

The Right of Publicity: Protection under Intellectual Property Rights

Ms. Sonam Jain Bajpai

Asst. Prof. Career college of Law, Bhopal
advocatesonamjain@gmail.com

The Right of Publicity is characterized as the Right of a person to control his or her business utilization of his or her own personality. A personality may comprise of a name, epithet, voice, previous name, photo, similarity or other unmistakable qualities. The definition brings up various issues like what does controls mean. Are there limitations on that control? Can it be used as a spear for censorship by a famous personality? What is a commercial use? Are there exceptions to commercial use? What does identity encompass? The Innovation and the Laws in regards to the security of a man's character have attempted to stay aware of the developing media in which these sorts of protected innovation can be abused. This Right perceives the restrictive right of individual to permit and control the utilization of his or her character. The right of Publicity is regularly mistaken for its more perceived cousins in the licensed innovation family, copyright and trademark. In this paper, an unassuming attempt is made to highlight and clarify different issues concerning big name rights and their assurance under IP laws. There are different worldwide traditions, which have perceived these rights, either specifically or in a roundabout way.

Keywords: Celebrity Rights, Publicity rights, Privacy Rights, celebrity, protection of celebrity rights.

The right of Celebrity to security is continually being abused in a couple courses through misappropriation by others. The Right of publicity and the right to the business utilization of their personality are ceaselessly

infringed. Private unpretentious components of VIPs are routinely spilled to general society and their assurance infringed upon. The ideal to security is in like manner hampered as to a steadily expanding degree supervisors work observation structures in regions in which their specialists have a sensible yearning of insurance. For expecting burglary, goading, etc., organizations are hindering and assaulting the assurance of their specialists by using disguised cameras, checking PC programs, email, site, and other programming. There is therefore a critical to require see enormous name rights inside the space of Intellectual Property rights (IPR) and to secure them against any harm.

Who is a Celebrity?

While examining celebrity rights, it is first important to comprehend what the term Celebrity implies. In addition, it is additionally essential to recollect that VIPs have the sole appropriate to abuse the benefit of being a superstar.

In the case of *Martin Luther King Jr Center for Social Change v American Heritage Products Inc*, it was enunciated that the term 'celebrity' should be interpreted in a broader sense to encompass more than the traditional categories of movie actors, rock stars and ball players. Under the 'direct commercial exploitation of identity' test, when an unauthorized use of a person's identity is made that is both direct in nature and commercial in motivation, the person whose identity has been misappropriated has by definition become a

celebrity for right of publicity purposes.

The Indian Copyright Act does not characterize the word 'Celebrity'. Be that as it may, reference can be made to the meaning of a performer as given under Section 2(qq). A performer is not a celebrity dependably and a VIP may not be a performer by any stretch of the imagination. The word performer incorporates 'an on-screen character, vocalist, performer, artist, tumbler, performer, seer, wind charmer, a man conveying an address or some other individual who makes an execution'. Section 38 of the Act gives an exceptional right i.e. performers' entitlement to any performer who shows up or participates in any execution in connection to such execution and that right might subsist until fifty years from the earliest starting point of the schedule year next after the year in which the execution is made. Clause 3 of a same section says that amid the duration of an performers right, in connection to any execution, any individual who, without the assent of the performer makes a sound recording or visual recording of the execution; or imitates a sound recording or visual recording of the execution and so on., might subject to the arrangements of Section 39, be deemed to have infringed the performers right.

Privacy Rights

The doctrine of privacy put forth by Warren and Brandeis has played a pivotal role in shaping celebrity rights. They opined that the basic concept of personal freedom extended to every person's right 'to be let alone'

In *Cohen v Herbal Concepts Inc*, a picture of the plaintiff and her daughter was used on the label of a cosmetic product without their consent. The defendants argued that the faces of the two individuals were not identifiable in the photograph. The court however, accepted the statement of the plaintiff's husband and awarded damages to the plaintiff in recognition of her privacy rights.

Likewise in another case, a photographer

took pictures of any celebrity during her delivery who filed a suit of 'invasion of privacy against Time Inc, a Newspaper for unauthorized and forceful entry into her hospital room and for photographing her despite her protests. She was successful in her suit and the court while awarding damages of US\$ 3000 opined:

'In publishing details of private matters, the media may report accurately and yet - at least on some occasions - may be found liable for damages. Lawsuits for defamation will not stand where the media have accurately reported the truth, but the media nevertheless could lose an action for invasion of privacy based on similar facts situations. In such instances the truth sometimes hurts.'

Therefore, in such cases, remedy is available to celebrities either in the form of an action for 'invasion of privacy' or in the form of assertion of their 'right to privacy'.

Publicity Rights

Prof J Thomas McCarthy stated, 'The right of publicity is not a kind of trademark. It is not just a species of copyright. And it is not just another kind of privacy right. It is none of these things, although it bears some family resemblance to all three.' Publicity right is 'the inherent right of every human being to control the commercial use of his or her identity.' This right also often referred to as merchandising right, is a right to exploit the economic value of the name and fame of an individual. To claim this right, it is necessary to establish that fame is a form of merchandise. Hence, if someone uses the fame of a celebrity to promote his goods it would be termed as an unfair trade practice, misappropriation of intellectual property, or an act of passing off.

Need to Protect Celebrity Rights

Basically, celebrity rights are assignable and licensable for business benefits. In the present setting, reputation includes enormous

measure of cash and general society picture of a celebrity is of colossal esteem. Perceiving this important resource as a property implies that the same would be liable to tax assessment as a capital resource simply like some other protected innovation.

This makes a financial motivation for people in general and superstars themselves are enough remunerated because of their ethical claim over cash emerging out of their popularity.

Besides, the privilege to reputation is inheritable. Hence relatives of a superstar can pick up from the prevalence made by the VIP amid his/her lifetime.

Thirdly, to protect performers by:

- (i) alleviating a sense of insecurity in performers due to the fear of 'technological unemployment' including, replacement of musicians by recorded music;
 - (ii) preventing bootlegging; and
 - (iii) controlling exploitation of performers who cannot manage the situation on their own.
- Though there is a definite need to protect celebrities, the question is how far? Whether celebrities deserve exclusive rights in a scenario where they are themselves responsible for submitting to the public, seeking patronage and thriving on public applause is question that many want an answer to.

Protection of Celebrity Rights

Liabilities and Remedies

Celebrity rights might be ensured utilizing trademark law, copyright law and passing off activity. Any infringement of an entertainers' non-property or recording rights will accordingly add up to breach of statutory obligation.

Trademark

In India, celebrities and business partners can acquire some protection from trademark law however such protection might be limited in

extension. Section 2(1) of the Indian Trade Marks Act, 2000, permits registration of any 'sign equipped for recognizing products and ventures of one individual from another, any word (counting individual names), outline, numeral and state of merchandise or their bundling' as trademark. Courts in India have concurred assurance to film titles, characters and names under trademark laws. The first case that dealt with character merchandizing in India was *Star India Private Limited v Leo Burnett India (Pvt) Ltd*, but jurisprudence is still emerging and character merchandising is an area yet to develop in India.

Copyright

There is not much clarity as to what aspects of celebrity rights may be protected under Copyright Act. In *Sim v Heinz & Co Ltd*, the court said that copyright is neither granted to voice, likeness nor other identifiers of a persona. Copyright gives exclusive, although, limited rights of protection and allows celebrities to authorize reproduction, creation of a derivative image, sale or display of, say, a commissioned photograph of themselves by others. 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 case of books involving celebrity authors, any adaptation, if original, nevertheless can get protection under copyright law.

Passing off Action

The activity of passing off is important in instances of identity marketing where a man's name, similarity or execution qualities are abused. When all is said in done, a passing off activity is a cure against the harm to the goodwill or notoriety of a man brought about by deception by someone else attempting to pass off his merchandise or business as the products of

another. An activity in going off may lie for any unapproved misuse of a celebrity's "goodwill" or "fame" by erroneously demonstrating support of items by the celebrity. So also, the 'wrongful appointment of identity' could add up to passing off as the celebrity could be said to have a restrictive ideal in the elite advertising for identity up as a part of his identity. Indian law perceives identity rights just when the character or the individual has freely obtained open acknowledgment.

Conclusion

In India, the select ideal to approve public performance and broadcast them doesn't exist. There is game plan, just, for assistant rights to foresee open execution or broadcasting or recordings made without the performers' agree and to get impartial pay. Thus, however money related rights are accessible, moral rights don't exist. No security is given against 'Substantial Similarity' which is an imperative part in protection of celebrity rights.

It is quite recently through prosecution; this creating issue can be trained. Award of huge damages and multi-million dollar settlements, may stop infringement or encroachment by the people who have in the past fail to respect the security of superstars and bosses. However, the legitimate has on and on seen nearness of various

parts of the genius rights, it rests with the lawmaking body to statutorily see business parts of celebrity rights to finish off the lacunae in law and keep pace with quick commercialization of big name status.

Reference

1. *White v Samsung Elec Am Inc*, 971 F.2d 1395, 1397 (9th Cir 1992), cert denied, 113 S. Ct. 2443 (1993).
2. *Martin Luther King Jr Center for Social Change v American Heritage Products Inc*, 694 F.2d 674 (11th Cir 1983).
3. Hetherington Lee, Direct commercial exploitation of identity: A new age for the right to publicity, *Columbia-VLA Journal of Law and the Arts*, 17 (1992) 1.
4. Louis Brandeis D & Warren Samuel D, The right to privacy, *Havard Law Review*, 4(5)(1890), http://groups.csail.mit.edu/mac/classes/6.805/article_s/privacy/Privacy_brand_warr2.html (11 January 2010).
5. *Cohen v Herbal Concepts Inc* (1984) 63 NY.2d 379.
6. Mccarthy J Thomas, The Spring 1995 Horace S Manges Lecture: The Human Persona as Commercial Property: The Right of Publicity, *Columbia-VLA Journal of Law and the Arts*, 19 (1995) 131.
7. Keller Bruce P, Condemned to repeat the past: The reemergence of misappropriation and other common law theories of protection for intellectual property, *Harvard Journal of Law & Technology*, 11 (2) (1998) 401.
8. *Star India Private Limited v Leo Burnett India (Pvt) Ltd* (2003) 2 B C R 655.
9. *Sim v Heinz & Co Ltd* [1959] 1 WLR 313 1959.

