

Dead celebrity persona-Who owns it?

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Abstract: Now a days, the celebrities are exploiting internet medium to earn money from their personas which is famous amongst general public, as they feel their personas is protected under the right of publicity or personality. The right of publicity or personality refers to “the inherent right of every human being to control the commercial use of his or her identity.”¹ As there is no federally protected right of publicity, each state has created its own protections for this intellectual property right.

Use of a person’s persona for commercial gain in an unauthorized manner amounts to a violation of the publicity rights of the person. Any person must, therefore, take permission of a celebrity for using his persona for commercial gain. Such authorization for commercial use forms one of the primary revenue sources of most celebrities. By virtue of their capacity to influence the minds of the public, celebrities endorse commercial products for a fee and generate substantial revenues.

The history of the right of publicity predominantly took momentum in the twentieth century; the Court enjoined the unauthorized use of Thomas Edison's name and picture on a medicine and explained. The New Jersey Court clearly viewed Edison's persona as having tangible value, thereby making it a commodity which Edison owned and could exploit (or refrain from exploiting) as he deemed fit. As such, the unauthorized use of Edison's persona injured him by depriving him of the opportunity to market the commodity himself. Yet, it was not until almost 50 years after the Edison decision that the Second Circuit rendered its decision in *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*, when the term "publicity rights" actually was coined.

In the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the decision Circuit Court of Appeals for the Second Circuit of the United States was rendered in the year 1953, Haelan, a famous baseball player signed an exclusive baseball card contract with one company (Haelan) and then a rival company (Topps) printed cards with pictures of the same player. Thus, the true issue before the Court was whether Haelan, as the assignee, could bring a claim against Topps. The Court decided the issue in the affirmative, and in the process coined the term "right of publicity." However, beyond recognizing a right of publicity for an individual, what Haelan really did was create an alienable property right - a right that could be transferred by, at the least, an assignment.

Though in India, the absence of a statute makes it difficult to recognize and enforce personality rights. There is no statute or law that protects personality rights in India per se. However, judicial precedents developed over a period of time have to a great extent, supported the enforcement of Personality rights in India. Nevertheless, these days India also started recognizing these rights through many significant judgments.

Keywords: personality, persona, publicity right, famous, celebrities, dead, posthumous right, , likeness, image,

INTRODUCTION

The life of the dead is placed in the memory of the living - Marcus Tullius Cicero

The right of the personality is inherent in nature and is grown with the persona of human being as such; it is belong to each respective individual as human being, till he or she lived his life. The right of the personality represent as juridical instruments meant to ensure appropriate protection for his persona. The right of the personality concerns the protection of the human body and his personality as well as the inherent moral values or moral integrity being of the person².

The right of publicity, often called personality rights, is the right of an individual to control the commercial use of his or her name, image, persona, likeness, or other unequivocal aspects of one's identity, so the right of publicity refers to the right to prevent unauthorized commercial use of such person’s overall persona. Thus the publicity rights vest only with a celebrity, famous personality or public figures that are known in general public. Rather in other words, a person must be famous personality or recognized by the public in order to possess the right of publicity. The public must identify or associate an identity to a person to his persona, if such a linkage between persona and the person is not established than the right of publicity does not come into effect.

1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2011). see The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of Experience Hendrix v. HendrixLicensing.com by Aubrie Hicks

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² See RESPECT OWED TO THE DECEASED HUMAN BEING: ASPECTS OF ITS REGULATION IN THE NEW ROMANIAN CIVIL CODE SEVASTIAN CERCEL Faculty of Law and Administrative Sciences, University of Craiova, Romania

This is where the right of publicity comes into existence, as right of publicity or personality rights vested with a person to protect and claim ownership on the usage of his name or image and prevent others from making a profit leaching on his persona. It is generally considered a property right as opposed to a personal right, and as such, the validity of the right of publicity can survive the death of the individual with variations like other forms of property rights these rights should continue posthumous, and the heirs must have a right to prevent such unauthorized usage. This is where the bone of contention lies.

The right of publicity accrues once a person achieves a celebrity status, then their life is constantly under public domain as such they lose right of privacy to certain extent. In the present scenario, when the internet reaching every nook and corner and spreading information on real-time basis so through internet has made celebrity, famous personality or public figures as a product for mass consumption is hurting a privacy of such individuals. The spread of digital media and communications has made it easy for individuals or businesses to take an image or video of a person and use it for their own purposes, this can often mean that a person may find that his/her name or his persona is being used, often for commercial purposes, without his / her consent or authorization. In recent years, such persons have found relief under doctrine of "right of publicity" for infringement or misappropriation.

Now a days, the celebrities are exploiting internet medium to earn money from their personas which is famous amongst general public, as they feel their personas is protected under the right of publicity or personality. The right of publicity or personality refers to "the inherent right of every human being to control the commercial use of his or her identity."³ As there is no federally protected right of publicity, each state has created its own protections for this intellectual property right.

Use of a person's persona for commercial gain in an unauthorized manner amounts to a violation of the publicity rights of the person. Any person must, therefore, take permission of a celebrity for using his persona for commercial gain. Such authorization for commercial use forms one of the primary revenue sources of most celebrities. By virtue of their capacity to influence the minds of the public, celebrities endorse commercial products for a fee and generate substantial revenues.

HISTORY OF THE RIGHT OF PUBLICITY

In 18th century too the famous individuals had laid a claim to a property right in respect of their identities. In 1899, the widow of Colonel John Atkinson, described as a "well-known lawyer and politician," sued to prevent the marketing of a "John Atkinson Cigar," bearing her late husband's likeness on its label. The Michigan Supreme Court, which disapproved of the defendant's conduct, declined to recognize an enforceable right. In another well known case, the Fifth Circuit Court of Appeals dismissed the case of a well-known professional football player David O'Brien plaintiff⁵, whose photograph was being utilized to endorse the sale of beer. Even though O'Brien was morally opposed to alcohol, the Court determined that he had valid cause of action.

The history of the right of publicity predominantly took momentum in the twentieth century; the Court enjoined the unauthorized use of Thomas Edison's name and picture on a medicine and explained⁶. The New Jersey Court clearly viewed Edison's persona as having tangible value, thereby making it a commodity which Edison owned and could exploit (or refrain from exploiting) as he deemed fit. As such, the unauthorized use of Edison's persona injured him by depriving him of the opportunity to market the commodity himself. Yet, it was not until almost 50 years after the Edison decision that the Second Circuit rendered its decision in *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*, when the term "publicity rights" actually was coined.

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Much Prior to the Haelan decision, the boundaries of an individual's publicity right was not defined. Rather it was widely accepted as subsidiary to a right of privacy, which protected the individuals from the third person unauthorized use of their names or images for commercial purposes⁸, if they were public figures. However, this was right solely to bring an action under tort law but not as a property right, As such, it was not at all clear that individual publicity rights could be alienated or enforced by a third party. Further this right was considered as the right of privacy was derived from the common law in some jurisdiction.¹ The judge Jerome Frank

3 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2011). see *The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of Experience Hendrix v. HendrixLicensing.com* by Aubrie Hicks

4 *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (Mich. 1899).

5 *O'Brien v. Pabst Sales, Co.*, 124 F.2d 167 (5th Cir. 1941)

6 *Edison v. Edison Polyform Mfg.*, 67 A. 392 (N.J. Ch. 1907)

7 202 F.2d 866 (2d Cir. 1953), *cert denied*, 346 U.S. 816 (1953).

8 The common law right of privacy is usually traced to the famous 1890 law review article written by Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) and to a series of judicial decisions and statutes implementing its proposals see. *BASEBALL CARDS AND THE BIRTH OF THE RIGHT OF PUBLICITY: THE CURIOUS CASE OF HAELAN LABORATORIES V. TOPPS CHEWING GUM* J. GORDON HYLTON

in his majority opinion in *Haelan* case moved opined beyond the tort analysis and found that individual major league baseball players have also possessed a property rights in their own images. More importantly, in Judge Frank's view this right could be transferred to a third party, who then had the same right as the individual himself to enforce it against competing, but unauthorized, users.

The right of publicity has been firstly defined by the American courts as an inherent right of every human being to control the commercial use of his or her identity. The leading Supreme Court decision in this area is *Zacchini v. Scripps-Howard Broadcasting Co.*⁹, This case concerned a television news station that taped and rebroadcast an entire 15 second "human cannonball" act performed by Zacchini. Although the Court's holding did not turn on the constitutionality of the right of publicity, the court treated the cause of action as viable and used the term "right of publicity" several times throughout the opinion. This treatment by the Supreme Court led other courts to begin to recognize the common law right of publicity. Under right of publicity doctrines, celebrities can bring an unfair competition claim against any individual who infringes this important intellectual property right.¹⁰

People magazine, instead, dropped \$14 million dollars for rights to the first photos of celebrities Angelina Jolie's and Brad Pitt's newborn twins, Vivienne and Knox.¹¹ This figure is hardly an outlier. Actresses,¹² musicians, models,¹³ and sports figures¹⁴ have all pocketed huge sums of money by auctioning the rights to publish the first photos of their infants, along with a story about the growing family, often approved by the parents before publication. Magazines are willing to pay the exorbitant amounts because, in theory, the price is offset by the massive sales of the issue of the magazine featuring the exclusive baby photographs plastered on the cover.

The vast number of newspapers and magazines that publish about the lives of celebrities would suffice to substantiate the relevance of personality rights. With the public having a voracious appetite for celebrity gossip and scandal, even a minor incident involving a celebrity can be blown out of proportion causing embarrassment and humiliation to the celebrity and any other party involved.

In addition to this, in order to build a popular fan base, images of celebrities are often adorned on merchandise such as T-Shirts, mugs, bags etc. When a celebrity chooses to endorse any particular good or service, it is perceived to reflect his/her own personal values. Some time unscrupulous people attempt to encash and make a quick buck by unauthorizedly using and commercializing of the celebrity's image. As such due to negative publicity and misuse of a celebrity's statuses make for the recognition of an individual's personality rights.

WHAT IS THE RIGHT OF PUBLICITY?

The right of publicity is simply the right of every person to control the commercial use of his or her identity. It refers that it is illegal under the right of publicity to use, without a license, the identity of a real person to attract attention to an advertisement. The right of publicity is the right of every person to control the commercial use of his or her identity. The right of publicity cannot be used to prevent someone's name or picture in news reporting. Further it cannot be used to prevent use of identity in an unauthorized biography. In addition, it cannot prevent use of identity in an entertainment parody; simply it can use the right of publicity either to prevent or to license for a fee the use of his name to help sell some sports equipment. However, he cannot use the right of publicity to stop a writer from doing a biography of his life in print or a partially fictionalized story of his life on a television special. It is basically a right to exploit his identity through purely advertising and other commercial uses.

TYPES OF PERSONALITY RIGHTS

The personality rights are generally considered to consist of two types of rights: the right of publicity, or to keep one's image and persona from being commercially exploited without permission or contractual compensation, which is similar to the use of a trademark; and the right to privacy, or the right to be left alone and not have one's personality represented publicly without permission. In common law jurisdictions, publicity rights fall into the realm of the tort of passing off. United States jurisprudence has substantially extended this right.

IS THERE RIGHT EXISTS FOR A DECEASED INDIVIDUAL IN USA

⁹ 433 U.S. 562 (1977).

¹⁰ J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2011). Id. § 1:3; see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).

¹¹ People received the U.S. rights to the photographs and accompanying story, while U.K. magazine Hello! received the rights to the photos in the U.K.; the companies split the \$14 million cost. Associated Press, *Jolie-Pitt Baby Pics Fetch \$14 Million*, MSNBC ONLINE, Aug. 1, 2008, <http://www.msnbc.msn.com/id/25967334>. The couple donated the money they received from the sale to charity.

¹² See Marcus Baram & Sheila Marikar, *Are Celebrity Baby Photos Really Worth Millions?*, ABC NEWS, July 16, 2008, <http://abcnews.go.com/entertainment/story?id=5378829&page=1>

¹³ Former Playboy model, Kendra Wilkinson, posed with her new son on the cover of Ok! magazine. *Introducing Kendra's Baby Boy*, OK!, Dec. 17, 2009, at cover page.

¹⁴ with NFL star Tom Brady for \$100,000. See *The Inside Track, Bouncing Baby Brady Graces Cover of OK Magazine*, BOSTON HERALD, Sept. 26, 2007, at 19, available at http://bostonherald.com.nyud.net/track/inside_track/view.bg?articleid=1034114&cache_interval=14121.

The majority of states in the U.S. recognize the right of publicity that extends the right to deceased individuals too. However, these so-called “posthumous” rights are usually limited in duration or subject to some requirements for acquiring, maintaining or enforcing the rights. As with regard to enforcement of right till what duration, most states start the clock at the time of the individual’s death, and stop the clock 20 to 100 years later.

The companies may desire to exploit a deceased individual’s personas for commercial purposes, such as in an advertising campaign, on a commemorative product, or in a social media posts. But such companies also carefully assess of any liability that may be may come at later date by associating without the permission of the individual’s estate.

More or less all courts follow the rule that whether or not a posthumous right of publicity exists is a matter of the law of the state in which the deceased individual was domiciled at the time of his /her death. Thus, under this majority rule, companies would be safe from right of publicity claims when the individual’s state either does not recognize a posthumous right of publicity, or the right of publicity has already ended based on the individual’s date of death. There is another famous case related, the estate of Marilyn Monroe could not obtain relief for a right of publicity violation in California, since she was found to have been domiciled in New York at the time of her death, which did not recognize a posthumous right. In a similar case, the estate of the late Diana, Princess of Wales, was found by a court not to have an enforceable posthumous publicity right to assert in California, since she was domiciled in the UK at the time of her death, which also did not recognize such a right.

Whereas in USA the states are consistent in protecting the rights of living individuals, the level of protection for deceased celebrities varies among the states.¹⁵ Some states allow the right to extend beyond death, while others refuse to recognize a posthumous right of publicity.¹⁶ Even some states that recognize a posthumous right of publicity, but the right is protected is not in uniform manner, some states are providing statutory protections and other states are providing only common law protections. Despite of having so many inconsistencies in approach by the states, over the last few years, the issue having continuous right to publicity even after death has been the subject of matter of many litigation, especially in light of the fact that many celebrities continue to earn vast amounts of money even after death.¹⁷ The most notable cases involve well-known celebrities such as Marilyn Monroe, Elvis Presley, and Jimi Hendrix.¹⁸ In each case, the court refused to extend the right of publicity past death, denying intellectual property protections to each celebrity’s estate.

In the another notable case, the litigation involving Jimi Hendrix’s personality rights led to the passage of the Washington Personality Rights Act (WPRA), which extended the existing personality rights even protected after death. As such the Washington State became the foremost state having statutory personality rights protection for deceased individuals. The federal district court in the state of Washington held that the Washington statute was unconstitutional, to the extent that it altered the normal rule that the law of the state of domicile at the time of death governed whether the posthumous right was recognized.¹⁹ In that particular case, the estate of deceased rock legend Jimi Hendrix (who was residing in New York) renewed a previously-asserted right of publicity claim with respect to an unauthorized use in Washington, after the statute had been amended to recognize a posthumous right even, when a deceased individual domiciled elsewhere. After the district court held aspects of the Washington right of publicity law unconstitutional, the estate appealed to the Ninth Circuit. Just this year, the Ninth Circuit reversed the district court’s ruling that the statute was unconstitutional, although it stated that its holding applied to the “limited controversy” before it, and it “need not resolve” the issue of “Washington’s approach to post-mortem personality rights[, which] raises difficult questions regarding whether another state must recognize the broad personality rights that Washington provides.”

Most recently, this issue has arose after the 2016 passing of Prince in Minnesota²⁰ Soon after his death, merchandise with unlicensed use of Prince’s persona was readily available for purchase²¹ In response, the Minnesota State Legislature reacted with the PRINCE Act protecting Prince’s personality rights, though the bill was retracted after being criticized for entrenching on the First Amendment and overbroad control of personality rights that would actually benefit professional sports entities looking for more control over publicity rights of athletes.²²



¹⁵ John W. Branch, David H. Green & Karl A. Hefter, No Respect for the Dead: Protecting Deceased Celebrity Personality Rights, 76 PAT. TRADEMARK & COPYRIGHT J. 678 (2008); see also *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 326 nn.12–14 (6th Cir. 2001) (noting that sixteen states recognize a postmortem right of publicity under statute or common law, while two states explicitly refuse to recognize a postmortem right of publicity). See 276 Seattle University Law Review [Vol. 36:275

¹⁶ See *Herman Miller, Inc.*, 270 F.3d at 326 nn.12–14. See *Ibid*

¹⁷ See Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 545 (2008) (“According to the annual list published by Forbes.com, the thirteen ‘Top Earning Dead Celebrities’ grossed a combined total of \$232 million in twelve months ending October, 2007. The Forbes list is topped by the estate of Elvis Presley, which generated \$49 million, and includes familiar names like Albert Einstein and John Lennon, as well as relative newcomers, such as the rapper, Tupac Shakur, and the ‘Godfather of Soul,’ James Brown. According to industry estimates, ‘after Mr. Presley, Ms. Monroe and James Dean are the most valuable dead-celebrity brands.’

¹⁸ *g.*, *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *Experience Hendrix, L.L.C. v. Elec. Hendrix, L.L.C.*, No. C07-0338 TSZ, 2008 WL 3243896 (W.D. Wash. Aug. 7, 2008); *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

¹⁹ *Experience Hendrix, LLC v. HendrixLicensing.com, Ltd.*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011)

²⁰ Oliver Herzfeld, *Prince’s Post-Mortem Publicity Rights*, Forbes (May 16, 2016), <http://www.forbes.com/sites/oliverherzfeld/2016/05/16/princes-post-morte...>

²¹ Kevin Burbach, *Prince death sparks Minnesota bill to clarify artist rights*, AP (May 10, 2016), <http://bigstory.ap.org/article/4d492e7b39054aaa8be26efeb845db/prince-d...>

²² Bill Donahue, *‘Prince Law’ Raises Free-Speech Red Flags, Critics Say*, Law360 (May 11, 2016), <http://www.law360.com/articles/794846/prince-law-raises-free-speech-red-...> Michael G. Bennett, *Why We Need To Stop The PRINCE Act*, Huffington Post (May 16, 2016), <http://www.huffingtonpost.com/michael-g-bennett/why-we-need-to-stop-the-...>

POSITION OF PERSONALITY RIGHTS IN UK:

The British courts, however, have always been vary about creating monopoly rights in names, likenesses or popularity and still not very much accepted within the UK. In the absence of personality or publicity rights, celebrities are thus forced to try and seek protection of the business value of their personality by other means, whether under copyright law, trade mark law, or by pushing the boundaries in the tort of passing-off. As the area of personality rights is raises many questions in comparison the United States has decades of experience with regard to a personality rights.

As early as in du *Boulay v du Boulay* a court stated that the use of others name is a grievance for which English law provides no redress. Actually it has never thought towards creating rights in a name per se as well as the protection for other personality features such as likeness, voice, distinctive clothes, etc. or a more general right of publicity has constantly been rejected: first in 1931 in *Tolley v Fry*²³, then in 1948 in *McCulloch v May*. The difficulties with the common field of activity hurdle began as long ago as 1947. *McCulloch v Lewis*²⁴ involved a popular children's radio broadcaster, known as Uncle Mac. The defendant began selling 'Uncle Mac's puffed Wheat' without the permission of the BBC, Uncle Mac's employer at the time. Not only did the cereal use the name 'Uncle Mac' it was also designed in such a way to associate the cereal with the celebrity. However, despite such close connection, the court found for the defendant. At the time the court were unwilling to accept that the public were aware of merchandising activities. Therefore, as the claimant was a presenter and not a cereal manufacturer, there could be no passing off claim.

In the past the courts have been rigid with the need for a common field of activity, causing many passing off claims to fail. As it is only covered by the common law, the case law has developed on a case by case basis, becoming increasingly strict as the judiciary appears to accept the possibility of commercial success.

The common law approach was subsequently confirmed and even taken one step further in *Lyngstad v Anabas*.²⁵ Here, the claimants attempted to prevent the sale of t-shirts bearing images of pop group, ABBA. The action once again failed on the common field issue. What differs from *McCulloch v May*, however, is that ABBA had its own official line of merchandise but the group's activities were still supposedly too far removed. Perhaps most ironic was the decision in *Tavener Rutledge Ltd v Trexapalm Ltd*²⁶. Not only was the defendant allowed to produce lollipops based on a television detective, Kojak, they were also able to successfully prevent a licensed manufacture from producing a similar product.

As other commonwealth jurisdictions, such as Australia, it has started to realise the true potential of character merchandising and it encompasses commercial gains. True recognition of the utility of passing off in such claims came through the decision in *Mirage Studios v Counter Feat Clothing Co.*²⁷ this case involved the production of clothing bearing images of the Teenage Mutant Ninja Turtles. Mirage Studios made significant profit from the sale of merchandise, so it was unsurprising that the court held that they also held goodwill in the clothing trade. This case clearly satisfied the requirements of passing off: the claimant had goodwill, there was a misrepresentation through unauthorized sales which could damage Mirage Studios trade.

The courts have attempted to reconcile this decision with the previous authorities by suggesting they were inappropriate where copyright exists in the character. Despite this, it is doubtful that the common field requirement remains relevant when discussing character merchandising and image rights. Although not a character merchandising decision, any remnants of earlier decisions, such as *McCullouch v May*, appear to have been forgotten by the courts.

The Danish toy brick maker, Lego, successfully stopped the use of the name by a plastic irrigation manufacturer. The courts appeared to just accept that the 'Lego' was such a recognisable brand that anyone would automatically assume there was a link. The star of Crocodile Dundee, Paul Hogan, has also been able to stop an advert that mimicked his character. Despite not actually damaging Hogan's career, the court believed it could damage his own potential marketing opportunities. This demonstrates the requirement for a common field of activity had become no more than an indicator for the likelihood of confusion.

Although, the English High Court's decision in the Eddie Irvine case has also changed little and the Irvine decision has been hailed by some as a legal watershed and that personality rights are now protectable under the common law of passing off. Basically, in the Irvine decision²⁸ simply the court has applied the law of passing off to modern business practice related to celebrity product

²³ *Tolley v Fry & Sons Ltd* [1931] AC 333 the defendants were owners a chocolate manufacturing company. They advertised their products with a caricature of the claimant, who was a prominent amateur golfer, showing him with the defendants' chocolate in his pocket while playing golf. The advertisement compared the excellence of the chocolate to the excellence of the claimant's drive. The claimant did not consent to or knew about the advertisement

²⁴ *McCulloch v Lewis A May* [1947] 2 All E.R. 845

²⁵ *Lyngstad v Anabas* [1977] F.S.R. 62 .

²⁶ *Tavener Rutledge Ltd v Trexapalm Ltd.* [1975] F.S.R. 479.

²⁷ *Mirage Studios v Counter Feat Clothing Co.* [1991] F.S.R. 145

²⁸ Reference [2003] EWCA Civ 423; [2003] 2 All ER 881; [2003] EMLR 538 Court of Appeal Judge Schiemann, Brooke & Jonathan Parker LJJ Date of Judgment 1 Apr 2003 The Defendants operated a radio station called Talksport, which had formerly been known as Talk Radio. Their marketing company sent out promotional material to a number of people responsible for the placement of advertisements. The material included a brochure featuring on its cover a picture of the Claimant, a well-known racing driver. The right to use the picture had been legally obtained, but the marketing company had doctored the picture, removing the mobile phone that the Claimant was holding and replacing it with a radio with the words "Talk Radio". The Claimant brought an action for passing off on the basis that it

endorsement. As Laddie J. has opined: "The sort of cases which come within the scope of a passing off action has not remained stationary over the years. Passing off is closely connected to and dependent upon what is happening in the market place." In fact, both passing off and false endorsement is growing areas because UK has no personality rights in this country. English courts seem to like neither the celebrity nor the merchandising business, and despite calls from lawyers for the UK to adopt a U.S style right to publicity, the British Judiciary is still resistant to the idea.

The aspect of privacy and publicity are two side of coin, to further elaborate the privacy and publicity can be seen as the two sides of a right of "personality" and while Continental jurisdictions tend to separate questions of privacy and questions of publicity, the human rights component of the latter are not seen to be too important. The case of *Douglas v Hello*²⁹ suggests that the English courts mix the spheres, while in American jurisprudence the development of privacy and publicity rights are clearly established. Undeniably the acceptance of privacy protection acted as an important catalyst in the promotion of publicity rights in America.

GERMAN JURISPRUDENCE:

The important decision of German Court in reference to case *Esra*³⁰, while considering the right of publicity. These cases will show that the German law goes further in protecting a bare personality right without necessary attachment to trade. The German court in *Esra* found that the novel had identified actual persons. The court could still decrypt the real identities of the characters of the Novel book. When the right of artistic freedom collided with the right of personality, German constitutional law demanded balancing of the interests.

The girlfriend's interests won over B's artistic freedom.³¹ These cases will show that the German law goes further in protecting a bare personality right. The Federal Constitutional Court employed a test as to whether the novel would be identified by a circle of acquaintances. The court in *Esra* found that the novel had identified actual persons. Even after B changed details in the novel during litigation, the court could still decrypt the real identities of the characters of the novel. When the right of artistic freedom collided with the right of personality, German constitutional law demanded balancing of the interests. The girlfriend's interests won over B's artistic freedom.

POSITION OF PERSONALITY RIGHTS IN INDIA:

The Trade Mark Act 1999, prohibits the use of personal names, where an application is made for the registration of trademark which falsely suggests connection with a living person ,or person whose death took place within 20 years prior to date of application for registration of trademark. Certain names like, Sri Sai Baba, Lord Buddha, Sri Ramakrishna, the Sikh gurus cannot be registered under section 16(1) of 1940, 23(1) of Trade & Merchandise Act 1958Mark &159(2) of the Trade Mark Act, 1999.

Individuals may apply for the protection of their name, likeness among other things, with the Indian Trademarks Registry in order to obtain statutory protection against misuse. This is of strategic importance for celebrities who intend to use their image and likeness to identify their own or an authorized line of merchandise. Few of the pertinent cases are discussed below:

In *DM Entertainment v Jhaveri*³², Daler Mehndi, a famous Indian composer and performer, brought an action against the defendant following the registration of the domain name 'dalermehtdi.net'. The Delhi High Court restrained the defendant from using the trademark DALER MEHNDI, thus recognizing the fact that an entertainer's name may have trademark significance. Another case involving an Indian citizen was that of Ratan Tata, the chairman of Tata lodged a complaint in World Intellectual Property Organization (WIPO) arbitration panel seeking the transfer of domain names comprising the name Tata (Tata Sons Ltd v Ramadasoft³³

In an another instance ,*Sourav Ganguly v. Tata Tea ltd.*, Sourav Ganguly, a hugely popular cricketer and former Indian captain, who returned from a tour of England to and a well-known brand of tea cashing in on his success by ordering consumers a chance to congratulate the cricketer. The order implied that the cricketer had associated himself with the promotion, which was not the case. Ultimately, Sourav Ganguly could successfully challenge it in the Court before settling the dispute amicably.

understood by the market that he had endorsed the radio station. The Judge, holding that a court could take judicial notice of the fact that it was common for famous people to exploit their names and images by way of endorsement, held that the Claimant did have a substantial reputation or good will and the Defendants had created a false message and so were liable.

²⁹ *Douglas v Hello! Ltd* Reference [2001] QB 967; [2001] 2 WLR 992; [2001] 2 All ER 289; [2001] EMLR 199; [2001] FSR 732 Court of Appeal Judge Brooke, Sedley & Keene LJ Date of Judgment 21 Dec 2000 Michael Douglas and Catherine Zeta-Jones, the first and second Claimants, entered into an agreement with OK! magazine, the third Claimants, by which OK! were given exclusive rights to publish photographs of the Douglas-Zeta-Jones wedding. At the wedding and reception photography was prohibited; employees signed agreements not to take photographs and guests were searched for cameras. Shortly after the wedding the Claimants became aware that Hello! magazine, the Defendant, was planning to publish surreptitiously taken photographs of the wedding. It was not known who had taken the photographs. The Claimants applied without notice for an interim injunction restraining the Defendants from publishing, on the ground of breach of confidence. Buckley J granted the injunction and it was continued by Hunt J at a hearing on notice. The Defendant appealed.

³⁰ Schwartz, Paul M & Karl-Nikolaus Peifer (2010) "Prosser's "Privacy" and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?" 98(6) California Law Review pp 1925-1987, p. 1927

³¹ Federal Constitutional Court, BVerf GE 119, 1, at para. 85 = 39 IIC 606, at para. 85 (2008). p. 37. Id

³² Delhi High Court Case CS No. 1147/2001

³³ (Case D2000-1713, February 8 2001)).

After going through the judgment as referred above, In relation to India, the personality rights do not have any statutory recognition in India per se. In contemporary era the notion has gained significance due to the increasing number of celebrity endorsement and commercialization. Celebrity rights are either secured as right to privacy or they can be ensured as the property of a persona.

Though in India, the absence of a statute makes it difficult to recognize and enforce personality rights. There is no statute or law that protects personality rights in India per se. However, judicial precedents in relation to concept of privacy has developed over a period of time have to a great extent, supported the enforcement of Personality rights in India. Nevertheless, these days India also started recognizing these rights through many significant judgments. The concept privacy is primary concept of law which is taking shape in India and the two laws of law personality and publicity though intermingled but certainly it is subsidiary to law of privacy as once privacy is restored to celebrities than automatically the other two components concept of personality and publicity comes to fore, these two concept so intermingled and their existence is offshoot to concept of privacy.

Without existence of concept of privacy there is no existence for two components concept of personality and publicity, as such the Indian courts have been dealt the question related to concept of privacy which is inherent right attached to human body who is existence of the life. Rest two components will come to existence only once privacy is restored to an individual, Than the individual may exploit his likeness or persona and create tool for publicity.

The concept of privacy and publicity is slowly taking shape in the courts. In *R Rajagopal v State of Tamil Nadu*³⁴ wherein the Supreme Court held that the right to privacy is implicit in the fundamental right to life – it is a right “to be left alone”. The court held that the Tamil magazine *Nakkheeran* did not require consent to publish the life story of the serial killer Auto Shankar, insofar as it was based on public records. However, if it went beyond such records, it might be “invading his right to privacy”. Fundamental rights can be enforced only against the state; however, the court recognized that in the private sphere, an action would lie in tort for breach of privacy as a common law right.

The assertion of personality rights was started by the one person Mr. Rajnikanth, He laid the foundation of publicity rights in India. This occurred in the case where the producers of a movie were trying to use his name and style of dialogue without his consent. The Madras High Court held that his name could not be used without his prior permission. The court further stated that personality rights vested in that person who had attained, and there was no need of proving falsity or confusion and a mere unauthorized used was sufficient. There are many judgments rendered by the courts in this sphere. One of the most important judgments related to personality rights was given in *ICC Development (International) Ltd. vs. Arvee Enterprises*³⁵, by the Delhi High Court in 2003, it was held that: *"The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice. etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc"*.

Further, in *TITAN Industries vs. M/s Ramkumar Jewellers*³⁶ on 26th April 2012, the defendant used an identical advertisement hoarding to the Plaintiffs' advertisement that featured the famous couple Mr. Amitabh Bachchan and Mrs. Jaya Bachchan. Further, the defendant also did not seek any permission or got into any agreements with either the couple or the plaintiff. Thus, the Delhi High Court granted the permanent injunction explaining the right to publicity: *"When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialize their identity but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity"*.

There is another case of Mr. Shivaji Rao Gaikwad (aka Rajinikanth) vs. M/s. Varsha Productions³⁷ an Interim injunction was passed against the release of a film "Main Hoon Rajinikanth" by Varsha Productions by referring to the judgements from the above-mentioned cases. The most recent case regarding the personality rights is Mr. Gautam Gambhir vs D.A.P & Co. & Anr³⁸, wherein the defendant was using Gautam Gambhir's name in running their lounge and restaurant, which was mistaken by people to be associated with the said famous personality. Thus, the applicant sued the defendant.

In this case the interim injunction was not granted as the defendant's name was also Gautam Gambhir, apparently, he has to carry on his business in his name and he neither claimed that the business is related to the cricketer nor he displayed any pictures of the cricketer anywhere. He very prominently displayed his own pictures everywhere to show his own identity. And when the logo of the restaurants was being registered no objection was raised by anyone. Seemingly it was decided that the defendant has not made any use of the reputation of the plaintiff's name in his trade. Therefore, the interim injunction was not granted, and all the pending applications were disposed off.

³⁴ 1995 AIR 264, 1994 SCC (6) 632

³⁵ 2003 (26) PTC 245

³⁶ 2012 (50) PTC 486 (Del)

³⁷ 2015 (62) PTC 351 (Madras)

³⁸ CS(COMM) 395/2017

In India at present in India, one can claim publicity rights; under action of passing off that is only action is available against any third party as in the case of misappropriation of trademarks that causes injury to the business, goodwill or reputation of a celebrity by trying to pass off its goods or business as those of the celebrity.

However, to make passing off action to be successful, all three classic elements of a passing off action must be proven: damage to reputation, misrepresentation and the resultant irreparable damage. Furthermore, the Indian courts have recognised the name of a celebrity as having trademark and have restrained third parties from misappropriating such names for use as domain names.. However, seeking recourse to IP laws has limitations as copyright law may protect a specific image in the form of a photograph, also allows for protection of a specific image as a photograph or painting; however, protection would not extend to the likeness of the celebrity's name or image.

In the event that the reputation of a celebrity is intentionally maligned by any person, a defamation suit can be filed. In India, defamation is both a civil wrong and a criminal offence. However, truth published in the public interest is a valid defence and the threshold of permissible intrusion into the lives of famous personalities is generally considered to be higher than that applicable to an ordinary individual.

But in India the courts are yet define the judicial interpretation of extending publicity rights to living or dead individuals as such this particular legal issue, at present is in early stage, several issues related to publicity rights are yet to be dealt by the courts. Keeping in view of the considering the ambiguity of the definition of the term "celebrity" itself, it is little difficult to determine, what considerations are required or that would lead to a conclusive determination of who will fall within the ambit of a famous or well-known person. Secondly, it is not considered yet as to whether the publicity right survives after death in India. In the USA, the states of California and South Carolina, for instance, both recognize post mortem rights to publicity – but while California imposes a durational limit of 70 years after the person's death, it is unclear as to whether South Carolina courts have decided on a period for which the right shall extend³⁹. On the other hand, New York does not recognize post mortem rights at all.

The courts have not yet expressly stated anything with respect to posthumous publicity rights. The only rights that have been up held posthumous are of those mentioned in the Emblems and Names (Prevention of Improper Use) Act. As that prevents the use of certain images, symbols and personalities from being used for commercial gain. The personalities included are Mahatma Gandhi, Pandit Jawaharlal Nehru, to name a few. There was a case where the luxury pen manufactures Mont Blanc had to withdraw a commemorative pen bearing the Mahatma, as it violated the provisions of the said Act. In the PIL the lawyers sought and succeeded in getting an injunction for the use of the image of Mahatma for a symbol of decadence (each pen was priced up to Rs. 12 lakhs). What would happen to the posthumous publicity rights of celebrities that are not mentioned in the Act? The posthumous publicity rights are linked to that of privacy and hence a part of the Fundamental right to life and personal liberty under Article 21 of the Constitution, there has been no precedents in this regard.

As we are far behind the western counterparts, still in India even there is no direct law that deals with a right of publicity or posthumously. Does it mean that General Motors would go scot- free if they had made the same ad with say, C.V Raman? As there is no proper legal recourse available as a matter of right of privacy posthumously, that can be claimed by his legal heirs of the great physicist under Publicity rights. Maximum in this case they could probably file for an injunction, or sort remedies under defamation. In the present context due to absence of posthumous rights of publicity in India, the legal heirs cannot claim damages under Publicity right and proving or establishing the defamation posthumously would be a challenge in Indian Courts.

CONCLUSION

The protection of publicity and image right is expanding very fast in the young generation minds as they are having more a celebrity obsessed culture in India, while Indian celebrities have intermittently attempted to protect their personality. As many legendary bollywood actors including Amitabh Bachchan are raising their concern from time to time of misuse and Amitabh Bachchan has spoke out against the unauthorized use of a sound-alike of his distinctive deep baritone in an advertisement promoting a brand of gutka (chewing tobacco), with the reason the his voice identifies his association with the products unauthorizedly which was detrimental to his image and of the famous Indian actor Rajnikanth has also published a legal notice in various magazines before the release of his latest film prohibiting anyone from damaging his screen persona or from using his character in the film for any financial gain including advertisements ,and impressions by comedians,clearly suggests that Right of publicity has emerged as an individual class of IP protection rights, the law on this aspect has taken a long time to develop. In light of the increase in celebrity endorsements and with celebrities eager to prevent exploitation of their rights it is high time for legislature to recognize publicity rights in a statutory manner.

Like other few of western countries except US, in India the law pertaining to personality or posthumous personality rights is still at a nascent stage; however, if the recent increase in reported cases involving personality rights is observed, certainly the awareness of asserting personality rights amongst celebrities is quickly growing, as such in the coming years the digital environment is going to play major role in increasing more or more people interest in persona / likeness of the celebrities will ultimately put pressure on

³⁹ Gignilliat v. GSB., 684 S.E.2d 756 (S.C. 2009) Supreme Court of South Carolina, Filed: October 12th, 2009
Precedential Status: Precedential Citations: 684 S.E.2d 756, 385 S.C. 452 Docket Number: 26735

the courts for recognizing firstly personality rights and may be later posthumous personality rights in India. In this digital age the interest amongst general public is going in rapid speed as business of selling Merchandise and advertising deals for endorsement of products by celebrities is generating millions of Rupees, and further selling magazine and tabloid containing stories of the celebrities in high volumes is adding to the revenues.

In the present age of availability of globalised mass media, the powerful economic factors are driving the cult of celebrity stardom; therefore, the legal framework governing its commercial exploitation is also going to evolve in the years to come.

