

CELEBRITY RIGHTS PROTECTION UNDER INTELLECTUAL PROPERTY RIGHTS REGIME: A CRITICAL ANALYSIS

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Abstract: An individual's personality is a means by which a person recognizes others and identifies his place in society. In India the current legal provisions on Protection of Publicity rights of Celebrity are vague and incomplete. Celebrities' personality is established by the goodwill that they have acquired through their continuous hard work and skill which forms to be their intangible property. The Indian legal system is underequipped in dealing with the modern phenomenon of celebrity endorsements and merchandising. With exorbitant sums riding on celebrities, the advertisers and market forces often find ways and means to abuse celebrity images. This paper is an attempt to critically analyse the IPR regime of protection with recognition of celebrity rights in India

INTRODUCTION

Intellectual Property Law has developed with the development in art, technology, science *etc.* and thus from mere political and social motivation has reached to the creation and innovation. Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement includes essentially seven kinds of intellectual property rights like 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 but in contemporary times the domain of Intellectual Property Rights (IPR) has been expanded to afford protection to modern rights such as the 'the right to publicity' a corollary of the right to privacy and the bundle of rights that emanate from 'celebrity rights'. However the adaptation of such rights of celebrity still does not have a well settled approach that can be universally recognized.

An individual's personality is a means by which a person recognizes others and identifies his place in society. Through the creation of one's personality an individual creates the expectation of himself in the eyes of others and the manner in which he is required to behave in the society. Different well established personalities tend to form an inspiration for the people and in some or the other way they serve the society at large. A sense of devotion forms with the passage of time with the well known personalities and in many circumstances people worship them like God and these personalities have great influential value as well as impact on the society helping to create awareness in differentiating between right and wrong aspects of life. "Individual's popularity is an extension of his property" similarly individual's corporation in the society is also extension of his/her personality. Celebrities personality is established by the goodwill that they have acquired through their continuous hard work and skill which forms to be their intangible property which they have freedom to flaunt and seek economic interest out of it by association in commercial market of advertisement, entertainment shows *etc.*

With the increasing importance of celebrity in the society exploitation of their goodwill has also increased with the greater pace by media, manufactures, producers as well as vendors. The very first instance of invasion in the privacy of celebrities is basically by media as considering everything about their personal life as public property and a great source for raising their channels Television

Rating Point (TRP) whether by personal gossip about them or through defaming them and then by others by misusing their celebrated image without their permission, thus causing economic loss as well as loss to their reputation.

History/Evolution

Understanding such situation would pay the way for recognizing rights of celebrities the origin of which one may find in the doctrine of privacy. The 'right to privacy' was conceptualised for the first time by Warren and Brandeis which argued that the common law should recognise a 'right to privacy' which they viewed as a right of preventing truthful but intrusive and embarrassing disclosures by the press.¹ Their essay is hailed by legal scholars as the foundation of privacy law especially in the U.S. Warren and Brandeis defined privacy as 'right to be let alone', a phrase adopted from Judge Cooley's famous treatise on torts in 1880.² Ruth Gavison argues that this formulation often neglects to understand that the typical privacy claim is not a claim for non-interference by the state; it is instead a claim for state interference in the form of legal protection against other individuals.³ Although the concepts of 'inviolable personality' and 'right to be let alone' were too broad and vague, these concepts explored the roots of right to privacy and explained how a right could be developed from within such broad conceptions.

*Haelan Laboratories v. Topps Chewing Gum, Inc*⁴ is the first case which recognized that celebrity's name or likeness has a value beyond the right of privacy. This case held that people, especially prominent ones, in addition to and independent of their right of privacy, have a 'right in publicity value of their photographs'. This right could be assigned or licensed, and the licensee or assignee could enforce it against third parties. This right according to Judge Frank, might be called a 'right to publicity'. Influenced with the decision in 1954 Melville B. Nimmer studied and defined parameters of right to publicity.⁵ He opined that with tremendous strides taken by the media and entertainment industry, there is a pecuniary value attached to the use of a celebrity's name, photograph, signature and likeness. This has led to commercialisation of various facets of his image and it is indeed this aspect of his personality that he should be allowed to control. Right to publicity was then recognized an individual kind of tort separate from invasion of privacy and false light by media in work of William D. Prosser⁶ and subsequently was accepted by all courts in United States.⁷

New York was the first state to enact a publicity law with the New York Civil Right Law in 1903. This statute prohibits the use of the name, portrait, or picture of any living person without prior consent for "advertising purposes" or "for the purposes of trade." In the early part of the 20th century, with little precedent for publicity rights, New York viewed publicity rights through the filter of personal rights. As of this writing, twenty-two states recognize the Right of publicity in some capacity via statute (Alabama, Arizona, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin).⁸

Similarly, origin of publicity rights in India has paved way through privacy rights recognition of celebrities and publicity rights have emerged as a sui generis regime owing to the increasing number of instances of their trespass. As compared to the global scenario, India has been lagging behind in recognising the right of publicity and image. There is neither a considerable body of case law, nor

¹ Samuel D Warren & Louis D Brandeis, "Right to Privacy" 4 *Harv. L. Rev.* 193 (1890) [hereinafter Warren & Brandeis, Right to Privacy]

² *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891).

³ Ruth Gavison, "Privacy and Limits of Law" 89 *Yale L. J.* 421, 438 (1980).

⁴ 202 F 2d 866 (2nd Cir.) (1953)

⁵ Melville B. Nimmer, "The Right of Publicity" 19 *Law and Contemp. Probs.* 203 (1954)

⁶ William Prosser, "Privacy" 48 *Cal. L. Rev.* 383 (1960)

⁷ American Law Institute's Third Restatement of Unfair Competition 1995, §.46

⁸ Right of Publicity, available at <http://rightofpublicity.com/brief-history-of-rop/> (last visited on July 18,2016).

any comprehensive statute governing image or publicity rights of celebrities. It is only the Emblems and Names (Prevention of Improper Use) Act, 1950, which to a limited extent, protects unauthorised use of few dignitaries' names by prohibiting the use of the names given in its schedule.⁹ The first authoritative case on publicity rights comes from the Delhi High Court, in *ICC Development (International) Ltd. v. Arvee Enterprises*.¹⁰ The court held that the right to publicity has evolved from the right to privacy and can inhere only in an individual or in any indicia of the individual's personality like his name, personality trait, signature, voice *etc.* This case shows that development of publicity rights in India flows from rights of human dignity and liberty as enshrined in articles 19 and 21 of the Constitution. With the increasing popularity of celebrities and increase in even greater pace their exploitation the awareness as to the requirement of protection of their rights has been formed to be the need of society not only to provide them with the rights but also to control the dominance of celebrities' individual interest over interest of public at large, by providing the limitations over the rights of them as celebrity holds great responsibility towards the society.

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

*R.R. RajaGopal v. State of Tamil Nadu*¹¹ In this case Supreme Court recognized the right of publicity in the form of right of privacy. Stating "the first aspect of privacy right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising - or non-advertising - purposes or for any other matter"

*Phoolandevi Vs Shekar Kapoor & others*¹² In this case Phoolan Devi herself protested that the film made by the respondent had distorted the facts. She sought an injunction as she has given up her all past criminal activities and started a fresh decent life. The court held that issue should be properly examined and effect on the private life of individual due to exhibition of such film should be scrutinized before the release of film. Thus, a celebrity can protect his /her name & image as a constitutional right.

*Sourav Ganguly vs Tata Tea Ltd*¹³ Sourav Ganguly who returned from England scoring magnificent centuries found himself extremely disturbed when he realized that Tata Tea Ltd., in which he was employed as a manager, was promoting its 1 kilo tea packet by offering the consumers a chance to congratulate Sourav through a postcard which was inside each packet of tea. In a way indirectly what the company intended was to promote the sale of its tea packet in the Indian market where Sourav had earned considerable amount of popularity.

*DM Entertainment v Baby Gift House & others*¹⁴ In 1996, Mehndi incorporated D.M. Entertainment, where "D.M." stands for the initials of his name. The company was originally created to manage Mehndi's advancing career and to help raise funds for charities and causes. After incorporating, Mehndi assigned all his publicity rights, including commercial endorsements and other related rights, to the company. Baby Gift House (BGH), is a company that owns toy and gift shops throughout Delhi. It sold dolls that were allegedly imitations of, and identical to, the likeness of Daler Mehndi. In addition to having Daler Mehndi's features, the dolls could make moves and sing lines from some of his compositions. Aggrieved by BGH's activities, D.M. Entertainment sued in Delhi High Court, alleging that the importation and sale of the dolls or images were a blatant infringement of Daler Mehndi's right to control the commercial exploitation of his persona.

⁹ Emblems and Names (Prevention of Improper Use) Act, 1950, s. 3

¹⁰ 2005 (30) PTC 253 (Del) [hereinafter ICC Development].

¹¹ JT 1994 (6) SC 514

¹² 57 (1995) DLT 154, 1995 (32) DRJ 142

¹³ CS no. 361 of 1997

¹⁴ MANU/DE/2043/2010

The Delhi High Court held the defendants liable for violating Mehndi's right of publicity, for false endorsement, and for passing off. The court granted the permanent injunction and awarded Mehndi token damages. The Court further noted that the right of publicity can, in a jurisprudential sense, be located within the individual's right and autonomy to permit or prohibit the commercial exploitation of his likeness or some attributes of his personality.

*Titan Industries Ltd. vs M/S Ramkumar Jewellelrs*¹⁵ in the present case the plaintiff hired Amiatab Bachchan and Jaya Bachchan for the endorsement of range of diamond jewellery sold and marketed under the brand name "Tanishq". The couple had assigned all their rights in personality to the plaintiff to be used in media, including print and video. The plaintiff invested great sum in promotional campaign.

The defendant dealing in identical goods to those of plaintiff, was found to put off the hoarding identical to plaintiffs' including the same photograph of celebrity couple as displayed in the plaintiffs' hoarding without the permission of the celebrity couple and with no consent of the plaintiff. The court held defendant liable not only for infringement of the plaintiff's copyright in the advertisement, but also for violation of couples' personality right. The court thereby granted an interim injunction in favour of the plaintiff specially recognizing the celebrity couples' personality rights misappropriation.

*Sampat Pal Vs. Sahara One Media and Entertainment Ltd. and Ors*¹⁶ Plaintiff Sampat Pal had filed a suit for permanent injunction and damages at Delhi HC wherein she claimed that she is a social activist and runs an organization in the name and style of "Gulabi Gang". The suit was filed to restrain Sahara One Media & Entertainment & Ors for releasing the film "Gulaab Gang" which she claimed was an adaption of her life story into a movie. She claimed that the portrayal of the characters in the film defamed her and degraded her along with the others members of the organization. She further alleged that the film defames her and portrays her work in bad light and in a horrific manner with swords and sickles. The Single bench of the Delhi High Court passed an order restraining the film's release until the next date of hearing from broadcasting, distributing and promoting the film "Gulaab Gang" in its censored or uncensored prints.

Thereafter the Producers i.e. Sahara One Media & Entertainment & Ors appealed before the Division Bench of the Delhi High Court. The Division Bench of the Delhi High Court allowed the release of the film with a condition in the Disclaimer that Sahara Media and Entertainment can show the film by stating that he has nothing whatsoever to do with the life and works of Sampat Lal and her organization.

*Mr. Sonu Nigam Vs. Mr. Amrik Singh (alias Mr. Mika Singh)*¹⁷ the parties to the case were to appear at the Mirchi Awards 2013, and were shown through photographs on the official posters of the event, with their due consent. Mika Singh, in order to promote himself displayed hoardings and posters, which were different from official hoardings and posters of the event, carrying huge pictures of himself along with smaller pictures of the other artists, including Sonu Nigam, without their consent and permission. It was stated that the said hoardings and posters gave an unjustified and incorrect impression to the public about the prominence given to Mika Singh as compared to the other artists. The Bombay High Court restrained the defendant from displaying the pictures of the Plaintiff without his consent and ordered the defendant to pay Rs. 10 Lakhs as damages towards specified charities, as consented by the parties.

¹⁵ CS(OS) No.2662/2011

¹⁶ CS (OS) 638/2014

¹⁷ MANU/MH/0517/2014

*Shivaji Rao Gaikwad vs. Varsha Production*¹⁸ superstar Rajnikanth filed a suit seeking injunction restraining the respondent from using the applicant's name/caricature/ style of dialogue delivering etc. in its forthcoming film "Main Hoon Rajinikanth" in any manner whatsoever alleging infiltration of his personality rights by such unauthorized use. Rajnikanth also expressed distress that the film had scenes of immoral nature and the respondent was trying to cash in on his popularity. The court observed that it cannot be disputed that intellectual property right is a recognized valuable right under the modern laws being followed by all civilized countries. Copyright Act, Trade Marks Act, etc are properly safeguarding the rights, by way of relevant statutes. As per Article 21 of the Constitution, everyone is entitled, not only for his life and personal liberty from taking away the said rights, except by procedure established by law, but also guaranteed to lead a dignified life in the human society and hence, no one can cause damage to the fame or reputation of any person against law. From the available materials of the film, the Court held that the film's title and caricature of Rajnikanth in the film would degrade his reputation. The Court was of the view that there was a prima facie case made out and the balance of convenience was also in favour of Rajnikanth. Accordingly, interim injunction was granted.

The above stated cases shows the recognition of celebrity rights protection in India by Indian Judiciary and thus need for streamlined protection to be granted to the celebrities in India.

II. STATEMENT OF PROBLEM

The Publicity Right of celebrity cannot be solely protected as flowing from article 19 and article 21 of the Constitution of India as Stated by Delhi High court in *ICC Development (International) Ltd. v. Arvee Enterprises*¹⁹

- i) The first problem would be that fundamental rights are generally only enforceable against the state within the meaning of Art.12 of the Constitution. Even though a liberal approach has been followed in this regard a citizen might find it difficult to enforce his publicity rights against private entities.
- ii) Secondly, fundamental rights cannot be waived. So, a person would find it difficult to engage in commercial transactions with his publicity rights.
- iii) Thirdly, it has been held that the rights under Article 19 and 21 are extinguished once a person dies. One's personae may be a valuable property that a person might wish his successors to protect and commercially exploit just like any other intellectual property.

Further the limited protection to a celebrity's image is provided under the provisions of trademark and copyright law. Section 14 of the Trade Marks Act 1999 prohibits use of personal names where an application is made for the registration of the trademark, which falsely suggests a connection with a living person, or a person whose death took place within 20 years prior to the date of application of the registration of the trademark. Therefore the legal heirs of the celebrities can also prevent the misuse of their names. The intent of recognising the transferability and licensing of the particular right can be interpreted from the statute. Thus the property right in one's name is granted to celebrities in the trademark law. But the lacuna of not outlining the rules on assigning and licensing such a right needs to be addressed.

The Copyright Act poses a challenge in case of recognition of publicity rights. The voice of celebrities which is often misused by advertisers cannot be copyrighted as it does not come within the ambit of literary, dramatic or musical work. There is a separate

¹⁸ MANU/TN/0189/2015

¹⁹ *Supra* note10

category of performers' rights which grants economic rights to performers.²⁰ But these rights also subsist in a particular performance and not in a general image of the artiste or a celebrity. Therefore the copyright act also is inadequate to confer image rights on celebrities.

Different international conventions have been recognized as relevant to protection of celebrity rights like the International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention), TRIPS and the WIPO Performances and Phonograms Treaty, 1996 (WPPT) but has still failed to provide for a universal definition for celebrity and further the specific protection of celebrity rights. Though other states like Newyork, California, Indiana *etc.* have specific provisions for recognizing celebrity rights in United States but have failed to provide for specific definition of celebrity that still varies case to case, further balance between the celebrity rights and public interest has not been maintained as in US, celebrity is gaining more and more control over his image and public is receiving nothing in return. Thus there is globally a need for specifying the definition of celebrity and balancing of interest of celebrities and public together.

Through the understanding of the statement of problem concerned for the protection of celebrity rights following research questions can be framed ,which author will further attempt to justify and answer.

III. RESEARCH QUESTIONS

1. What is the definition of Celebrity?
2. What are the different rights that can be granted to celebrity?
3. Why there is need for protection of celebrity rights in India?
4. How far the Celebrity Rights are protected under Intellectual Property Rights (IPR) Regime in India?

IV. RESEARCH METHODOLOGY

The methodology that is adopted in this study is essentially doctrinal, based on the critical analysis of primary as well as secondary sources. The primary material includes the relevant national legislation and their official and judicial interpretation as contained in the case-laws and administrative decisions. The secondary material includes books research and commentaries published in various journals special attention is made to rely on recent legal developments as far as possible.

V. DEFINING CELEBRITY

To provide for the rights of celebrity determination of definition of the term celebrity itself is the foremost important task. A celebrity is a person who is known for his well-knownness. He is neither good nor bad, great or petty. He is the human pseudo event.²¹ What makes an individual a celebrity is difficult to define in the contemporary era when this status has become increasingly available to many in our populace. Boorstin has wisely chosen to identify a celebrity through its axiomatic trait of being well known. With all the concomitant perks and publicity, celebrity status is widely popularised by the media. Famous faces greet us at every turn – on

²⁰ Copyright Act, 1957 , s.38

²¹ Daniel J. Boorstin, *The Image: A Guide to Pseudo-Events in America* 57 (1961).

billboards, on television, on public transport, in the magazines and newspapers, and even on cereal boxes. Celebrities capture the imagination of the youth and the purses of advertisers.²²

The Oxford and Macmillan's Dictionary defines Celebrity as "famous person, especially in entertainment or sports" and "famous is defined as state of being well known" there is no doubt that celebrity personality is an intangible and valuable asset. Their association with various causes, products and events enable advertisers to exploit their ephemeral status in the society. It is this exploitation which further paves the way for misappropriation of their personas and commercially valuable reputation. A celebrity is a person who has achieved considerable amount of fame during his course of time and has become very much known to the eyes of the public and media. Celebrities include actors, sports persons, musicians *etc.* Now there is a difference between celebrities and performers. A performer is always a person who comes in the fore front of the public, but a celebrity does not always come in the open public forum. Public Perception is one of the main criteria in determining whether an individual is a celebrity or not. The word celebrity comes from a Latin word 'celebritatem' which means condition of being famous.²³ But now-a-days, actors, authors, artists, politicians, models, athletes, musicians, singers, television personalities or anyone who manages to capture public attention including reality TV actors are all celebrities. There is lack of legal definition of celebrity as even if the reference be made to definition of performer as provided in section 2(qq) of the Indian Copyright Act, a performer is not a celebrity always and a celebrity may not be performer at all. For example, a teacher teaching in class or a snake charmer performing his art are performers but not celebrity.

With the above discussion as an effort to define celebrity it can be very well traced out that who is a celebrity cannot be given a straight jacket definition though meaning only can be explored of celebrity and that will vary with the case to case as in with the judicial construction

VI. CLASSIFICATION OF RIGHTS TO BE GRANTED TO CELEBRITIES

The rights which may be granted to celebrities can be divided into three broad categories: moral rights/personality rights, publicity rights and privacy rights.

Society perceives an individual in a particular way. Where celebrities are involved, their artistic endeavours are considered an extension of their personalities. Intellectual property theorists derived this personhood approach from theories of Kant and Hegel, who viewed private property as embodiment of the personality. They support the contention of private property rights in one's personality as they promote self-expression and human development and thus contribute to the society.²⁴ Therefore an individual's personality embodies emotional, dignitary, human and moral values attached to it. Professor Kwall argues that the doctrine of moral rights could be extended to constructed personas to protect personality and reputational aspects of celebrities.²⁵ The persona projected by the celebrity is his creativity and his livelihood depends on its preservation and integrity.

The right of publicity is the right of an individual to prevent others from using his name, likeness, photograph or image for commercial purposes without obtaining consent. In other words, it prohibits the unauthorised use of elements or indicia that uniquely

²² David Tan, "Beyond the Trademark Law: What the Right of Publicity Can Learn From Cultural Studies", 25(3) *Cardozo Arts & Ent. L. J.* 913, 914 (2008)

²³ Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights" 81 *Cal. Law. Rev.* 125, 128 (1993)

²⁴ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

²⁵ Roberta Rosenthal Kwall, "Preserving Personality and Reputational Interests Through Constructed Personas Through Moral Rights: A Blue Print for Twenty First Century" *U. Ill. L. Rev.* 151, 151-152 (2001).

identify a person.²⁶ Thus it is only the celebrity who can authorise the manner in which his name can be used. Melville B. Nimmer has advocated for “right to publicity” by undercutting the force in the doctrine of privacy as evolved by Brandies and Warren.²⁷ In his critique Nimmer opined that what celebrities needed was not protection against unreasonable intrusion into privacy, but some right to control commercial value of identity.²⁸ A well known personality thus does not wish to have his name, photograph and likeness reproduced and publicised without his consent or without remuneration to him.

VIL.RATIONALE FOR PROTECTION OF CELEBRITY RIGHTS

Various rationales buttress the right of publicity, but the most direct policy rationale for the right of publicity is the “natural rights of property justification,” arguing that “nothing is so strongly intuited as the notion that my identity is mine-it is my property to control as I see fit.”²⁹ Broadly two kinds of justifications for the protection of Celebrity rights can be granted that are; Moral and Economic. One moral justifications falls under John Locke’s labour theory which states that a celebrity deserves all the reward he can gain because he has worked hard and created a persona that has value.³⁰ This theory states that unless people are given celebrity rights, they will not work hard to create a personality that has value and as a result the society will suffer. Another moral justification is the notion of unjust enrichment which states that a company should not be able to earn profit out of the image or likeness of a celebrity without compensating the celebrity for the use. The final moral justification for the labour theory concerns state privacy laws. It states that a celebrity should be free to associate with whom he desires. Thus argument further states that if a celebrity is associated with certain items or services, his reputation might get injured and as result he might lose self respect and economic value.

There are two primary economic justifications in support of the right of publicity. The first justification utilizes the copyright Act and the second one utilizes the Lanham Act. The first economic justification is the incentives argument which states that if a celebrity is unable to exploit his name, fame, image, likeness, the celebrity lacks the incentive to create a valuable persona. The second justification is concerned with public and its role as consumers. This argument contends that if a celebrity is unable to control his image then the companies will be able to exploit their image and trick the public into believing that it is the celebrity is actually endorsing the product with which he/she is associated. This argument which intends to prevent consumer confusion is based upon section 43a of the Lanham Act.

Basic idea is that the livelihood of celebrity depends on the goodwill or the image of the celebrity that has developed in the eyes of the people and their income depends on the popularity they attain through recognition by the people. That is the reason that being a celebrity protection of one’s image is very important. As the importance of celebrities have increased in society exploitation of their privacy rights have also increased at greater pace by media as it tends to be the important interface between the public and celebrity. As people tend to be so much associated with the celebrities considering them as their friends or source of inspiration they take keen interest in every minute happening in lives of celebrities and on the other hand as celebrities do not know the public so there is no mutual exchange of information. Therefore celebrities try to control their personal information that can put them in situation of embarrassment and humiliation leading to exploitation of their image in public.

²⁶ Stacy Allen, Emilio B. Nicolas & Megan Honey, Non Human Persons and the Right of Publicity, *available at* <http://images.jw.com/com/publications/1185.pdf> (last visited on July 19, 2016)

²⁷ Melville B. Nimmer, “The Right of Publicity” 19 *Law And Contemp. Probs.* 203 (1954) [hereinafter Nimmer, *The Right of Publicity*].

²⁸ *Ibid*

²⁹ J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2d ed. 2014).

³⁰ Anurag Pareek and Arka Majumdar , “Protection of celebrity rights- The problems and solutions” 11 *JIPR* 415-423 (2006)

MMS (Multi Media Service) scandals have become new trend whether being original leak of videos or majorly through fake videos just to exploit the celebrity image and earn good monetary benefits out of it. These videos tend to form a matter of immense popularity among the public but becomes great source of exploitation and defamation for celebrities. Even Supreme Court reacted towards the MMS scandal of Shahid Kapoor and Kareena Kapoor while dealing with the constitutional validity of section 499 of Indian Penal Code and observed that the Kareena-Shahid photo was not in good taste and court further hinted at the need for establishing balance between public interest and defamation so that freedom of expression of newspapers are not stretched beyond the limits.³¹

Although right to publicity comes under the extended view of Article 21 but this right is not absolute; reasonable restrictions can be placed thereon in public interest under Article 19(5). Freedom of press is embedded under Article 19 of the Constitution. Also the expression of 'freedom of speech and expression' used in Article 19(1) (a) has been held to include the right to acquire information and disseminate the same.³² The Supreme Court has given a broad dimension to Article 19(1) (a) by laying down the proposition that the freedom to receive and to communicate information and ideas without interference is an important aspect of freedom of speech and expression.³³

This has been consistently challenged by the celebrities on the ground that media has misused their freedom under the guise of giving news in 'public interest'.³⁴ There have been alternative arguments that celebrities have dedicated their lives to the public and no longer command the protection of law of privacy. But this waiver is not absolute and the celebrity has a right to maintain the privacy of his nonprofessional and other parts of professional life.

It is clear that a right to privacy is a treasured possession of every individual; it should be respected and should not be exploited by the media on the pretext of public interest.

Further the new issue which has been evolved Till these cases the status of Right to Privacy was established as its being part of Fundamental Rights under Part III of the Constitution of India but today the status of Right to Privacy as being part of Article 21 is questionable after the recent Aadhaar Card issue which has been raised in the Supreme Court involving important question of law as to Does Aadhaar infringe on people's privacy and whether privacy is a Fundamental Right? It has been claimed by many that Aadhaar infringes on the right to privacy of individuals. In past, the Supreme Court has ruled that privacy is not a fundamental right. The apex court has now set up a nine-judge bench to settle this debate and examine its past judgements. A smaller bench would be set up later to decide the Aadhaar case.³⁵ Considering the importance verdict of the landmark case it further becomes a more vital issue to provide protection to rights of celebrities majorly based on exploitation of their privacy rights Overall the Constitution of India provides for the general kind of protection to the Celebrity's rights.. Further in India the current legal provisions on Protection of Publicity rights of Celebrity are vague and incomplete.

VIII. PRESENT IPR REGIME AND CELEBRITY RIGHTS PROTECTION IN INDIA

³¹ Shahid-Kareena photo not in good taste SC, available at <http://www.tribuneindia.com/2004/20041218/nation.htm#3>

³² M.P. JAIN, INDIAN CONSTITUTIONAL LAW 988 (5th ed. 2008).

³³ In *State of Uttar Pradesh v. Raj Narain.*, AIR 1975 SC 865, 884, the apex court held that Art 19(1)(a) not only guarantees freedom of speech and expression, it also ensures and comprehends the right of citizens to know, the right to receive information regarding matters of public concern. Similar ratio was drawn in cases like *Secretary, Minister of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, AIR 1995 SC 1236 and *Association of Democratic Reforms v. Union of India*, AIR 2001 Del 126.

³⁴ Pareek & Majumdar, Protection of Celebrity Rights, Anurag Pareek & Arka Majumdar, Protection of Celebrity Rights- Problems and Solutions, 11 J. INTELLEC. PROP. RIGHTS , 418 (2006) [hereinafter Pareek & Majumdar, Protection of Celebrity Rights].

³⁵ [FE Online](#) | New Delhi | Updated: July 19, 2017 3:24 PM **Aadhaar card case in Supreme Court: 5 important questions the case will seek to answer**

Intellectual Property Law has developed with the development in art, technology, science *etc.* and thus from mere political and social motivation has reached to the creation and innovation. Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement includes essentially seven kinds of intellectual property rights like 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 but in contemporary times the domain of Intellectual Property Rights (IPR) has been expanded to afford protection to modern rights such as the ‘the right to publicity’ a corollary of the right to privacy and the bundle of rights that emanate from ‘celebrity rights’. However the adaptation of such rights of celebrity still does not have a well settled approach that can be universally recognized. The intangible nature of intellectual property, which allows it to flow relatively freely across the borders, presents a need for international enforcement of intellectual property rights.

Trademark laws

The critical primary function of trademark is identification of origin of goods and services. A consumer is informed of the quality and attributes of a product by the trademark they bear and further gives assurance that the product bearing the mark are under the control of same person.

Individual may apply for protection of their name, similarity and nicknames, in addition to other things, with the Indian Trademarks Registry. The statutory protection granted plays a significant role to celebrities who plan to utilize their resemblance and image to recognise an approved line of merchandise or their own goods and services. With the changing pace celebrities are also getting aware of their name and image rights. A recent example is of actress Mallika Sehrawat who registered her name as a trademark.³⁶Applying for enlistment of their names and images as trademarks many other celebrities have sought a protection under Trademark laws, which includes yoga guru Baba Ramdev, cardiologist Naresh Trehan, Chef Sanjeev Kapoor and actress Kajol to name a few³⁷

Relief was granted to senior batsman Sourav Ganguly by the court in the recent case *Sourav Ganguly v. Tata Tea Ltd.*³⁸ constituting that his popularity and personality forms to be his intellectual property and thus a licensed innovation. The facts of the case were that on returning from Lords after being the holder of magnificent hundreds of the year Sourav Ganguly got to know that Tata Tea Ltd. was advancing its tea by alluring consumers to have an opportunity to congratulate the cricketer by the postcard which can be found in every one kilo packet of the tea. Though he was the representative of the company but has never approved the company to promote its tea in association with his image or name.

Celebrities are increasingly becoming aware of their image and publicity rights, there have been many other instances where celebrities have sought protection of their rights. For example the famous actor Rajnikanth claimed a right over his screen persona and issued a legal notice form imitating his image or ‘character’ from the film “BABA” which was scheduled to be released, for the commercial interest. Inferable from abuse of their voice by different brands, performing artists Amitabh Bachchan and Sunny Deol are additionally looking for protection under the trademark law.³⁹

The limited protection to a celebrity’s image is provided under the provisions of trademark laws. Under the Trademarks Act, 1999 there is no specific provision to grant protection to image and publicity rights. Though, the Act under Section 2(m) providing the

³⁶ *Id*

³⁷ Thomas George, Celebrity-focused Culture Highlights Need for Statutory Right to Publicity, *available at* :<http://www.worldtrademarkreview.com/issues/article.ashx?g=1596958f-55a7-4b2b-a93c-66f887027801>(last visited on 2 Aug. 2017).

³⁸ CS no. 361 of 1997

³⁹ There were recent instance of a Gutka company imitating Amitabh Bachchan’s voice in its advertisement for endorsement of its product without his permission. Also Sunny Deol issued legal notice to Big 92.7 FM because the latter aired audio fillers ‘Son Sunny’ mimicking him and his family. *available at*: <http://www.financialexpress.com/news/when-celebrities-seek-copyrights/729569/0> (last visited on 2 Aug. 2017).

definition of 'mark' does include names. Some well known personalities from India like Baba Ramdev, Sanjeev Kapoor, Kajol, Sachin Tendulkar, Shahrukh Khan and Yuvraj Singh etc. have applied for the registration of their name as trademark to have protection under the Act against its misuse. There is great rise in the trend as regard to the use of name and image by the celebrity to market goods or services. Passing off is the common law remedy on which celebrities depend to protect their image and publicity rights. To avail the remedy from passing off action the proof of the persons' reputation, misrepresentation caused and thus irreparable damage to the individual is required.

Section 14 of the Trade Marks Act 1999 restricts utilization of individual names where an application is made for the registration of the trademark, which dishonestly proposes an association with a living individual, or a man whose passing occurred inside 20 years before the date of application of the registration of the trademark. In this manner the lawful beneficiaries of the celebrities can likewise protect the abuse of their names. The purpose of perceiving the transferability and permitting of the specific right can be constructed from the statute. Accordingly the property right in one's name is allowed to celebrities in the trademark law. Though, the lacuna of not delineating the rules on assigning and authorizing such a right needs to be taken into consideration.

A celebrity can protect his or her name from use as a part of a domain name by exercising a court remedy in light of trademark encroachment (if he or she has acquired the registration for the mark) or by filing a passing off case in view of his or her goodwill and reputation in his or her name. Under the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers a complaint can be filed alternatively by him or her.

In the majority of the UDRP cases it has been discovered by the panellists that complainants' claim to have a personal name protected under trademark rights will depend on the premise that the complainant could have either utilized the individual name being referred to as marketable commodity, giving permission to promote someone else's goods and services using his/her name or image charging the considerable fee or in direct commercial transactions in advertising his/her personal products or ventures.

Recently, politician Arun Jaitley – the finance and defence minister in the present government – looked for a perpetual to control the litigants from abusing the domain name "arunjaitely.com" and to call for immediate transfer of the same sought for the perpetual injunction to be granted. In *Jaitley v Network Solutions Private Limited*⁴⁰It was litigated the Jaitley wanted to register the domain name 'arunjitely.com', but came to know that same has been registered by the defendant beforehand. It was argued that the once the domain name registration was expired the defendant rather deleting it or transferring it to the plaintiff transferred the same to auction site for domain names (the third defendant). Allowing the interim injunction the restricted the transfer, discharge or offer available to be purchased of the domain name "arunjaitely.com" to any outsider and the formation of any outsider intrigue in that.

The action of passing off is relevant in cases of personality merchandising where a person's name, likeness or performance characteristics are misused. In general, a passing off action is a remedy against the misrepresentation causing damage to the reputation or goodwill of an individual by another person trying to pass off his goods or business as the goods of another.

Copyright Laws

The Copyright Act represents a challenge in regard to acknowledgment of publicity and image rights. There is very little lucidity with reference to what parts of celebrity rights might be ensured under Copyright Act. Celebrities' voice cannot be granted protection under Indian copyright laws as it does not fall in the category of literary, dramatic or musical work. Though, the voices of celebrities are frequently abused by the promoters or advertisers. The economic or commercial rights to the performer under copyright laws have

⁴⁰ 2011 (47) PTC 1 (Del)

been provided as a separate class of performers' right.⁴¹ But the problem which subsists is that these rights are provided in specific performance and not in the artist or celebrities' general image. In this way the Copyright Act also proves to be insufficient to invest image rights on celebrities. Copyright gives exclusive, although, constrained rights of protection and enables the celebrities to approve propagation, formation of a subsidiary picture, deal or display of, say, an authorized photo of themselves by others.⁴² To pursue an action for copyright infringement, an individual must be able to show ownership of a copyright in the image and copying of that image. In the context of celebrity photographs, the biggest problem celebrities' encounter is their lack of ownership in the photograph being exploited. In the case of books involving celebrity authors, any adaptation, if original, nevertheless can get protection under copyright law.

Under the category of artistic work the Indian Copyright Act, 1957 gives protection to painting, sculpture, drawings and so on. The protection granted by the section 14 of the Act which provides exclusive right to author to authorize others to reproduce the work in any form, including conversion of two dimensional works to three dimensional works and vice versa has been extended by the court. Now such protection has been extended to include protection of fictitious characters falling in the ambit of artistic work.

Though, no protection has been accorded to the celebrity's name or image in India. In the case of *Raja Pocket Books v Radha Pocket Books*⁴³ 'Nagraj the Snake King' a well known character of the youngsters' comic, was granted protection under law of copyright

The Copyright Act, 1957 does not define the word 'celebrity'. However, the definition of a 'performer' under section 2(qq) includes an actor, singer, musician, dancer, acrobat, juggler, snake charmer, lecturer or any other person who delivers a performance. There is lack of legal definition of celebrity as even if the reference be made to definition of performer as provided in section 2(qq) of the Indian Copyright Act, a performer is not a celebrity always and a celebrity may not be performer at all. For example, a teacher teaching in class or a snake charmer performing his art are performers but not celebrity. Section 2(qq) defines performers under the Copyright Act 1957, which includes actors, singers etc. This shows that even actors are being given the performers right. Performer's right includes economic rights, moral rights and non-tangible rights. Non-tangible rights include the right over the persona of the performer⁴⁴, the right against use of likeness or name of the performer.⁴⁵ Thus it seems that the authors are well protected under the interest of performer's rights under Copyright Act. However Section 38(4) of the act of 1957 specifically brings an exception to the performer's rights. It reads as "Once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of Sub-sections (1), (2) and (3) shall have no further application to such performance". This shows that in case the actors have performed the work in a cinematograph film then they cannot claim any protection as per their performer's rights. Thus once they receive royalty, they cannot claim any protection.

As per new Copyright Amendment Act, 2012, a new provision Section 38B (b) has been added in the copyright which specifically mention that "the performer of a performance shall, independently of his right after assignment, either wholly or partially of his rights, have the right to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation". Thus the protection has been widened now, to protect the interest of the actors doing performance in a cinematograph film. The question as per Section 2(q) of the Copyright Amendment Act 2012, which defines a

⁴¹ Performers' Rights are given under Sec.38 of the Copyright Act, 1957. It should be noted that performers are only conferred with economic rights and there is no provision to accord moral rights.

⁴² Prather M, Celebrity copyright law, 2010, available at: http://www.ehow.com/about_6461739_celebrity-copyright-law.html, (last visited on 5 Aug,2017)

⁴³ *Raja Pocket Books v Radha Pocket Books* (1997) (40) DRJ 791

⁴⁴ *Onassis v Christian Dior*, (1984)122 Misc.2d 603

⁴⁵ *Presley v. Russen*, (1981)513 F.Supp. 1339 D.N.J

performance as ‘a performance is any visual or acoustic presentation made live by one or more performers’ remains unclear. The question remains unsolved as to how the performance in a movie by an actor would be considered as having performer’s rights. It brings ‘acting’ as a dubious work, without any clarification about its protection as a copyrightable subject matter. If a work is itself not a subject matter of copyright protection then it would be very difficult to establish the fact that actors are entitled to claim even the morality rights in any work.

Morality rights as per the Indian Copyright Act 1957 have been given only to the authors and not to the actors as such. As per Section 57 of the act, there exists special right which is conferred only to the authors. Authorship has not been extended to include actors within its own. The WPPT has expressly denied ‘moral rights’ to audio-visual performers such as actors⁴⁶, partly due to India’s insistence during negotiations, leading several commentators to opine that this was due to the powerful producer’s lobby in both Hollywood as well as Bollywood which seeks to deny actors any rights.⁴⁷

IX.CONCLUSION

From the above discussion, one can understand that a celebrity right is a right of its own kind. On one hand, it is the property of the celebrity, who can exploit it in any ways, as he prefers, and the publicity rights are treated as one’s own property. The Indian legal system is underequipped in dealing with the modern phenomenon of celebrity endorsements and merchandising. With exorbitant sums riding on celebrities, the advertisers and market forces often find ways and means to abuse celebrity images.

Neither the present trademark law nor copyright regime provides an overall protection of the personality and image rights of the character. Though the registered names of the characters may be sought to be protected, as noted above, under the provisions prescribed to protect “well known marks,” the whole process shall involve many legal hurdles needed to be crossed. The provision is not providing for a per se protection to such names as the protection shall be available only when such proprietor or user will be able to establish that the name is a well known mark. Further, the provision does not provide for any remedy against unauthorised use of the image or other personality attributes of any character or celebrity for the endorsement purposes. Similarly no protection of moral rights has been provided to celebrities under Indian Copyright Act, as it fails to include actors within the ambit of authors. This situation furthers the need to recognise the right of publicity in India.

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⁴⁶ World Intellectual Property Organization , *available at* :www.wipo.org/pressroom/en/releases/2002/p_302.html(last visited on 4 Aug.,2017)

⁴⁷ Fiona Macmillan “The Cruel C: Copyright and Film”, 21 *Eur IPR*.(2002).

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