privacy.

In India, publicity rights have typically been handled under the purview of intellectual property rights. The main explanation for this is that, until very recently, the Puttaswamy ruling from August 2017 raised doubts about the right to privacy's status as a fundamental right. As a result, India's right to publicity has not developed much as a component of the right to privacy.

Publicity rights are typically linked to a specific person¹. The majority of them are about celebrities who have established recognizable personas for themselves. Because of this, the protection of the publicity right has frequently not been granted, with the justification that people's lives may be "newsworthy" or in the public domain in a way that makes them considerable to be in public interest. But celebrities are not the only ones who have the right to own their persona. Given this context, several inquiries emerge: a) Does India's Right to Privacy include the Right to Publicity? b) If so, does it apply to everyone? And c) Are there any exceptions to these rights? To address these queries, we will examine the Right to Publicity from a number of angles. We will analyze how these rights have evolved and are treated in India based on this understanding, particularly in light of the Right to

¹ <https://www.anaassociates.com/wp-content/uploads/2016/10/Right-of-Publicity-under-Indian-Law.pdf>

Privacy's recognition².

The connection between the Publicity Rights and the Right to Privacy

The right to privacy is the set of rights that enables a person to keep their personal information private. It enables them to prevent someone else from using their identity for personal gain without their permission. According to Article 21 of the Indian Constitution, the Supreme Court of India has recognized the right to privacy as a fundamental freedom. The Supreme Court noted in *K.S. Puttaswamy v. Union of India* that privacy is an inherent acknowledgement of heterogeneity, of a person's right to stand out from the crowd, resist conformity, and carve out a private space³. A person's right to privacy protects them from the spotlight of publicity on their private and intimate affairs. It addresses the entitlement to publicity as a crucial component of a celebrity's right to life.

Originally, the right to privacy gave rise to the right of publicity. The names of Louis Brandeis and Samuel Warren have historically been associated with the privacy right doctrine in the United States. In 1890, they co-wrote and published the piece "The Right to Privacy" in the *Harvard Law Review*. Following publication, the "right to be left alone" has replaced the right to privacy. Famous US scientist William Prosser further outlined the following categories that fall under the umbrella of the individual's right to privacy: protection from prying eyes; avoidance of embarrassing personal information being disclosed; defense against media portraying oneself in a negative light; and appropriate remedies, typically for commercial gain, regarding one's name and likeness.

Legal provisions pertaining to publicity rights

Although the Indian judiciary has repeatedly acknowledged publicity rights, no current statute specifically mentions them. On the other hand, infringement of intellectual property, unfair trade practices, and passing off may all be considered when a publicity right is violated.

However, India's publicity rights are derived from a number of statutes⁴:

² <https://repository.nls.ac.in/nlsir>

³ <https://blog.iplayers.in/publicity-rights-fall-within-ambit-ipr/>

⁴ <https://www.sconline.com/blog/post/2022/01/24/a-cause-celebre-publicity-rights-in-india/>

The Trade Marks Act, 1999

According to Section 14 of the Act, the Trademark Registrar may require the applicant to provide the consent of the living person or the consent of the deceased person's legal heirs if the application for trademark registration suggests a relationship with any living person or with any person who passed away 20 years prior to the date of filing the application. If the Registrar receives no consent, the registration may be denied. Therefore, in accordance with the Trade Marks Act, 1999, a person is not permitted to register a trademark connected to a celebrity— alive or deceased—unless the applicant receives consent from the celebrity or, if applicable, the celebrity's legal heir. Furthermore, the Act may restrict the use of a celebrity's name as part of a domain name.

The well-known Indian cricket player claimed in "Gautam Gambhir vs. D.A.P & Co. & Anr."⁵ that his name should be protected by trademark law because it is being used as a tag line for the respondents' restaurant chain. The cricket player therefore claimed that his personality rights were being illegally violated and that the name was misleading the public about its association with the aforementioned chain of restaurants.

In rejecting the cricketer's request for an injunction, the Delhi High Court determined that there was insufficient evidence to substantiate the plaintiff's claim because the defendant's restaurant and social media pages did not display any images of the cricketer to the public, including posters, pictures, or bios. To link his "own" identity to the restaurant, the defendant has, in fact, uploaded his own photos. Therefore, the Court dismissed the suits and the applications, ruling that there was no commercialization of the cricketer's name or any loss of goodwill in his industry.

The Copyright Act, 1957

In order to prevent unauthorized use of the marketing rights and reputation of performers and authors, respectively, Sections 38 and 57 of the Copyright Act 1957, which relate to the rights of performers and authors, respectively, are enforceable. Moreover, the Act may provide protection for an individual's picture, image, painting, or other similar derivatives⁶.

⁵ <https://indiancaselaw.in/gautam-gambhir-v-d-a-p-and-co-and-ors/>

⁶ https://www.indiacode.nic.in/handle/123456789/1367?sam_handle=123456789/1362

Other characteristics, such as a person's signature, may be protected under this Act, even though copyright ownership over a photograph may be problematic because the photographer will own the copyright over the image they have taken.

The plaintiff in “ICC Development (International) Ltd. vs. Arvee Enterprises and Ors⁷” contended that they are the sole and exclusive owners of the commercial "identity" or "persona" of ICC Events and those they are the owners of all commercially significant ICC Cricket events' publicity rights. The defendants emphasized that the right to publicity protects not only the public values of living people but also the public values of inanimate objects that become well-known through hard work. They were falsely taking advantage of the plaintiff's "persona" and "identity" in order to allegedly make illegal gains.

While rejecting the plaintiff's argument, the Delhi High Court noted that imposing personality rights on a corporate would undermine the basic notion of "persona," even though all forms of appropriation of the property of legal entities are adequately protected by the laws, including Copyright Law.

The Emblems and Names (Prevention of Improper Use) Act 1950

This Act provided some protection against the unapproved use of the names of specific national figures and the institutions it designated for commercial purposes without official government authorization.

The Competition Act 2002

According to the provisions of this Act, any unauthorized use of a person's name or likeness that could lead a consumer to believe that the person is connected to a false or misleading product endorsement is prohibited⁸.

⁷ <https://indiankanoon.org/doc/358048/>

⁸ <https://www.cci.gov.in/legal-framework/act>

Position of Publicity Rights in the USA and UK

United States of America

Celebrities in the US have two choices when it comes to publicity rights: the state-specific legislation or the Lanham Act of 1946, a federal statute that sets the legal framework for trademarks in the nation. The Lanham Act protects consumers from fraud and deceit as well as trademark owners from giving the false impression that they are associated with or endorsing a product. A person may be subject to a civil action under the Lanham Act if they use any word, term, name, symbol, or device, or any combination of them, or if they make any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, with the intent to confuse, mislead, or deceive others about their relationship, affiliation, or association with them, or about the origin, sponsorship, or approval of their projects, services, or products. This implies that anyone attempting to deceive others by falsely claiming to be associated or affiliated with another individual will face civil litigation.

Individuals who are impacted by this misuse have the option to report either a false endorsement or an unregistered mark infringement. Celebrities can use the Lanham Act to protect their publicity rights even though its main goal is to protect consumers. This is because of the Act's expansive interpretation. As a result, a plaintiff was able to prove in a particular false endorsement case that the defendants had imitated his voice in a song parodying Tom Waits. The Lanham Act does not guarantee success in all cases in protecting publicity rights, despite the fact that some celebrities have been able to do so. This is due to the fact that consumer reaction and confusion, as well as the potential for challenges in gaining celebrity followers as customers, are used as metrics for violations and infringement⁹.

Publicity rights were a subset of privacy rights under common law practice. In the first case to distinguish between publicity and privacy rights, "Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.", the courts ruled that athletes had a right to "the publicity value of their photographs," or, to put it another way, a right "to grant the exclusive privilege of publishing their pictures." The Lanham Act claims are primarily measured by preventing consumer confusion, whereas State Right of

⁹ <https://www.mondaq.com/india/trademark/905188/publicity-rights-and-its-scope-in-intellectual-property-laws>

Publicity claims are measured by "protecting an individual's right to remuneration and preventing misappropriation and unjust enrichment from the theft of good will," and are therefore typically easier to prove. State-by-state variations exist in the extent of the State Right of Publicity claims, but the fundamental components remain largely unchanged. In order to successfully assert a common law right of publicity claim, a plaintiff must demonstrate four things: (1) the defendant used the plaintiff's identity; (2) the defendant used the plaintiff's name or likeness for commercial or other purposes; (3) there was no consent obtained; and (4) there was an injury as a result.

Therefore, celebrities are typically able to control the commercial use of their identities due to the liberal interpretation of the Lanham Act by the courts and states' willingness to address the right directly, even though the United States' approach to the right of publicity is not the most ideal one.

United Kingdom

Similar to India, the UK does not recognize any particular rights related to publicity, so celebrities must choose between various legal avenues in order to protect themselves. There is no specific provision to protect these rights in the Trade Marks Act of 1994. Celebrities lose all legal protection if their names are not registered as trademarks because the Act only protects registered trademarks. "The more famous the celebrities are, the less distinctiveness their names possess," so even if the celebrities try to register their names as trademarks, they are met with disappointment. The court in *Re: Elvis Presley Trademarks, Inc* rejected the application to register the name "Elvis Presley" on the grounds that it was too well-known to be used as a distinctive feature to distinguish products. When someone's likeness appears in a picture or motion picture, they may be able to protect it under the Copyrights, Designs and Patent Act of 1988 (also known as the CDPA). This protection, though, is only available if the person "commissioned" the work. Furthermore, the law only forbids an infringer from copying all or a "substantial part" of the original work, even if the celebrity owns the copyright in the picture or movie. Because it becomes more difficult to demonstrate that an infringer has copied a significant portion of the original work, it becomes more difficult for the individual to assert his rights¹⁰.

¹⁰ <https://www.iplink-asia.com/>

Infringement of Publicity Rights

Under Indian law, infringement of the right to publicity is not defined in the absence of a specific statute. Unauthorized use of a celebrity's persona, image, or information, however, constitutes an infringement on that person's right to publicity and can be challenged as such. According to the terms and conditions of the license agreement, an infringement suit may be filed by the licensee, the licensor, or both of them in accordance with the provisions of the trademark and copyright laws. The right of publicity may be covered by the copyright and trademark legal defenses. For instance, if any information about a specific person is of public interest or concern, it may be published by the media¹¹.

Remedies against Infringement

The following remedies are available in the event of an infringement of the right to publicity.

1. Since this is a civil wrong, the owner may file a civil lawsuit for unjustified interference with the right. The right to privacy can also be enforced by bringing a tort action or filing a writ petition.
2. If the owner knows or has reasonable suspicion that an imputation will hurt the owner's reputation, they may bring a defamation lawsuit against anyone who makes or publishes an imputation about the owner of the right.
3. Since defamation is both a criminal and civil offense in India, the owner may file a civil or criminal lawsuit.
4. A third party that attempts to falsely associate its product with a celebrity by making unapproved claims that the celebrity is endorsing the product may also be subject to a passing-off action.

An injunction is granted by the court on satisfaction of the following 3 conditions:

1. a) that there exists a prima facie case in the plaintiff's favor;
2. b) that the balance of convenience is in the plaintiff's favor; and
3. c) that irreparable loss or harm will result to the plaintiff on refusal of the claimed injunction.

¹¹ <https://blog.ipleaders.in/publicity-rights-fall-within-ambit-ipr/>

In addition to an injunction, actual damages, damages to goodwill and reputation, and occasionally punitive damages are granted by Indian courts as compensation.

Conclusion

Since many celebrities are now aware of the concept, publicity rights are unique rights that will only receive greater attention in the years to come. The legislature needs to acknowledge the commercial and property rights component of the right to privacy, as acknowledged by the Indian judiciary, and create a statutory law to close the loophole. India can adopt these rights and follow the USA's relatively accommodating model to ensure that the right kind of legal protection is provided.

The thorough examination of the aforementioned paragraphs leads to the conclusion that, despite the Indian statutes' lack of a specific provision, the judiciary has viewed publicity rights as inherently belonging to the category of intellectual property rights. Therefore, a civil action for the protection of the publicity rights may be brought in the event that they are violated.

Nevertheless, Indian courts have yet to acknowledge and uphold the rights to publicity that exist beyond death. Furthermore, since there are currently no established precedents for the enforcement of publicity rights, legislation is absolutely essential given the statutory conditions surrounding them.

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