MY REPUTATION IS MY REPUTATION, NONE OF YOUR REPUTATION: UNFURLING CELEBRITY RIGHTS

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ABSTRACT

Celebrity rights are a bundle of rights that entitle a person who has attained a celebrity status to a distinct "identity". The right to privacy inextricably linked with the Publicity Rights may all be referred to as Celebrity Rights. Popular persons frequently find themselves in a soup where their name, picture, or other likeness are distorted or unauthorisedly used by a third party to promote their goods or services by capitalising on their reputation and making it look as if that particular celebrity is endorsing it. In such cases, not only does a celebrity's reputation is likely to be damaged, but the celebrity also faces economic loss. As per John Locke, every person has the right to enjoy the fruit of their labour, similarly, celebrities should have the sole right to reap the benefits of their carefully crafted reputation. It is morally and economically unfair when a third party uses their reputation without their consent. This paper attempts to bring together the evolution, aspects, reasons, jurisprudence, and legislations revolving around celebrity rights under one ink. The paper concludes with serving food for thought to its readers.

Key Words- Privacy, Publicity, Personality, Celebrity, Copyright, Trademark, Passing-off

INTRODUCTION

With the advent of the 21st century, competition among brands has increased manifolds. Along with ensuring product quality, the companies are now tilting towards heavy marketing and advertisements of their goods and services. Companies engage celebrities or popular personalities to endorse their brand to create brand awareness. Celebrity endorsements are a way of influencing customers, gaining visibility and increasing credibility in the market. But

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what happens when a third party uses a celebrity's image or voice unfairly? Does it only affect the celebrity, or does it also affect the endorsing company?

Any unfair use of a celebrity's likeness infringes a group or rights- Privacy, Personality, and Publicity. These rights together form Celebrity rights. When a celebrity endorses a product, the audience believes that the celebrity has faith in that product. In many situations, unfair use of a celebrity's image or voice by brands for advertising their products can disrepute the celebrity if the brand is viewed negatively by the people.[175] For example, a tobacco brand advertising its product by unfairly using a celebrity's image or voice might tarnish the reputation of the celebrity. Celebrities are approached for brand endorsements mainly based on the reputation they have in the eyes of the public. A tarnished reputation is thus bad for their business.

While the celebrity suffers damage to their reputation and above-mentioned rights, the brands they endorse might also face an economic loss. For example, if Mr. X, a celebrity is endorsing a protein drink brand 'A', and another protein drink brand 'B' unfairly uses Mr. X's image or voice while advertising their product, it creates confusion among the audience. The audience is led to believe that Mr. X, is endorsing brand 'A' as well as brand 'B'. Thus, the consumer base that A would have gained due to the popularity of Mr. X, gets divided between brand 'A' and brand 'B', making brand A suffer. So, celebrity rights are crucial not only to the celebrities themselves but also to the brands endorsed by such celebrities. Thankfully, for such brands and celebrities, IPR comes to their refuge, to some extent, to protect them from such unfairness.

RATIONALE FOR PROTECTING CELEBRITY RIGHTS

We generalise celebrities as being popular among the audience and as public figures capable of influencing people. But, from the legal perspective, a generalised view does little to no good. A public person is "*a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a "public personage". He is, in other words, a celebrity*."[176] The definition of a public person can also be extended to persons who try or

[175] Michael Madow, 'Private Ownership of Public Image; Popular Culture and Publicity Rights' (1993) 81 CLR <https://jstor.org/stable/3480785> accessed 31 January 2022.
[176] W Prosser, *Handbook of the Law of Torts* (4th edn, 1971) 823.

maintain a celebrity status.[177] Every person who wishes to lead a private life should be able to do so and has a right to be left alone,[178] more so when the person is a celebrity. The value of a celebrity's image or likeness goes beyond the right to privacy of a normal person as they have the right to publicity in their photos, voice, etc.[179] The need to protect celebrity rights can further be justified by the following theories-

1. JOHN LOCKE'S THEORY

John Locke, an English Philosopher and Political Theorist, wrote *The Second Treatise of Government* in 1689. In chapter 5 of the book, Locke explains how every man has a right to the labour of his body and the work of his hands. So, when he uses his labour on a property, it becomes his.[180] Celebrities work hard to earn a good reputation and uphold a positive image. Applying Locke's principle, since celebrities use their labour to create a good reputation for themselves, such reputation is their property and no one has a right to it unless they explicitly give someone a right to use their reputation.

Further, Locke illustrates that although the river created by God is commonly owned by all humans, if a person uses his labour and fills a jug with the river water, it belongs to such a person even though the jug might have been kept in the open where others have access to it. Locke argues that since such a person has used his labour, the jug of water strictly belongs to him and no one can use it without explicit consent.[181] Similarly, although a celebrity's images and likeness are publicly available, it still strictly belongs to the celebrity and no one can use it without their consent. Thus, no brand or company can use a celebrity's image or likeness without obtaining explicit and fair consent.

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[177] Richard B Hoffman, 'The Right of Publicity - Heirs' Right, Advertisers' Windfall, or Courts' Nightmare (1981) 31(1) DePaul Law Review <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2296&context=law-review> accessed 2 February 2022.
[178] *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
[179] *Haelan Laboratories v Topps Chewing Gum Inc* (1953) 202 F 2d 866.
[180] John Locke, *Second Treatise of Government* (first published 1690, Jonathan Bennett, 2017) <https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf> accessed 2 February 2022.
[181] ibid.

2. KANT'S AND HEGEL'S THEORY

A work is considered to be an expression of the author and resembles his personality. His expression forms a part of his creativity which deserves protection. This idea was proposed by a 19th-century philosopher, Kant.[182] Kant proposed that such an expression deserves protection because economic rights are vested in it and because it is the author's work and he has created it. This theory is based on moral rights protected by IPR that gives the artist certain rights to control modifications and derogatory actions against the work.[183]

Quoting the works of another political philosopher, George Hegel "*the circumstance that I, as free will, am an object to myself in what I possess and only become an actual will by this means constitutes the genuine and rightful element in possession, the determination of property*",[184] it is understood that personality of a person, especially a renowned one, is a culmination of their capabilities and reinforcement of self-understanding. Kant further stated that personality-related rights come into existence when such persons are willing to claim such rights against other persons.[185]

Putting this in perspective of celebrity rights and combining the views of the two philosophers, the image and likeness of a renowned person should be protected since it is an expression of their personality in terms of capability and self-understanding. Such an expression of personality needs protection and should be protected only if such persons claim their right over their personality.

3. UNJUST ENRICHMENT

Aside from the celebrities themselves, brands engaging celebrities for commercial advertisements or endorsements are also harmed if some other brand unfairly uses the likeness of such celebrities for promotion. Generally, as a matter of industry practice, celebrities

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[182] Immanuel Kant, *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 30-32 <http://users.clas.ufl.edu/burt/UnReadingDisaster/Kantperpetualpeace.pdf> accessed 2 February 2022.
[183] Berne Convention for the Protection of Literary and Artistic Works, art 6.
[184] Georg W F Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 2001) 76-77 <http://home.lu.lv/~ruben/Vestures_filozofija/HegelPhilosophy%20of%20Right.pdf> accessed 2 February 2022.
[185] Immanuel Kant, *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 30-32 <http://users.clas.ufl.edu/burt/UnReadingDisaster/Kantperpetualpeace.pdf> accessed 2 February 2022.

engaged in a brand endorsement are not allowed to sign an endorsement agreement with another brand in the same product line so that consumers are attracted only to their brand and gain from such association with the celebrity. Eg- If Mr. X endorses a beauty brand 'P', he would not be allowed to endorse any other beauty brand by the endorsement agreement he signed with 'P'. In such a case, if any other beauty brand uses the likeness of Mr. X without his consent or an agreement, such brand will be unfairly benefitted. Richard Hoffman stressed this fact of unjust enrichment. He stated that since a celebrity's likeness attracts attention and promotes brands that the celebrity is associated with, any other brand using the celebrity's likeness without consent would result in unjust enrichment of such brand.[186]

This unjust enrichment is not only against the rightful brand but also against the celebrity. The desirability of a celebrity is a result of their hard work and sacrifices of their privacy (privacy is sacrificed when they agree to lend their name, image and likeness for their work). In the case of *McFarland v. E & K Corp*,[187] the court said that a celebrity's likeness is a fruit of their labour and they should be entitled to legal protection. Their hard work empowers them with significant economic potential and thus, they should be able to freely enjoy the fruits of their labour without unjust enrichment[188] and should be able to capitalise their personality completely.[189] Their reputation is like an investment for them which pays off. If they are not protected against unjust enrichment, they will lose interest in investing in their image.[190] The apex court of US observed that "*The State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual…the protection provides an economic incentive for [the artist] to make the investment required to produce a performance of interest to the public.*."[191]

VARIOUS ELEMENTS OF CELEBRITY RIGHTS

After establishing that celebrities and brands they endorse have the inherent right to protect their work from unjust enrichment, it is quintessential to look at the various rights of celebrities'

[186] W Prosser, *Handbook of the Law of Torts* (4th edn, 1971) 823.
[187] *McFarland v E & K Corp* (1991) 18 USPQ 2d (BNA) 1246.
[188] *Palmer v Schonhorn Enters Inc* (1967) 96 NJ Super 458.
[189] *Zacchini v Scripps-Howard Broad Co* (1977) 433 US 562.
[190] ibid.
[191] *Palmer v Schonhorn Enters Inc* (1967) 96 NJ Super 458.

that act as a safeguard and protect their likeness. As pointed out earlier in this paper, celebrity rights are a combination of 3 rights- Privacy rights, Personality rights and Publicity rights.

1. PERSONALITY RIGHTS

Every person has a unique personality that helps others identify and distinguish them from others. Each person is recognised by their personality, which creates a certain image of themselves in public eyes.[192] An individual's emotions, dignity, morals etc., are a part of their personality.[193] Each person contributes to society in their unique way owing to their personality and individual talents. The Hegelian metaphysical concept of property also justifies such personalities by saying, "*An individual's property is an extension of their personality.*"[194] In accordance with Locke's theory and the Hegelian concept put into the current frame of personality rights, it is safe to conclude that a celebrity's work is an extension of their personality.

Jurisprudence philosopher Sir Salmond once opined that "*persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality received legal recognition.*"[195] One of the first legal battles to claim personality rights was fought in 1931 when Tolley, an amateur golf player was portrayed in a Cadbury chocolate advertisement by the defendants without Tolley's consent. Tolley moved the court and argued that the defendants wrongly portrayed him in the advertisement and made it appear as if he was endorsing the brand to gain an unfair advantage of his reputation and personality as an amateur golf player. The court contended with his argument and awarded damages to him for the wrongful use of his personality.[196]

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[192] Tabez Ahmed and Satya Ranjan Swain, 'Celebrity Rights: Protection under IP Laws' (2011) 16 Journal of Intellectual Property Rights <http://nopr.niscair.res.in/bitstream/123456789/11021/1/JIPR%2016(1)%207-16.pdf?utm_source=The_Journal_Database&trk=right_banner&id=1415701989&ref=16069806d0afbb3d9db21bfeeeb5de0e> accessed 26 January 2022.
[193] Garima Budhiraja, 'Publicity Rights of Celebrities: An Analysis under the Intellectual Property Regime' (2011) 7 NALSAR Student Law Review <http://commonlii.org/in/journals/NALSARStuLawRw/2011/7.html> accessed 26 January 2022.
[194] Kanu Priya, 'Intellectual Property and Hegelian Justification' (2008) 1 NUJS Law Review <http://commonlii.org/in/journals/NUJSLawRw/2008/23.pdf> accessed 26 January 2022.
[195] PJ Fitzgerald, *Salmond on Jurisprudence* (Universal Law Publishing 2002) 298.
[196] *Tolley v Fry* (1931) AC 333.

2. PRIVACY RIGHTS

The concept of celebrity rights gained momentum through the concept of privacy rights. As Samuel Warren and Louis Brandeis argued, the right to be left alone is a basic personal freedom and should be extended to all persons.[197] People are fascinated by a celebrity's lives and need to know every single detail of their lives. To fulfil this wish, the media and paparazzi hover around celebrities to collect whatever information possible and feed the public. As a result, the privacy of a celebrity's family, friends, relatives, etc., is also encroached upon. Amongst all this, the life of a celebrity becomes open to media and public scrutiny, thus resulting in "*colonisation of the veridical self by the public face*" as quoted by David Tan.[198] He further elaborates that even a modicum of privacy for celebrities should be a fundamental human right given how open their lives are to the media and scrutiny.[199] Following the observations of Michael Madow[200] mentioned previously, David Tan's remark seems prudent.

While celebrities do require media attention for their profession, sometimes the overreaching effects of media can be overwhelming. Understanding the dilemma of public figures, Braudy wrote "*Fame is desired because it is the ultimate justification, yet it is hated because it brings with it unwanted focus as well, depersonalising as much as individualising. Then, when the public image threatens to become overpowering, privacy seems to be a retreat*"[201] Simply put, to build an image and reputation, public figures need to have a public life, they wilfully give up their privacy in certain circumstances. But when it starts encroaching their personal space, they start claiming their privacy rights. Everything should be in the right proportion; a balance needs to be maintained. Privacy rights ensure that celebrities have this balance. In a classic case, Dorothy Barber was forcefully photographed inside her hospital room during delivery even after the agency was denied entry.[202] In 2017, India received her landmark judgment on

[197] Louis D Brandeis and Samuel D Warren, 'The Right to Privacy' (1890) 4 HLR <https://cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> accessed 27 January 2022.
[198] David Tan, 'Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies' (2007) 25(3) AELJ <https://heinonline.org/HOL/LandingPage?handle=hein.journals/caelj25&div=31&id=&page=> accessed 25 January 2022.
[199] ibid.
[200] Michael Madow, 'Private Ownership of Public Image; Popular Culture and Publicity Rights' (1993) 81 CLR <https://jstor.org/stable/3480785> accessed 31 January 2022.
[201] Leo Braudy, *The Frenzy of Renown: Fame and its History* (Oxford University Press 1986).
[202] *Barber v Times Inc* (1942) 159 SW 2d 291, 295.

privacy rights that included privacy as a part of fundamental rights.[203] The court, in this case, further recognised privacy rights to upheld individual autonomy and personal dignity.

3. PUBLICITY RIGHTS

It was in the 1950s that the marketing and advertising industry realised the potential of celebrity endorsements. Due to high economic returns on celebrity endorsements, the commercial value of celebrities increased.[204] The newly introduced concept of celebrity endorsement gained momentum quickly due to its economic benefits and thus needed legal protection. It is a fact that if something has a high commercial value, the judicial system will always protect it.[205]

Publicity rights prevent the unauthorised use of a celebrity's name or likeness by a third person for commercial benefit. It was first defined as "*inherent right of every human being to control the commercial use of his or her identity*" in 1984.[206] Publicity rights give a celebrity the exclusive right to license their name and likeness to a third party of their choice for commercial. In case of unauthorised use of their likeness, publicity rights grant them the right to demand compensation. The first case to ever recognise this right and separate it from privacy rights[207] was *Harlan Laboratories, Inc. v. Topps Chewing Gum Inc.*[208] In the case, the court ruled that public figures have "*publicity rights in their photographs*" and have the "*right to grant the exclusive privilege of publishing*".

In *Martin Luther King, Jr. Centre for Social Change, Inc. v. American Heritage Products, Inc.*,[209] it was upon the court to decide whether the death of a celebrity extinguishes their publicity rights, the opined that "*if the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely*

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[203] *K S Puttaswamy v Union of India* (2017) 10 SCC 1.
[204] George M Armstrong Jr, 'The Reification of Celebrity: Persona as Property' (1991) 51(3) Lousiana Law Review <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5285&context=lalrev> accessed 28 January 2022.
[205] ibid.
[206] *Lerman v Flynt Distrib Co* (1984) 745 F 2d.
[207] Harshada Wadkar, 'India: Publicity Rights and its Scope in Intellectual Property Laws' (Mondaq, 19 March 2020) <https://mondaq.com/india/trademark/905188/publicity-rights-and-its-scope-in-intellectual-property-laws> accessed 25 January 2022.
[208] *Haelan Laboratories v Topps Chewing Gum Inc* (1953) 202 F 2d 866.
[209] *Martin Luther King Jr Center for Social Change, Inc v American Heritage Products, Inc* (1983) 694 F 2d 674.

death would seriously impair, if not destroy, the value of the right of continued commercial use.." thus implying that celebrity rights are transferable and inheritable.[210]

INDIA'S STANCE ON CELEBRITY RIGHTS

With regard to the judicial interpretation of celebrity rights, India is far behind its Western counterparts. The Indian legislation also has not shown acceptance of this concept. While India is still at a nascent stage in conceptualising celebrity rights, the momentum in India is not very encouraging. Only one piece of legislation in India prohibits the unauthorised use of certain public figures and national emblems for commercial benefits- The Emblems and Names (Prevention of Improper Use) Act, 1950.[211] Such marks as provided in the schedule of the act is also prohibited from being trademarked on the grounds of complete refusal of registration.[212] Montblanc, a German company launched a limited edition of 'Gandhi Pens in honour of Mahatma Gandhi. On 29 September 2009, Tushar Gandhi, Mahatma's great-grandson launched the 'Gandhi Pens' in India. 2 days after the launch, a petition was filed before the Kerala High Court stating that the sale of such pens is illegal since the section 9A of the Emblems Act protects the name and pictorial representation of Mahatma Gandhi and states that it cannot be used as an item for commercial or trade purposes.[213] The court closed the petition after the respondent agreed not to sell the 'Gandhi Pens' owing to the Emblems Act.

1. CELEBRITY RIGHTS AND IPR

In the late 1990s, courts recognised the popularity to be an IPR. In an unreported case of *Sourabh Ganguly v. Tata Tea Ltd.,*[214] although Sourabh was an employee of the defendant company, he did not authorise the company to advertise their tea using his name. Thus, the court held that the fame and popularity he gained as a cricketer constituted Intellectual property rights of which he was the proprietor. For a long time, celebrity rights have been sought after as per the ambit of IPR in India, primarily because India did not recognise the right to privacy as a fundamental right until the Puttaswamy case in 2017.[215] This case put privacy rights in

[210] Prakash Sharma and Devesh Tripathi, 'Celebrity Agony: Establishing Publicity Rights under the Existing IPR Framework' (2019) Summer Issue ILI Law Review <https://ili.ac.in/pdf/prakash.pdf> accessed 27 December 2021.
[211] Emblems and Names (Prevention of Improper Use) Act 1950, s 3.
[212] Trade Marks Act 1999, s 9(2)(d).
[213] *Dijo Kappen v Union of India* (2011) SCC OnLine Ker 1213.
[214] *Sourabh Ganguly v Tata Tea Ltd* (1997)CS No 361 of 1997.
[215] *K S Puttaswamy v Union of India* (2017) 10 SCC 1.

India on the map of Part III of the Constitution. Thus, there has been very little development of celebrity rights concerning privacy in India. However, privacy has been the setting ground for the recognition of celebrity rights as a concept around the world.[216] In IPR, celebrity rights get protected via Trademark, Copyrights and tort of passing-off.

A. TRADEMARK

Protection under Trademark is similar to celebrity rights in one aspect- Controlling confusion. As trademarks prevent consumers from confusing one brand for the other, celebrity rights also prevent the audience from thinking that a particular celebrity is associated with the brand in the case where the brand unfairly uses such celebrity's likeness. But, the purpose of Trademark is wholly different from celebrity rights.[217] The test for Trademark infringement is based on "*likelihood of confusion*" and the test to determine infringement of publicity rights is "*identifiability*".[218]

The Shakespearean concept of 'What's in a name?' seemed apt for those times when people wanted to spread the idea of believing in a man's ability than in his name. But now, a person is recognised by his name for the hard work he puts in. Bringing this in context with the theme of the paper, a celebrity is known by their name. The fruit of their hard work is embedded in their name and likeness. After the 2016 Supreme court judgment[219] where the court held that title of a work cannot be protected under Copyright, the only resort left was that of the trademark.

No provision under the Trademarks Act, 1999 prohibits a celebrity from trademarking their name. Section 2(zb) defines 'trade mark' as a sign or symbol represented graphically that distinguishes the goods and services of one person from the other.[220] To prevent unscrupulous use of celebrity's names, they have turned towards trademarking their name. In India, the act allows registration of "*sign capable of distinguishing goods and services of one person from*

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[216] Louis D Brandeis and Samuel D Warren, 'The Right to Privacy' (1890) 4 HLR <https://cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> accessed 27 January 2022.
[217] McCarthy and J Thomas, *Rights of Publicity and Privacy* (Clark Boardman Callaghan 1999).
[218] Patrick J Heneghan and Herbert C Wamsley, 'The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen' (1982) 2(1) Loyola of Los Angeles Entertainment Law <http://preslaw.info/the-service-mark-alternative-to-the-right-of-publicity-estate-of-presley-v-russen> accessed 14 February 2022.
[219] *Krishika Lulla v Shyam Vithalrao Devkatta* (2016) 2 SCC 52.
[220] Trade Marks Act 1999, s 2(zb).

another, any word (including personal names), design, numeral and shape of goods or their packaging"[221] as a trademark. Indian courts, too have granted celebrities protection under Trademark by allowing them to trademark their name and titles and characters and titles of films.

To save themselves from unauthorised use of their names, celebrities in India like Shahrukh Khan, Kajol, Ajay Devgan, Sunny Leone and a few more have trademarked their name. Nice classification for Trademark categorises goods and services into 45 classes,[222] thus every good and service sought to be trademarked should be with respect to the classes. Celebrities wanting to trademark their name will also have to register under one of the 45 classes. For e.g., Shahrukh Khan registered work mark 'SRK' under class 9.[223]

After registering their name and likeness, celebrities can assign or licence their trademark.[224] Celebrities gain monetary benefits from such assignments and licensing. This way, they are in complete control of their image and likeness, commercially benefit from their goodwill and are also protected against any unauthorised use. In case of a deceptive mark or symbol similar to the one registered, is in use, the proprietor of a registered trademark can claim infringement of their trademark. This is called dilution of trademark which was first recognised in Indian courts in the 1990s.[225] Dilution has been termed as 'a species of infringement' by courts.[226] By far, Trademark provides the best protection amongst all the other forms of IPR protection.[227]

B. COPYRIGHT

Amitabh Bachchan was keen on copyrighting his voice after he learnt that a Gutka company imitated his voice in their advertisements to sell Gutka. But, unfortunately, the Copyright Act

[221] Trade Marks Act 1999, s 2(1).
[222] WIPO, Nice Classification <https://wipo.int/classifications/nice/nclpub/en/fr/> accessed 13 February 2022.
[223] Trademark Public Search, IP India online, Application no 970166 <https://ipindiaonline.gov.in/tmrpublicsearch/tmsearch.aspx?tn=254229726&st=Wordmark> accessed 18 February 2022.
[224] Trade Marks Act 1999, ss 37-56.
[225] *Daimler Benz Aktiegesellschaft v Hybo Hindustan* AIR 1994 Del 239.
[226] *ITC Limited v Philip Morris Products* (2010) 42 PTC 572.
[227] Prakash Sharma and Devesh Tripathi, 'Celebrity Agony: Establishing Publicity Rights under the Existing IPR Framework' (2019) Summer Issue ILI Law Review <https://ili.ac.in/pdf/prakash.pdf> accessed 27 December 2021.

in India does not protect voice *per se*.[228] The Copyright Act protects literary, dramatic, artistic or musical work, or cinematograph films and records. There has been no interpretation made to date by the judiciary that extended copyright protection to a person's voice *per se*.[229]

When the popularity of the fictional characters played by real-life celebrities increases, the audience tends to associate that celebrity with that fictional character.[230] In such cases, the celebrities have rights in their performance of that character, commonly known as performers' rights. Several international conventions like- The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (Rome Convention), Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS) and the WIPO Performances and Phonograms Treaty, 1996 (WPPT) protect and recognise performers' rights. The Indian legislation recognises performers to be "*actors, singers, musicians, dancers, acrobats, jugglers, conjurers, snake charmer, a person delivering a lecture or any other person who makes a performance*."[231] The legislation provides certain economic rights to performers like the right to make a visual recording or a sound recording of the act performed by the performers including the right to issue copies, the right of production, right to communicate the work to the public, the right to broadcast the performance to the public and right to sell or give the work on commercial rental.[232] Moral rights like the right to attribution and the right to the integrity of work are also vested in the performers.[233] Thus, if anyone uses a video or photograph or any kind of excerpt from the performance of a performer, such performer can claim infringement of their performers' rights.

Performers have three kinds of moral rights associated with their work according to the Delhi High Court.[234] First, paternity right in their work, i.e.- the right to have their name on the work.

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[228] Amit Gupta, 'When Celebrities Seek Copyrights' *Financial Express* (Noida, 27 December 2010) <https://financialexpress.com/archive/when-celebrities-seek-copyrights/729569/#:~:text=Voice%2C%20per%20se%2C%20cannot%20be,or%20cinematograph%20films%20and%20records.&text=However%2C%20copyright%20protection%20is%20not%20available%20specifically%20for%20voice.> accessed 19 February 2022.
[229] ibid.
[230] Nishant Kewalramani and Sandeep M Hegde, 'Character Merchandising' (2012) 17 JIPR <http://nopr.niscair.res.in/bitstream/123456789/14770/3/JIPR%2017%285%29%20454-462.pdf> accessed 17 February 2022.
[231] Copyright Act 1957, s 2(qq).
[232] Copyright Act 1957, s 38A.
[233] Copyright Act 1957, s 38B.
[234] *Amar Nath Sehgal v Union of India* (2005) 30 PTC 253.

This right is also called the right to identification since the work gets identified with the name of the performer. Second, the right to disseminate or divulge the work i.e.- selling the work for valuable consideration and lastly, the right to maintain the purity, i.e.- right against any kind of distortion or misidentification.

The supreme court in *Indian Performing Rights Society v. Eastern India Motion Pictures Association*[235] stated that the composer and lyricist of a cinematograph song have the right to perform that song in public even if the copyright of that song vests in the film producer if the film producer commissioned that song to the composer and lyricist for a valuable consideration. Such a person will then have performers' rights in the performance in today's date.

C. TORT OF PASSING-OFF

The tort of passing is not defined in the Indian legislation explicitly. The Cambridge Dictionary[236] defines the tort of passing-off as "*the illegal act of selling a product that is similar to one that another company has legally protected by a trademark*". The Trademark law protects against infringement of registered marks and provides the same remedy in case of unregistered marks in the form of the tort of passing-off.[237] The tort of passing-off is, therefore a common law tort protecting the goodwill of the trademark holder, whether registered or not, against any damage caused by the defendant using deceptive marks.[238] It is based on the concept "*A man may not sell his goods under the pretence that they are the goods of another man*"[239] The Supreme court defined the tort of passing-off as unfairly gaining economic benefit by capitalising on the reputation earned by the plaintiff.[240] The action of passing off is independent of the trademark claim of the plaintiff.[241] More than protecting the right of the plaintiff, the tort of passing-off protects the consumers against confusion and

[235] *Indian Performing Rights Society v Eastern India Motion Pictures Association* AIR 1977 SC 1143.
[236] 'Cambridge Dictionary' <https://dictionary.cambridge.org/dictionary/english/passing-off> accessed 21 February 2022.
[237] Trade Marks Act 1999, s 27.
[238] 'Passing-off Action under the Trademark Law' (Indian Bar Association) <https://indianbarassociation.org/wp-content/uploads/2013/02/Passing-off-action-under-trade-mark-law.pdf> accessed 23 January 2022.
[239] *N R Dongre v Whirlpool Corporation* AIR 1995 Del 300.
[240] *Cadila Healthcare Ltd v Cadila Pharmaceuticals Ltd* (2001) 5 SCC 73.
[241] *Wander Ltd v Antox India P Ltd* (1990) (Suppl) SCC 727.

misrepresentation.[242] One of the essentials of passing off is the consumers believing the goods to be that of the plaintiff and buying them.

The tort of passing off can be claimed after establishing three important elements. First, the plaintiff has goodwill and reputation, second, misrepresentation was made by the plaintiff either intentionally or unintentionally and third, the plaintiff has suffered or is likely to suffer damage due to the misrepresentation.[243] These essential elements were reiterated by the Supreme Court in 2002.[244] In the famous case of *Honda Motors Co. Ltd v. Charanjit Singh & Others*,[245] the plaintiff is the famous Japanese car and motorcycle giant and the defendants started selling pressure cookers under the name 'Honda'. Honda was an unregistered trademark then in 2002 (it registered its trademark in 2005),[246] the plaintiff filed an injunction against the defendants for the tort of passing off. The plaintiff could establish that they had goodwill and reputation, the defendants misrepresented their mark and that they suffered damages due to such misrepresentation by the defendants. Thus, the court granted an order of injunction in favour of the plaintiff.

In light of the theme of the paper, if a popular band- ABC has not registered its logo, and an apparel company starts associating the band's logo or uses a logo deceptively similar to the band. In this case, the public will be led to believe that the apparel company is somehow related to the band. So, ABC can claim the tort of passing off against the apparel company. In the case of *Irvine v. Talksport*,[247] the plaintiff, who was a famous sports star, came to know that a manipulated photo of his was used by the defendant as if the plaintiff was endorsing the defendant's radio station. The court held that although the plaintiff's likeness was used in a different industry, the tort of passing off will be maintainable since the "*likeness of the plaintiff is a fundamental of a brand and along with several economic and other rights conjoined with that status.*" In *Henderson v. Radio Corporation Pvt Ltd*,[248] the plaintiffs were professional

[242] *Consumer Distributing Co v Seiko Time Canada Ltd* [1984] 1 SCR 583.
[243] *Baker Huges Ltd v Hiroo Khushalani* (2000) 102 Comp Cas 203.
[244] *Laxmikant V Patel v Chetanbhat Shah* AIR 2002 SC 275.
[245] *Honda Motors Co Ltd v Charanjit Singh* (2002) 101 DLT 359.
[246] Trademark Public Search, IP India online, application no 797154 <https://ipindiaonline.gov.in/tmrpublicsearch/tmsearch.aspx?tn=255271965&st=Wordmark> accessed 21 February 2022.
[247] *Irvine v Talksport* (2002) WLR 2355.
[248] *Henderson v Radio Corporation Pvt Ltd* (1969) RPC 218.

ballroom dancers who claimed the tort of passing off and sought an injunction against the selling, printing or distribution of the gramophone record cover entitled "*Strictly for Dancing Vol 1*." The court agreeing with the plaintiff opined that "*wrongful appropriation against the personality of a professional is an injury to professional reputation*." Since the plaintiffs were professionals and their name was unauthorisedly used by the defendants in the same industry, it was likely to create confusion amongst the public and would lead them into believing that the plaintiffs were associated with the goods of the defendants.

2. JUDICIAL EFFORTS

The judiciary has been putting efforts to evolve a holistic jurisprudence for the concept of celebrity rights. In various cases, the courts have taken varying opinions giving us the surety that the courts will not carry a strict interpretation of the concept. The judiciary while delivering on that surety has gone ahead with the legislation and recognised all the three elements of celebrity rights- Privacy, personality and publicity independent of any legislation.

A. PUBLICITY AS A PRIVACY RIGHT

The Supreme Court while laying down that right to privacy is a part of Article 21 of the constitution in the R Rajagopal case, opined that "*A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy"*[249] This judgement came way before the development of publicity rights started in the country. This shows that the courts have always wanted to root publicity rights as a part of privacy. Further, this same para of the judgement was cited by the Madras high court while expressing that publicity rights lie in the right to privacy.[250]

[249] *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
[250] *K Ganeshan v Film Certification Appellate Tribunal* (2016) SCC OnLine 9355.

Analysing the last line of the cited paragraph of the R Rajagopal case, the court believes that if a person voluntarily brings controversy upon himself, the right to privacy would not be available to them. As discussed earlier in this paper, celebrities wish to be in the spotlight, and thus voluntarily bring controversy to themselves. Building upon this view, the defendants in the case of *Phoolan Devi v. Shekhar Kapoor*[251] argued that since the plaintiff is a celebrity who chose to live a life open to the public domain, does not have privacy rights. Interestingly, the court relied on the same case of R Rajagopal (which the defendant used to base their argument) and ruled that "*the right to privacy must encompass and protect the personal intimacies of the home, family, marriage, motherhood, procreation, and child-rearing, irrespective of whether the person is a public figure*" and passed an order in favour of the plaintiff.

The first case that recognised celebrity rights was *ICC Development (International) Ltd. v. Arvee Enterprises*.[252] The court opined that the publicity rights of a celebrity have grown from privacy rights and a person acquires publicity right by virtue of his association with a sports movie etc. The court indicated that "*such a right is only vested in an individual or the indicia of the individual's personality like name signature voice etc*." It further stated that such rights are not vested in any organisation that promoted the person and made him popular.

B. IDENTIFIABILITY - AS A PERSONALITY RIGHT AND PROPERTY RIGHT

In another Madras high court case,[253] the famous actor Shivaji Rao Gaikwad aka Rajnikanth filed an injunction against a film titled "*Main Hoon Rajinikanth"* claiming that he did not authorise the film. Further, the defendant chose to advertise the film as "*Hot Kavita Radheshyam As Sex Worker For Rajinikanth*". The plaintiff found the act of the defendant to be defamatory and unauthorised. The court, in this case, did not focus on the privacy right that the plaintiff is entitled to but focussed on how the film was not consented to and the advertisement was defamatory to the plaintiff who has acquired a reputation and built a personality of his own. The court found the actions of the defendant to be a breach of personality right vested in the plaintiff and granted a permanent injunction. The court stressed the fact that to claim personality rights, the person needs to be a celebrity- easily identifiable.

[251] *Phoolan Devi v Shekhar Kapoor* (1994) SCC OnLine 722.
[252] *ICC Development (International) Ltd v Arvee Enterprises* (2005) 30 PTC 253.
[253] *Shivaji Rao Gaikwad v Varsha Productions* (2016) 62 PTC 351.

Interestingly, the court while deciding this case referred to the cases of publicity rights and thus equated personality rights with publicity rights.[254]

In the case of *D.M. Entertainment v. Baby Gift House*,[255] Daler Mehndi had assigned his trademark to the plaintiff to commercialise his persona. The defendant misused the trademark and the plaintiff sought a remedy against the defendant. This case brought a big jump in the jurisprudence of publicity rights as it laid down the test of 'identifiability'. The court said that personal attributes should be identified as a part of personality and concluded by remarking that "*publicity right can, in a jurisprudential sense, be located with the individual's right and autonomy to permit or not to permit the commercial exploitation of his likeness or some attributes of his personality."*

In a personality right infringement filed by Sonu Nigam against Mika Singh, the Bombay High Court held that: "*no third person should make any commercial profits by using celebrity images unless they have consented to it*". The court deemed fit to impose a heavy fine on the defendant and in general in such cases so that the fine acts as a deterrent against gaining unjust enrichment by using a celebrity's reputation and likeness

Titan Industries v. Ramkumar Jewellers[256] is an authoritative text on publicity rights in India and has been cited repeatedly. Mr Amitabh Bachchan and Mrs Jaya Bachchan had assigned the plaintiff their publicity rights to advertise the goods of the plaintiff. The defendant unauthorisedly portrayed Mr Amitabh Bachchan and Mrs Jaya Bachchan as endorsers of the defendant's business on hoardings that were put up for advertising his goods. The plaintiff argued that they had a publicity right that had been allocated to them by a contract. The discussion was broken into three points by the court. The first is the plaintiff's legal right to sue. In this case, the court decided that the plaintiff should be allowed to sue because of the exclusivity clause in the contract. Second, the court defined the publicity right as a celebrity's right. Finally, the court examined 'validity' and 'identifiability' as aspects of publicity rights. The same criterion of 'identifiability' was mentioned in the D.M. Entertainment case,[257]

[254] Siddharth Jain and Sanyam Jain, 'Publicity Right in India: A Misconception!' (2020) 3(2) JIPS <https://journalofipstudies.files.wordpress.com/2020/07/vol-3-issue-2-6.pdf> accessed 16 February 2022.
[255] *D M Entertainment v Baby Gift House* MANU/DE/2043/2010.
[256] *Titan Industries v Ramkumar Jewellers* (2012) 50 PTC 486.
[257] *D M Entertainment v Baby Gift House* MANU/DE/2043/2010.

however, in the present case, the 'validity' factor was defined as the plaintiff having an enforceable claim in a human being's identity or persona, thus justifying the *locus standi* of the plaintiff.

C. PUBLICITY RIGHTS AS A PART OF TRADEMARK LAW

Mr Arun Jaitley's name, the court found in *Arun Jaitley v. Network Solutions Private Limited and Ors,*[258] comes into the category of names that, in addition to being a personal name, have acquired distinguishing indicia of their own. As a result, the said name has become a well-known personal name or mark under trademark law due to its unique nature or distinctive character, as well as its increased popularity in a variety of industries. As a result, trademark law protects some part of the right to publicity.

The plaintiff was a luxury brand and the defendant was a luxury online shopping portal in the case of *Christian Louboutin Sas v. Nakul Bajaj*.[259] The plaintiff observed sales of their product-line made on the defendant's platform were unauthorised sales and sued the defendant for dilution of trademark, passing-off, and trademark infringement on various grounds, one of them being that the defendant's website prominently exhibited images of Mr Christian Louboutin, infringing on his right of publicity. In support of his claim, the plaintiff argued that popular persons have the right to publicity in their photos, and cited a US judgement- *Haelan Laboratories v. Topps Chewing Gum*[260] and the Titan Industries case[261] to back up their argument. The Delhi high court found the scales of justice dipping weighing in the favour of the plaintiff.

In the case of *Gautam Gambhir v. D.A.P & Co*.,[262] the plaintiff who is a well-known cricket personality Gautam Gambhir filed an injunction seeking to prevent the defendant from using his name in the tagline of the restaurants owned by the defendant. The defendant contended that the use of 'Gautam Gambhir' was due to the defendant's name being Gautam Gambhir. The defendant was further able to prove that he had taken cautious steps by putting his pictures

[258] *Arun Jaitley v Network Solutions Pvt Ltd* (2011) 181 DLT 716.
[259] *Sas v Nakul Bajaj* (2015) 216 DLT (CN) 9.
[260] *Haelan Laboratories v Topps Chewing Gum Inc* (1953) 202 F 2d 866.
[261] *Titan Industries v Ramkumar Jewellers* (2012) 50 PTC 486.
[262] *Gautam Gambhir v DAP & Co* (2017) SCC OnLine 12167.

on online websites and associating his name with those pictures. In this case, it was noted that the ' 'plaintiff's goodwill in so sense was depreciated in his field- cricket. The court noted that the defendant did not have any malafide intention of capitalising on the plaintiff's reputation and since the plaintiff is not associated with the restaurant industry and thus the plaintiff's name was not being commercialised by the defendant to gain any economic advantage. The defendant was merely using his name in the tagline of the restaurants. The significance of this case is that it emphasised the importance of a clear message of endorsement and thus used the confusion test, which is commonly used in trademark law, to determine the validity of the plaintiff's claims. It also laid down certain boundaries for claiming publicity rights in the likeness of celebrities, another wise any person with the same or similar likeness to that of the celebrity will never be able to use their personality traits in the public domain.

CONCLUSION

Celebrity rights give celebrities the right to commercialise their personality and gain monetarily, thus vesting economic rights in their personality. Locke's theory[263] aptly justifies why a celebrity should be able to capitalise on their personality and Kant[264] stresses the fact that economic right is vested in the work of the author since it's an extension of his personality. On the other hand, Hegel[265] believes that personality rights are not vested in the celebrity they come into existence only when claimed. This parody is resolved by looking at IPR. The IPR regime supports Kant to some extent. In the case of copyright, India does not mandate the registration of work in order to claim copyright infringement and monetary compensation.[266] Although the Trademark act in India mandates registration of the trademark,[267] an unregistered mark can be protected via common law- tort of passing-off.[268] Thus, it can be safely concluded that economic rights vest in the celebrity.

[263] John Locke, *Second Treatise of Government* (first published 1690, Jonathan Bennett, 2017) <https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf> accessed 2 February 2022.
[264] Immanuel Kant, *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) 30-32 <http://users.clas.ufl.edu/burt/UnReadingDisaster/Kantperpetualpeace.pdf> accessed 2 February 2022.
[265] Georg W F Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 2001) 76-77 <http://home.lu.lv/~ruben/Vestures_filozofija/HegelPhilosophy%20of%20Right.pdf> accessed 2 February 2022.
[266] Copyright Act 1957, s 45.
[267] Trade Marks Act 1999, s 27.
[268] Trade Marks Act 1999, s 27(2).

Turning to the judiciary, celebrity rights have come a long way from being recognised as a part of privacy and IPR to having its separate share of judicial interpretation. The judiciary in India has been proactive in evolving jurisprudence around the concept the celebrity rights. Celebrity rights encompass- privacy rights, personality rights and publicity rights, publicity rights being the most important one. From the jurisprudential aspect, privacy rights only claimed a breach of privacy which every person has a right to as opined in the R. Rajagopal case[269]. Then came the right to personality which gave rights only to persons who attained a celebrity status to claim rights on their likeness and damage to reputation by the act of the defendant.[270] With the advent of publicity rights, celebrities' right to assign and license their personality rights were guaranteed and any misuse of such assignment and licensing was prevented.

The judiciary has made it amply clear that publicity rights only vest in a celebrity.[271] This is contrary to what Canada follows. In Canada, every person has a right to their name, voice and likeness.[272] Since the Indian judiciary is of the opinion that publicity rights are rooted in privacy right[273]- a right available to all the citizens of the country, then why doesn't the court allow a non-celebrity to claim a breach of publicity right? – Just a food for thought!

[269] *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632.
[270] *Shivaji Rao Gaikwad v Varsha Productions* (2016) 62 PTC 351.
[271] ibid.
[272] Nina R Nariman, 'A Cause Célèbre: Publicity Rights in India' (2021) 6(1) SCC-J <https://scconline.com/blog/post/2022/01/24/a-cause-celebre-publicity-rights-in-india/> accessed 22 February 2022.
[273] *ICC Development (International) Ltd v Arvee Enterprises* (2005) 30 PTC 253.