

Intellectual Property Rights vis à vis Celebrity Endorsements

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Abstract

Over time, the scope of Copyright law has broadened, resulting in the formation of fresh notions such as "Personality Rights." Individuals who have developed a "identifiable persona" in the eyes of the public are granted certain rights. Personality rights are divided into two categories: Right to Publicity and Right to Privacy. 'Famous Endorsements' are when such identifiable individuals utilize their celebrity status to promote a company's goods and services in order to attract more customers. This is the most popular type of marketing utilized by major corporations to boost sales and build goodwill. However, when celebrities support incorrect or misleading commercials, this avenue of transmitting important information to the public becomes dangerous. To address these concerns, the Customer Protection Act of 2019 included provisions holding celebrities advocating such items or services accountable for consumer injury. According to the law, celebrities must undertake "due diligence" on products before endorsing them in order to prevent deceptive marketing from being pushed. However, the question of whether or not celebrities who are not directly involved in production or manufacture can be held accountable for exploitation of their personality rights remains unanswered. This article tries to address the newly formed legal relationship between personality rights and consumer protection via celebrity endorsements.

Introduction

Intellectual Property Law has evolved in tandem with advances in art, technology, science, and other fields, progressing from purely political and social motive to creativity and innovation. The Agreement on Trade-Associated Aspects of Intellectual Property Rights (TRIPS) covers seven types of intellectual property rights, including copyright and related rights. Trademarks, including service marks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, and undisclosed information, including trade secrets; however, in recent

years, the domain of Intellectual Property Rights (IPR) has been expanded to include modern rights such as the "right to publicity," a corollary of the "right to privacy."

However, there is still no well-defined strategy to the adaptation of celebrity rights that can be universally acknowledged.¹

A person's personality is how he or she recognizes people and defines his or her place in society. Individuals build their own expectations of themselves in the eyes of others and the manner in which they are expected to behave in society by developing their personalities. Different well-known persons act as sources of inspiration for the public and, in some way or another, they assist society as a whole. With the passage of time, a sense of devotion develops toward well-known personalities, and in many cases, people worship them as if they were Gods. These personalities have enormous influence and impact on society, aiding in the creation of awareness in distinguishing between right and wrong aspects of life. "A person's popularity is an extension of his property," and "a person's corporation in society is an extension of his or her personality."² Celebrities' personalities are defined by the goodwill they have built up through time as a result of their hard work and expertise, which serves as their intangible property, which they are allowed to flaunt and profit from by affiliating with commercial markets such as advertising and entertainment shows.

With the growing relevance of celebrities in society, media, manufacturers, producers, and vendors have intensified their exploitation of their goodwill at a faster rate. The first instance of celebrity privacy invasion is by the media, which views everything about their personal lives as public property and a great source for increasing their channels Television Rating Point (TRP), whether through personal gossip or defamation, and then by others who misappropriate their celebrated image without their permission, resulting in economic loss.³

Coherence between Celebrity Rights and Intellectual Property Rights

¹ Shilpika Pandey, CELEBRITY RIGHTS PROTECTION UNDER INTELLECTUAL PROPERTY RIGHTS REGIME: A CRITICAL ANALYSIS (2018), 2018 IJCRT | Volume 6, Issue 1 January 2018 p.1602

² Ibid.

³ Shilpika Pandey, CELEBRITY RIGHTS PROTECTION UNDER INTELLECTUAL PROPERTY RIGHTS REGIME: A CRITICAL ANALYSIS (2018), 2018 IJCRT | Volume 6, Issue 1 January 2018 p.1603-1604

Celebrity rights are a type of personal and intangible property. The protection of a famous person's personality traits and the goodwill associated with them is intangible in nature. Continuous hard work, innovation, skill, and time are used to build public goodwill or reputation. Once a person's persona has been established by his or her brain and accepted by society, it becomes his personal property, which he must defend and flaunt. This intellectually developed property is well-suited to IPR protection. The ideas of trade mark and copyright must be understood for the greatest understanding of the suitability of protecting celebrity rights under IPR.⁴

1. Trade Marks

The law of trade marks and celebrity publicity rights have a lot in common, such as ensuring that the owner of the right maintains control over the role and meaning of their identity. The purpose of trade mark legislation is to regulate trade mark use that causes confusion or ambiguity about the affiliation or source of the good. The right to celebrity offers a comparable level of protection, since it aims to avoid situations in which a celebrity is fraudulently or mistakenly connected with a product that they have not given their agreement to support. These rights are important since they not only safeguard the celebrity's interests, but they also aid to raise public awareness. Despite the fact that all of these similarities exist, the use of a trade mark as the primary means of protecting celebrity rights is not warranted due to significant differences in the idea and concept of protection between a trade mark and a celebrity right. In terms of the interests that must be protected, the purposes of trade mark and publicity rights protection are vastly different. Professor McCarthy also claims that “despite their obvious parallels, rights of publicity are only equivalent to trade marks.”⁵ He distinguishes four primary areas of distinctions between publicity rights and trade marks: Identification, prior exploitation, infringement tests, and transfer rules are the four steps. “While the economic worth of a human person is central to the right of publicity, the use of a phrase or symbol in such a way that it identifies and differentiates a commercial source is central to the law of trade marks.”⁶ The goal of service mark protection is to prevent uncertainty about the

⁴ Lukose, Lisa & Pandey, Shilpika. (2019). PROTECTION OF CELEBRITY RIGHTS A COMPARATIVE ANALYSIS OF RELEVANT IPR LAWS IN US, UK AND INDIA. *The Journal of Intellectual Property*. 14. 10.34122/jip.2019.06.14.2.87.

⁵ McCarthy, J. Thomas, *Rights of Publicity and Privacy*, 2nd edn., Clark Boardman Callaghan, 1999, § 5:6.

⁶ *Ibid*

source of service, whereas the goal of publicity right protection is to prevent commercial misappropriation.⁷

The likelihood of confusion test is used to determine trade mark infringement, however the test for determining publicity right infringement is based on 'identifiability.' "The 'identifiability' test of the right of publicity is not the same as the trade mark law's 'likelihood of confusion' test."⁸

2. Copyright

Copyright law and publicity rights bear a striking connection, with copyright "impacting on legal rights that center on the right of the individual to regulate the use of his or her identity or performance qualities in marketing and advertising media."⁹

Copyrightable qualities such as name, likeness, and voice are included in the persona protected by the right of publicity. Celebrities' claims for copyright protection can be portrayed as infringement of their identity. Protection against misappropriation of the persona is governed by the same laws that govern copyright law. While copyright protection "encourages intellectual and artistic creation by assuring the creator that the fruits of his labour will benefit only him or his heirs... the rationale behind the right of publicity is that a person who has struggled to create a 'persona' should be entitled to the exclusive benefits of that effort."¹⁰ The development of these personalities benefits society. The contrasts in the policy goals of the two rights are one of the most significant problems with arguing for parallel protection of the right of publicity inside copyright laws. The issue over whether any celebrity's misappropriation claims should be covered by copyright law revolves around whether the "work" in the right of publicity, the persona, is protected.¹¹ Copyright in a photo, for example, can protect against "any authorised use" of the shot's likeness... The challenge

⁷ Heneghan, Patrick J. & Wamsley, Herbert D., "The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen", Loyola of Los Angeles Entertainment Law Review, Vo.2 No.1(1982), p.127

⁸ Ibid

⁹ Trade Marks Act, 1994, s.154

¹⁰ Bvers, David C., "CoDvriecht to Life: Toward Copyright Protection for Name and Likeness", Cal. St. B. J., Vol.56(1981), p.52.

¹¹ Downing v. Abercrombie & Fitch Co., (2001). 265 F.3d 994 Clothing company used surfers' photos in an advertisement, and when the surfers sued for infringement of publicity rights, the court held that "the subject matter of Appellants' statutory and common law right of publicity claims is their names and likenesses. A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C. §102." Similarly, McCarthy argues that the persona is not fixed in the manner required at least under the U.S. Copyright Act.

therefore becomes establishing exactly what is the 'subject' of the copyright sought."¹² No matter how much cosmetic surgery has been done, one is not the "author" of one's face. This 'work' was either 'authored' by God, fate, or our parents' genes.¹³ These are some of the reasons why celebrity rights are best protected under the trade mark and copyright protection regimes. However, celebrity rights, as a combination of proprietary and dignitary interests, necessitate particular law that takes a dual approach to protection, with a focus on intellectual property rights to safeguard commercial rights of personality.¹⁴

Personal Rights of Celebrities per se Endorsements

As intellectual property rights have evolved, a new set of rights called as Personality Rights has emerged. These rights are the outcome of an individual's creation of a certain image in society, which serves as a source of personal identity. As a result of applying the Hegelian Concept of Property, which states that an individual's property is an extension of his own personality, the need for such rights to be protected arises when an individual uses his personality to contribute to society, and society commercially exploits such unique identities. The Right to Privacy and the Right to Publicity are two aspects of protection that are addressed by the judicial interpretation of personality rights.

Celebrity Endorsements are based on the concept of Merchandising Rights, which are a subset of the broader concept of Personality Rights known as the "Right to Publicity." After the Delhi High Court's decision in ICC Development (International) Ltd. v Arvee Enterprises and Ors., the notion of Right to Publicity was well appreciated.¹⁵ The Court concluded that "the right of publicity has evolved from the right of privacy and can inhere only in an individual or any indicators of an individual's personality such as his name, personality attribute, signature, voice, or any other

¹² Berne Convention for the Protection of Literary and Artistic Works, Article 6bis Sept. 9, 1886, 828 U.N.T.S. 221 (last revised at Paris, July 24, 1971). While TRIPS is the dominant intellectual property treaty in force today, the Berne Convention is still the source for international protection of moral rights since, after "strenuous objection" by the United States, the moral rights provisions of Berne were not incorporated into the TRIPS Agreement. Paul Goldstein, "International Copyright: Principles, Law And Practice" 55 (2001)

¹³ Ibid.

¹⁴ Lukose, Lisa & Pandey, Shilpika. (2019). PROTECTION OF CELEBRITY RIGHTS A COMPARATIVE ANALYSIS OF RELEVANT IPR LAWS IN US, UK AND INDIA. The Journal of Intellectual Property. 14. 10.34122/jip.2019.06.14.2.87

¹⁵ ICC Development (International) Ltd. v Arvee Enterprises and Ors., 2003 (26) PTC 245 (Del).

indicia of an individual's personality." An individual may have a right of notoriety as a result of his involvement in a particular event, sport, or film." When the identity of celebrities or other identifiable individuals is exploited to market goods and services, merchandising rights exist, implying a commercial relationship between the individual and the products being supported. The main benefit of such a relationship is that it leads to increased sales since customers are more likely to recognize or identify products promoted by celebrities they admire, and they are also more inclined to relate to them because they believe the celebrity uses them. Anushka Sharma promoting Nivea creams or Alia Bhatt supporting Garnier beauty goods, for example, allows people to connect with their favorite celebrities when purchasing these items, resulting in increased sales and brand recognition for the brands associated with these famous celebrities.¹⁶

While the Right to Publicity refers to an individual's ability to control the economic exploitation of his or her identify and identifiable personality, the Right to Privacy refers to the ability to prevent others from doing so in a damaging way that could hurt the individual's personality. The need to protect renowned people's rights arises when their identities are used for commercial gain without their consent, as the court found in the case of Titan Industries v M/s Ramkumar Jewellers,¹⁷ where the court affirmed that "When a renowned person's identity is exploited in advertising without their consent, the objection is not that no one should sell their identity, but that the famous person should have the right to decide when, when, and how their identity is utilized. The right to publicity is the right to govern the commercial use of one's identity." These rights apply not just during the individual's lifetime, but also after his or her death. Unauthorized exploitation of a celebrity's identity to market one's own goods or services would be considered not only misappropriation of intellectual property, but also passing off and unfair trade conduct. These persons have only achieved such an identifiable identity as a result of their hard work and expertise, and they are thus entitled to have their rights protected from unfair economic exploitation. The use of this platform to ensure that consumers purchasing the items and services promoted by celebrities are not tricked or misled is another legal factor that must be considered in regard to celebrity endorsements. The

¹⁶ Diksha Arora, Celebrity Endorsements – The Interplay between Intellectual Property Law and The Consumer Protection Act (2019), *Journal of Intellectual Property Rights* Vol 25, November 2020, pp 173-179

¹⁷ Titan Industries v M/s Ramkumar Jewellers, 2012 (50) PTC 486 (Del)

right to publicity and endorsement is accompanied by a responsibility to the public to avoid misleading or fraudulent advertising.¹⁸

Protection and Defense of Celebrity Rights in India

In India, the jurisprudence of publicity and image rights is still in its infancy. In comparison to the rest of the world, India has lagged behind in terms of appreciating the value of publicity and image rights. Though Article 21 of the Indian Constitution, which protects an individual's right to life and liberty, also includes the protection of an individual's publicity rights as part of privacy rights. Although the right to privacy is enshrined in article 21 of the Indian Constitution and has been interpreted by the courts in landmark cases such as *Kharak Singh v. State of U.P.*,¹⁹ *Rajagopal v. State of T.N.*,²⁰ and *Justice K. S. Puttuswamy (Retd.) v. Union of India*,²¹ such protection in terms of protecting celebrity personality traits has proven to be insufficient as enforcement of fundamental rights has proven to be ineffective. Celebrity rights are a type of personal and intangible property. It's a blend of celebrity's dignitary and proprietary interests, and the constitutional right only protects the dignitary side. Even though it falls under the broad range of Article 21 of the Indian Constitution, the right to publicity is not absolute. Under Article 19 of the Constitution, reasonable restrictions might be placed on such a right to protect the public interest. The right to obtain information and spread it has been deemed to be under the umbrella of "freedom of speech and expression" under article 19(1)(a).²²

The provisions of trade mark regulations provide little protection to a celebrity's image. There is no particular provision in the Trade Marks Act of 1999 that protects image and publicity rights. However, the definition of "mark" in section 2(m) of the Act does include names. Celebrities rely on passing off as a common law remedy to preserve their image and publicity rights. In order to obtain a remedy from a passing off case, proof of the person's reputation, misrepresentation, and thus irreparable harm to the individual in connection with the goods or services is required. The Indian Trade Mark Act, 1999, provides for the protection of a particular attribute of personality,

¹⁸ Supra 16

¹⁹ AIR 1963 SC1295: (1964) 1 SCR 332

²⁰ (1994) SCC 632

²¹ Writ Petition (Civil) No 494 of 2012

²² Jain, M. P., *Indian Constitutional Law*, Fifth edition, Wadhwa and Co., 2008, p.988.

namely names, under section 14, however it does not address the rules for assigning and approving such rights. The trade mark legislation provides limited insurance with no clarity of concept, making it more difficult for judges to apply the law. Furthermore, while the Copyright Act of 1957 recognizes actors as performers and provides them with performer's rights, it fails to recognize acting in cinematographic films as a subject matter of performer's rights protection because it only refers to the actors' live performances. Though performers' rights protect performers' economic, moral, and intangible rights, they are limited to the specific performance made by the performer and not beyond that. As a result, even if sportspeople fall under the definition of performer, their intangible rights protection will be limited to distortion, mutilation, or modification of their performance and not beyond that.²³

Strife betwixt Interests of Consumers & Intellectual Property Rights of Celebrities

India has the largest amount of celebrity endorsements in Asia. Consumers are captivated and influenced by advertisements featuring celebrities, which is also true. This raises the stakes for successful implementation of the regulations governing false endorsement commercials.²⁴ The Consumer Protection Act of 2019's new measures were written with the same aim in mind. While it is well recognized that celebrities endorsing items might lead to consumers purchasing products they don't need or that aren't suited for them, it is equally crucial to remember that disseminating important information to consumers about these products and services is a necessity of the hour. The Consumer Protection Act of 2019 protects consumers by increasing the liability of manufacturers and endorsers of various products and services, ensuring stricter compliance with the law's other requirements and standards. We must comprehend the ramifications of such rigorous restrictions, since the many obligations and fines placed on endorsers and manufacturers under the 2019 Act have already been considered. The increased pressure on celebrities endorsing products and services to conduct due diligence prior to endorsement and verify the veracity of the claims not only aims to ensure greater accountability on the part of endorsers and manufacturers

²³ Supra 14

²⁴ Chinmoy Pradeep Sharma, Law governing Endorsements: The Global Perspective and its Emergence in India, Bar & Bench, 8 December 2019, <https://www.barandbench.com/columns/law-governing-endorsements-the-globalperspective-and-its-emergence-in-india> (accessed on 1 September 2021)

for the advertisements they publish, but it also aims to ensure the consumer's right to be informed and right to safety²⁵ is furthered.

A coin, on the other hand, always has two sides. Aside from the obvious benefits that the new provisions of the Consumer Protection Act of 2019 have brought about, there are certain issues that they pose to the rights of celebrities who endorse these products and services. At the end of the day, endorsements are a form of commercial exploitation of their Right to Publicity, which arises from their Personality Rights. For most Indian athletes and actors, endorsing a product is a big source of income. They're also a source of money for firms whose sales rise as a result of a well-known celebrity promoting their goods. While it is critical that consumer interests be prioritized while marketing and selling a product, it is also critical to ensure that the endorser's rights are not violated in the process. There have been cases where celebrities' identities have been exploited to promote things without their knowledge or agreement. This was recently seen in the Pan Bahar-Pierce Brosnan debacle, in which Brosnan claimed that he was "grossly misled" by the firm into endorsing a product with cancer-causing adverse effects. This case not only concerned a breach of contract due to misrepresentation, but it also appeared to involve the abuse of publicity rights. In cases like these, celebrities being held accountable for things they promoted that were advertised through deception could result in significant financial and social consequences for the celebrity.²⁶

The necessity of protecting publicity rights has been repeatedly emphasized by courts. In the matter of D.M Entertainment Pvt. Ltd. v Baby Gift House & Ors.,²⁷ the Honorable Delhi High Court decided that the Right to Publicity affects an individual's persona. The case concerned the misappropriation of Daler Mehndi's trademark and right to publicity. As a result, the Court decided that infringement of the right to publicity might also be construed as a passing-off action. The importance of an individual's right to publicity was also interpreted in a recent Supreme Court decision in the case of Justice KS Puttuswamy (Retd.) v Union of India,²⁸ in which a 9-Judge Bench unanimously held Right to Privacy to be a Fundamental Right under Article 21 of the

²⁵ The Consumer Protection Act, 2019, Section 2(9)

²⁶ Supra 16

²⁷ D.M Entertainment Pvt. Ltd. v Baby Gift House & Ors, MANU/DE/2043/2010

²⁸ Justice KS Puttuswamy (Retd.) v Union of India AIR 2017 SC 4161

Constitution of India, 1950,²⁹ and interpreted "publicity" to be a "inviolable personality of an individual." As a result, a celebrity who has achieved fame as a result of his or her achievements in a particular sector has the right to properly utilize his or her right to publicity. With that said, it is also known that such commercial exploitation opportunities arise as a result of society's widespread appreciation, or "fans," who should not be misled or duped into purchasing items or services based on fraudulent or misleading ads. This conflict between the right to exploit one's commercial identity through the Right to Publicity and protecting the interests of consumers has been addressed to some extent by the provisions of the Consumer Protection Act, 2019, but there is still a great deal of ambiguity in their interpretation that has gone unaddressed.³⁰

Some of the other noteworthy cases supporting protection of Celebrity Rights in India:

Tata Tea Ltd. vs. Sourav Ganguly;³¹ Sourav Ganguly, who had just returned from England where he had scored magnificent centuries, was extremely disturbed when he learned that Tata Tea Ltd., where he worked as a manager, was promoting its 1 kilo tea packet by giving customers the opportunity to congratulate Sourav via a postcard included in each packet of tea. In a way, the corporation was attempting to increase the sale of its tea packets in the Indian market, where Sourav had established a significant following.

Shekar Kapoor and others vs. Phoolandevi³² - In this instance, Phoolan Devi protested, claiming that the respondent's film twisted the truth. She requested an injunction since she had stopped all of her previous illegal activities and begun a new, decent life. The court ruled that the matter should be thoroughly investigated, and the impact on an individual's private life as a result of the screening of such a film should be thoroughly evaluated before the picture is released. As a result, a celebrity's name and image can be protected as a constitutional right.

State of Tamil Nadu v. R.R. RajaGopal³³ - In this case, the Supreme Court recognized the right to privacy as a type of publicity. "The first feature of a person's privacy right must be considered to

²⁹ Constitution of India, 1950, Article 21 – "Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law"

³⁰ Diksha Arora, Celebrity Endorsements – The Interplay between Intellectual Property Law and The Consumer Protection Act (2019), Journal of Intellectual Property Rights Vol 25, November 2020, pp 173-179

³¹ CS no. 361 of 1997

³² 57 (1995) DLT 154, 1995 (32) DRJ 142

³³ JT 1994 (6) SC 514

have been breached when, for example, a person's name or likeness is used, without his consent, for commercial or non-advertising purposes, or for any other matter," the court writes.

Conclusion

From the preceding discussion, it is clear that a celebrity right is a unique type of right. On the one hand, it is the celebrity's property, which he can use in any way he wants, and the publicity rights are recognized as one's own property. In dealing with the modern issue of celebrity endorsements and merchandise, the Indian legal system is woefully unprepared. With such large sums relying on celebrity pictures, advertisers and market forces frequently discover ways to exploit celebrity images. Neither the current trademark legislation nor the copyright regime give comprehensive protection for the character's personality and image rights. Though the registered names of the characters may be sought to be protected under the laws specified to protect "well known marks," as indicated above, the entire process will entail numerous legal hurdles to overcome. The clause does not grant per se protection to such names; rather, protection will be granted only if the proprietor or user can demonstrate that the name is a well-known mark. Furthermore, the clause has no safeguards against the illegal exploitation of a character's or celebrity's image or other personality traits for the purpose of endorsement. Similarly, the Indian Copyright Act does not provide moral rights protection to celebrities because it excludes actors from the definition of authors. This situation emphasizes the need for India to acknowledge the right to publicity.