

EXPANDING THE HORIZONS OF PUBLICITY

RIGHT: AN ANALYSIS

Thesis Submitted For the Award of the Degree of

DOCTOR OF PHILOSOPHY

In

Law

By:

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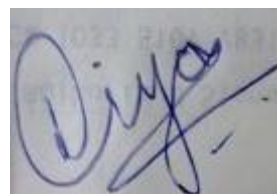
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2022

DECLARATION

I hereby declare that the theses entitled “**Expanding the Horizons of Publicity Right: An Analysis**” submitted to the School of Law, Lovely Professional University for the award of degree of Doctor of Philosophy is a record of original and independent research work done by me under the supervision and guidance of Dr. Meenu Chopra, Associate Professor, School of Law, Lovely Professional University and that the theses have not formed the basis for the award of any Degree, Diploma, Associateship or other similar titles.



Place: Jalandhar

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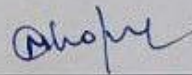
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CERTIFICATE

I hereby certify that this dissertation entitled "**Expanding the Horizons of Publicity Right: An Analysis**" submitted for the award of Doctor of Philosophy (Ph.D) is a record of research work done by the candidate "Divya Jain" during the period of her study under my guidance at School of Law, Lovely Professional University, Phagwara, Punjab, India, and that the theses have not formed the basis for the award of any Degree, Diploma, Associateship, fellowship or other similar titles to the candidate. I further certify that these theses represents the independent work of the candidate.

Place:

Date:



Dr. Meenu Chopra

Associate Professor

Supervisor & Guide

Preface/Acknowledgement

The study was undertaken by the researcher for laying down the groundwork for the establishment of Publicity Right in India. For this purpose, the researcher had to implement that the Publicity Right is the need of the time and aligns with the laws in existence. An empirical study was undertaken to establish that the publicity right extends to every individual as well.

For the completion of the work, my mentor, Dr. Meenu Chopra, Associate Professor, Lovely Professional University, plays an important role. She guided and helped me throughout the work so that the final work produced is a work of art, a masterpiece. I would like to thank her for her time and immense knowledge, which helped me in the completion of the thesis.

I would further like to extend my thanks to all the professors at Lovely Professional University, who were always ready to extend a hand of help for the completion of the work.

I would also like to extend my thanks to the Lovely Professional University, for providing the library facility in offline mode and also by providing us with the essential e-resources, during this pandemic time. This helped the researchers like me to complete the work with efficiency.

I would like to thank my family members, without their support I could never have completed my thesis. Especial thanks to my father Col. R.C. Jain, mother Sweta Jain, Husband Nishkam Jain, Father in Law, Dr. Pramod Jain and other family members.

- Divya Jain

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Abstract

The title of the thesis is "Expanding the Horizons of Publicity Right: An Analysis". The main objective behind the work and the title was to determine and establish that the Publicity right is the need of the time. There has been no significant work done in this field, keeping in mind the different aspects of India. This study has been undertaken to understand the level of protection that publicity rights can grant and also to determine the level of protection being granted to publicity rights.

The researcher has undertaken an empirical study to analyse the concept of publicity rights that can be effective for the general citizens as well, because, in today's time, the right has been generally associated with celebrities only. This fact has been examined. The right has been in effect for everyone, not just a selected few. Therefore the implications and the level of awareness among the general public have been analysed.

Further, the researcher aims at establishing that the publicity right is the need of the time, as the time is advancing at an alarming rate, and the easy availability of technology in that matter does not always help anyone. Sometimes it becomes a boon rather than being a bane for maximum people. Since the times are advancing, so is the level of criminal activities with it. The crimes are no more traditional, they are advancing. The crimes related to a person, especially where a person's identity is involved, for e.g. situation where a person's identity has been stolen for the sole purpose of making profits for themselves, have advanced a lot.

To provide protection to every individual, and to have a place where they can ascertain that their identity has been utilized wrongly, without their permission, the concept of publicity right came into action. The researcher has laid down how the right can apply to an individual as well. Along with that, it has to be established that the right aligns with the Constitution of India. The level of protection that the Constitution of India grants to the concept of publicity rights.

The work is not just limited to that, the publicity right has a strong connection with the concept of freedom of speech and expression, because one's person's right to express their work, does not limit another person's right to make the news public. The interlinking between these two factors has been examined properly in this work. The concept that everyone has a right to practice any trade and commerce also plays an important factor here and that factor has also been examined in detail.

After the fact that the publicity right is in fact in consonance with the Constitution of India. Other aspects, such as under which law can the publicity right find better protection have been analysed. Whether the protection can be granted through the Intellectual Property Rights, especially through copyright and trademark, or the protection can be granted to it through the common law principle of torts, i.e. passing off, defamation, cyber laws, etc.

The work is both empirical and non-empirical work. The non-empirical work has been undertaken to analyse the above-mentioned aspects of the work. The empirical work has been undertaken to analyse how the publicity right has extent and affect the rights of the general public at large.

Through this research, the research is aiming to disperse the basic knowledge in the field of publicity rights. It will help in understanding what publicity right stands for, and the extent of its protection, i.e. it is not limited to the celebrities, but also has the capacity of protecting the general public as well. The different features of publicity right, i.e. the persons, voice, signature, look alike, sound alike, and use of shadow depicting a person, all have been discussed and examined in detail in this current work. Even the factors when it amounts to infringement and when it does not have also been analysed in the work. The confusion regarding the ownership, as to who is the owner of the publicity right has been examined. The owner is the individual itself, until and unless they have transferred or assigned their publicity right to someone else. The ownership has been analysed with the help of the basic owner concept of property given.

After examining the basic concept of publicity rights. Another aspect i.e. whether the publicity right aligns with the Constitution of India has been analysed in detail, all the different aspects have been taken into account, along with the aspect of the relationship between the right to privacy and publicity right. The interlinking or rather the protection provided to the publicity right through the existing laws has been examined in detail. A comparative study has also been undertaken to identify the lacunas that India is facing while protecting publicity rights.

❖ **Research Objectives:**

From the above literature review, the following objectives were framed:

- 1- To study and understand the Publicity Right as need of the time.
- 2- To study and establish that the Publicity Right is in consonance with the Constitution of India.
- 3- To understand and appraise the legal framework governing the Publicity Right in India in the light of Intellectual property rights.
- 4- To study and analyse any interlink between the Publicity Right and other existing laws.
- 5- To identify and compare the Publicity Rights as recognized in different countries and India.
- 6- To examine the scope of the level of protection that Publicity Right can endowed on celebrity as well as an individual or general public.
- 7- To conduct an empirical study and analyse the result for the applicability of the Publicity Right on the general public.

❖ **Hypotheses:**

In order to achieve the above said objectives, the researcher has come out with the following hypothesis:

H₁ :- Publicity right is applicable to the celebrities only, the protection of the right does not extend towards the general public.

H₂ :- General Public is well aware of the Publicity Right.

Expanding Horizons of Publicity Right: An Analysis

1. INTRODUCTION:

The traditional form of property includes land and objects that can be associated as tangible and non-tangible, movable and non-movable. The intangible form of the property later came to be known as Intellectual Property Rights. The main purpose of Intellectual Property rights was to protect a person's intellectual thinking. Copyright, Patents and Trademark were among the first to be formally recognized as an IPR. Later on due to the advent of technology and the internet. New forms of IPR came to be recognized. Such as the Trade Secrets, Traditional Knowledge, Industrial Designs, Geographical Indication, Integrated Circuits, and Traditional Knowledge.¹

With further advancement of technology or rather the internet, any form of information came to be accessible in minutes. This also helped in the development of the modern advertisement process. Nowadays whether while watching TV or using the internet, we are bombarded with advertisements.² These advertisements are made attractive not only through the use of modern technological adamant but also with the help of using famous personalities. These personalities are also referred to as “celebrities”. The most famous examples for considering the use of personalities are Sharuk Khan, M.S. Dhoni, Virat Kohli, Amitabh Bachchan, etc. All these persons have worked hard to gain the status of celebrity.³

¹ Ankita Mohanty, Characteristics and Nature of Intellectual Property Right, *available at:* <https://www.legalbites.in/characteristics-nature-intellectual-property-right/> (last visited on July 06, 2020).

²Should we have publicity right in the U.K., *available at:* https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjz87e1uM_XAhXLN48KHcu9DWsQFggnMAA&url=https%3A%2F%2Fwww.kent.ac.uk%2Fflaw%2Fip%2Fresources%2Fip_dissertations%2F2005-06%2FE_McGuckin.doc&usg=AOvVaw1cELifLkDOtCsYFZZpO-8Z (last visited on July 06, 2020).

³ The Practical Lawyers, “The Commodification of Celebrities: Right Of Publicity” (Eastern Book Company, July 3, 2020), *available at:* http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=15478#:~:text=In%20common%20law%20jurisdictions%2C%20publicity.services%20as%20those%20of%20another. (last visited on July 11, 2020).

When such a personality's persona is used, without their permission, it leads to hardship. To avoid such hardships, a right has emerged, i.e. Publicity Right. This right gives the control to the person, to decide when and where their personalities can be used. This particular right is not limited to famous personalities, but it can be extended to individuals as well. In this thesis, the research aims at finding a balance as to how this publicity right should not only be formally recognized in India but should be extended to normal citizens as well.

2. PUBLICITY RIGHT:

The Publicity Right under the “Black Law’s Dictionary” has been defined as: “The right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent.”⁴ The Publicity right can also be known as personality rights or persona right, and they can further be evaluated as “the right to control the commercial use of one’s identity⁵ or the right to control the use of one's name, voice, image and likenesses for commercial purposes.”⁶

The basic elements of Publicity Right can be estimated as: “name, image and likeness”. With time the Publicity right’s elements have advanced. Now it includes “any indicia of a person's personality that can be directly related to the person”. If any company chooses, to gain any personal commercial benefits, due to the unauthorized use of the person's personality, then it becomes a crime. Now it has become mandatory for the companies to be able to use a person's personality, firstly, they have to get their permission and secondly, they have to make proper payment for such use. With such commercial advancement in one's personality, the right has emerged as a property right.⁷

⁴ Bryan A. Garner, Black’s Law Dictionary, 1889 (St. Paul, Minn, 1999).

⁵ A Brief History of the Right of Publicity, available at: <http://rightofpublicity.com/brief-history-of-rop> (last visited on June 18, 2020).

⁶Stacey L. Dogan and Mark A. Lemley, “What the Right of Publicity Can Learn from Trademark Law” 58 *SLR* 1161-1220 (2006).

⁷ *Supra* note 5.

The Publicity Right initial recognition was a part and parcel of Privacy Right in the case of "*National Medical Ltd. v Jooste*"⁸, "Justice Harms" termed privacy right as: "Privacy is an individual condition of life characterised by exclusion from the public and publicity. The condition embraces all those personal facts which a person concerned has determined him to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private" or can also be called a "right to be left alone".

In India, the concept of Publicity Right was enshrined with the privacy right by the SC in the case of "*R Rajagopal v State of Tamil Nadu*"⁹, the court held that, "the first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent."¹⁰

The SC in the case of "*Justice K.S. Puttaswamy (retd.)...v Union of India and Ors*"¹¹ the field of privacy right held that: - "A right to privacy encompasses the competence to determine the destiny of private facts... The individual concerned is entitled to dictate the ambit of disclosure ..." in this case, the justice put in the face the concept that every individual has a right, to decide what type of information and when such information should be disclosed. This was done with the understanding that any information leaks can also have advert effect on the individual. Such control is not only limited to the false information that can be released. Such a control sometimes has to be extended towards some truthful information that can be released, as it can also have an advert effect on the individual. Not everyone can make a proper judgment with only some information on hand. They tend to make a wrong impression of the individual depending on the information so released.

The Publicity Right was conceived in the case of "*Haelan Laboratories v Topp Chewing Gum Inc*"¹², by Judge Frank, "it was mentioned in the case that

⁸ 273 (1996).

⁹ 1995 AIR 264, 1994 SCC (6) 632.

¹⁰ Right of Publicity in India- an Unfinished Story, available at: <https://spicyip.com/2016/01/right-of-publicity-in-india-an-unfinished-story.html> (last visited on June 18, 2020).

¹¹ (2017) 10 SCC 1.

¹² 202 F 2d 866 (second circuit court) (1953).

without the right, the images of the persons so used would be denied the proper revenue which is authorised and have right over and therefore they would feel sorely deprived.”¹³

The most important case that had been deliberated on the concept of Publicity Right in India, has been conveyed through DHC, in the case of “*ICC Development (international) Ltd. v. Arvee Enterprises*”¹⁴ The Court in this case had independently and formally given recognition to the Publicity right. The Delhi High Court held that “The Publicity Right as evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual’s personality like his name, personality trait, signature, voice, etc. An individual may acquire the Publicity Right by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event...”¹⁵

Any person's persona can be used for commercialization purposes. When an individual comes to know of such use, where they have not consented towards it, then that individual is entitled to proper compensation.¹⁶

Since the time Publicity Right has been recognized in India, due to not having a statute independently been made on it, there have been attempts to try and protect the right through the existing laws. Some of the most profound use has been of IPR, especially within the ambit of copyright and Trademark.¹⁷

¹³ Garima Bhdhiraja, “Publicity Rights Of Celebrities: An Analysis Under The Intellectual Property Regime” *NSLR* 85-108.

¹⁴ 2005 (30) PTC 235 (Del.).

¹⁵ *Supra* note 10.

¹⁶ The Right of Publicity: A Doctrine Gone Wild?, available at: <http://www.ipwatchdog.com/2010/03/11/the-right-of-publicity-a-doctrine-gone-wild/id=9647/> (last visited on June 18, 2020).

¹⁷ *Supra* note 5.

3. INTERLINKING OF PUBLICITY RIGHT & IPR:

Today it is been conjectured that a publicity right is a form of IPR. The bases of such conjecture are based on Labour theory and Utilitarian Theory. Considering the fact that publicity right is a new concept when compared to copyright and trademark, it seems to have some similarities with copyright and trademark.¹⁸

Trademark law protects the general public by not allowing the use of confusing and similar trademarks and also protects against the dilution of an owner's mark.¹⁹ The main aim of providing Publicity right to the celebrities is to give them control over the unfair use of their name, image, voice, likeness, etc. in this way Publicity right is similar to the trademark law. Trademark registration provided to the celebrities' works in two ways, first, by giving them registration, the celebrities can give an authorized assignment or license for the use of their name, likeness, or any indicia of their personality etc. for the merchandising purpose. Secondly, the celebrities get a means to protect the unauthorized use of their name image voice likeness, etc. by way of suit for infringement of trademark under the Trademark Act.²⁰ In India sec. 2(1) of the Indian Trademark Act, 1999 allows registration for "any sign capable of distinguishing goods and services of one person from another, any word (including personal names), design, numerical and shape of goods or their packaging' as the trademark".²¹

Publicity rights and Copyright law are not much similar in nature, but the connection can be developed through sec. 38 of the Indian Copyright Act 1957: "to prevent unauthorized marketing of one's performance."²² The images in the print form can get registered under The Copyright Act of 1957. In the case of

¹⁸ Right of Publicity and the Intersection of Copyright and Trademark Law, *available at*: <https://digitalcommons.law.ggu.edu/pubs/484/> (last visited on June 19, 2020).

¹⁹ Lynne M.J. Boisineau, "Intellectual Property Law: The Right of Publicity and the Social Media Revolution" 30 (3) *vacation law* 66-67 (2013).

²⁰ *Supra* note 18.

²¹ Meaning of Trade Mark, *available at*: [http://www.trademark-india.com/about-trademarks.html#:~:text=Section%20\(1\)\(zb.packaging%20and%20combination%20of%20colours.](http://www.trademark-india.com/about-trademarks.html#:~:text=Section%20(1)(zb.packaging%20and%20combination%20of%20colours.) (last visited on April 13, 2022).

²² Celebrities' rights, *available at*: https://www.slideshare.net/altacitglobal/celebrity-rights?qid=e26c35cc-a0d0-4ed5-9119-94a608762d7e&v=&b=&from_search=4 (last visited on June 13, 2020).

*“Titan Industries Limited v. M/s Ramkumar Jewellers”*²³, the defendant was making unauthorized use of a picture of “Amitabh and Jaya Bachchan” on the signboards. For the picture, the rights were already taken by the Titan jewellers. The offender had not taken the approval of the plaintiff or from the Bachchan family for the use of the Picture. The Delhi HC held that the offenders had not only infringed the plaintiff's copyright but also defrauded the couple's publicity right. The court said: “when the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialise their identity but that the right to control when, where and how their identity is used should vest with the famous personality.”²⁴

Celebrities and other famous persons have started to claim their personality rights. For e.g. in the famous case *“Shivaji Rao Gaikwad v Varsha Productions”*²⁵ Rajinikanth was successful against the claim of personality right. He was being misrepresented in the movie “Mein hon Rajinikant” the producer claimed that the movie was based on himself, but the people were directly relating the movie to the famous movie star, as the plaintiff's name dialogued delivery style and caricature were being used. The court passed the order stating that the Rajinikanth's personality right or the Publicity Right is being infringed due to the movie.²⁶

Along the same lines, Rajat Sharma introduced a case in the court *“Rajat Sharma & Anr v Ashok Venkatramani & Anr”*²⁷, where Rajat Sharma's personality rights were upheld along with the right in the show “App ki Adalat”. “Zee Media Corporation” wanting to encourage its new TV anchor-less news

²³ 2012 (50) PTC 486 (Del).

²⁴ Right to publicity and possible contractual breach, available at: https://www.slideshare.net/altacitglobal/right-to-publicity-amp-possible-contracutal-breach?qid=e26c35cc-a0d0-4ed5-9119-94a608762d7e&v=&b=&from_search=12 (last visited on June 13, 2020).

²⁵ 2015 (62) PTC 351 (Madras).

²⁶ Annand and Annand, Right of Publicity in India, available at: <https://www.lexology.com/library/detail.aspx?g=c2428891-d91a-4fbc-b5a4-a6e0cb9e3913#:~:text=Shivaji%20Rao%20Gaikwad%2C%20more%20popularly,to%20be%20immoral%20in%20nature>. (last visited on July 08, 2020).

²⁷ CS (COMM) 15/2019.

station, took a dig on many famous TV journalists.²⁸ The Delhi High Court stated that "Sharma had an unassailable right in his public persona and identity as a famous television show host. It also stated that the use of the Statement in the Advertisement amounted to false advertising."²⁹ An order of injunction was passed in the favour of the plaintiff.³⁰

Publicity Right does have some resemblances with the copyright and trademark law and at the same time, there are still many different aspects of Publicity Right which are not protected by either of the topics, which has been illustrated in the following table.

Elements of Publicity Right:	Elements of Publicity Right covered by Copyright:	Elements of Publicity Right covered by Trademark:
• Persona • Mannerism • Style • Image • Voice • Likeness	• Image • Performance (section 38).	• Name • Signature • Likeness (section 2(m))

²⁸ Krusha Maheshwari, Personality Rights Law in India, available at: https://singhanialaw.com/article_detail.php?Id=88 (last visited on July 08, 2020).

²⁹ Media Law & Fashion Law in India recent Developments, available at: <https://singhanialaw.com/newsletter.php?Id=87> (last visited on July 08, 2020).

³⁰ Prarthana Patnaik, Rajat Sharma v/s Zee Media-Delhi HC's Latest Order on Personality Rights, available at: <https://spicyip.com/2019/01/rajat-sharma-v-s-zee-media-delhi-hcs-latest-order-on-personality-rights.html> (last visited on July 08, 2020).

• Distinctive Appearance • Gestures • Signature • Performance		
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Table 1.1: The relationship between the Publicity Right, Trademark and Copyright are represented here.

Publicity Right is not only linked to the Intellectual Property Rights but also affects other laws and rights as well, some of these rights are covered by the Constitution of India, some under the Unfair Trade Practices, Competition Law, Law of Torts, etc. the same has been represented below.

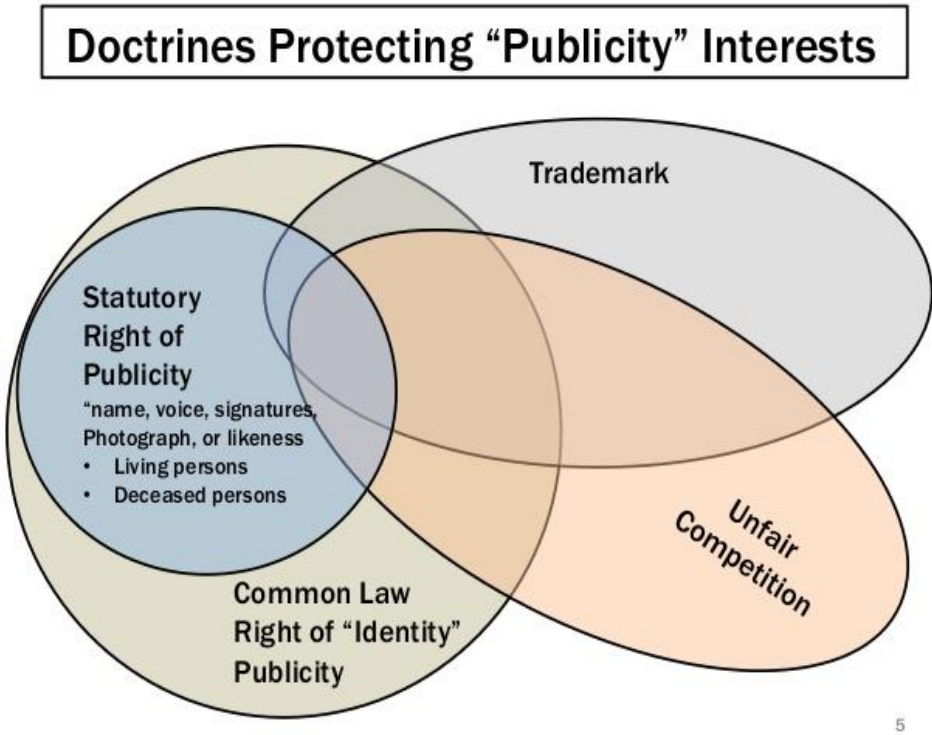


Fig. 1.1:- The picture depicts how publicity right is interlinked and protected by common law right of “identity” (torts), trademark law and unfair competition.

4. PUBLICITY RIGHT RECOGNISED IN DIFFERENT COUNTRIES:-

The different States have their own understanding as to what amounts to a violation of the Right to Publicity.³¹ There are almost 24 States who have given recognition to Publicity Right. Some of the States have recognized the right to publicity either as a case law principle or as a statute.³² For comparative study, the States which has recognized publicity right are as follows:-

4.1: UNITED STATES OF AMERICA (USA):-

In the USA the publicity right is state-recognized. There is no federal law for the protection of publicity right, but many states have recognized the right either through case law principles laid down through the various courts or through separate legislations constructed on it. The first time when the publicity right was recognized, it was done through the privacy right. The very first time it was done in the case of “*Robertson v Rochester Folding Box*”³³

With the advent of time and due to an increase in situations where a person's personality gets violated, the publicity right came to be recognized as a separate right then that from the privacy right. The very first time it was recognized separately, it was done through a Georgia court. The main bases for recognizing it as a separate right was done due to commercial deliberation. The property rights in a person's personality were formally given recognition through the court.

The different methods of protection of the publicity right within the USA are:

1. Either through the state enacted laws. There are almost 25 states who have enacted laws separately for the protection of publicity rights.³⁴

³¹ State law: Right of Publicity, available at: <http://www.dmlp.org/legal-guide/state-law-right-publicity> (last visited on June 19, 2020).

³² Statutes and Interactive Map, available at: <http://rightofpublicity.com/statutes> (last visited on June 19, 2020).

³³ (1902) 171 N.Y 538; 64 N.E 442; N.Y. LEXIS 881.

³⁴ *Supra* note 32.

2. If there is no state enacted laws on the publicity right, then it can be done through copyright.
3. Trademark or the Lanham Act.³⁵
4. Unfair trade practices.
5. Breach of contract.
6. Or defamation.

These are some of the basic ways the publicity right can be protected in the USA. Such matters shall be discussed in details in the further chapters.

4.2: UNITED KINGDOM:-

The United Kingdom has protected the publicity right through case laws. There is no separate legislation to date on the matter of publicity right. That does not mean that the Publicity right cannot be protected at all in the United Kingdoms. The Right can very well be protected through the existing copyright law³⁶, copyright can protect an individual's image claim in a photograph or a film.

The scope of an individual's likeness to be able to be protected through Copyright Act is not possible³⁷, the same has been stated in the case of "*Re: Elvis Presley Trademarks, Inc*".³⁸ Here Elvis Presley Enterprise was aiming for registration of three masks as trademarks but was denied the petition on the grounds of it not being distinctive in nature. The Court held that: "Elvis Presley did not own his name to be able to prevent all and any uses of it by third parties, so Enterprises can have no greater rights. Similarly, Elvis Presley did not own his appearance. For example, during his life, he could not prevent a fan from having a tattoo put on his chest or a drawing on his car which looked like the musician simply on the basis that it was his appearance which was depicted. For

³⁵ Jonathon Schlegelmilch, "Publicity Rights in the U.K. and the USA: It is time for the United Kingdom to follow America's lead" 1 *Gonzaga Law Review Online* 110 -111 (2016).

³⁶ United Kingdom, The Copyright, Design and Patent Act 1988.

³⁷ Bristows LLP, Right of Publicity in the United Kingdom, available at: <https://www.lexology.com/library/detail.aspx?g=dfbb3135-5ef0-40d0-afd3-1e6c81e064a7> (last visited on July 09, 2020).

³⁸ [1997] R.P.D.T.M.C. 543 (Ch.) (Eng.).

the same reason under our law, Enterprises do not own the likeness of Elvis Presley. No doubt it can prevent the reproduction of the drawings and photographs of him in which it owns the copyright, but it has no right to prevent the reproduction or exploitation of any of the myriad of photographs, including press photographs, and drawings in which it does not own the copyright simply because they contain or depict a likeness of Elvis Presley".³⁹

The Trademark Act of 1994 can protect the name and signature of a celebrity. Some celebrities have registered either their name or image within the trademark reasons for some goods and services. For e.g. David Beckham has registered his name concerning the goods such as perfume cosmetics and health care. Alan Shearer has enlisted his image in regards to goods such as bags, sports articles and clothing. Common tort law of passing off and the right to privacy are also some of the other ways by which the publicity right can be protected in the UK.⁴⁰

4.4: INDIA:-

In India, the publicity right has been recognized through the common law principle.⁴¹ There is no legislation enacted upon the right separately to protect the law. The right also has transferability and assignability aspects. The research aims at analysing how the publicity right can be protected in India, despite not having a proper law for its protection. If those laws which can protect publicity right are sufficient, if not then what can be the remedy available? Can the publicity right apply to the general public as well or if it will be limited to celebrities only? All such questions shall be answered by the researcher in this research.

Some of the laws which are able to provide protection to publicity right are:

1. The Constitution of India, through the art. 21 and 19.
2. Trademark Act.

³⁹ *Supra* note 34 at 112.

⁴⁰ *Supra* note 37.

⁴¹ Entertainment law: India and Right of Publicity, available at: <https://www.bananaip.com/ip-news-center/india-and-right-of-publicity/> (last visited on June 19, 2020).

3. Copyright Act.⁴²
4. Passing off.
5. Defamation.
6. Cyber laws.⁴³

All the courts in India can try the case on the matter of publicity right.⁴⁴ Examine if they are the best options for the protection of the publicity right.

For the furtherance of the research work, the researcher has divided the work and the objectives into 8 chapters. The researcher in each of the chapters have discussed in details the objectives specified. The basic research gap has been identified, along with the research objectives and questions, hypothesis and the research methodology. For basic understanding of publicity right the researcher has discussed in detail the basic meaning of publicity right. As the concept of publicity right has emerged through the growth of celebrities. Along with that the different features or elements of the publicity right, and what amounts to infringement of these features have been examined. The confusion in regards to the ownership has also been examined. For understanding that the publicity right aligns with the Constitution of India. If it is not then the right would be ultra-virus. The aspects it has with the right to privacy and the “freedom of speech and expression” and the right “to practice any profession” has been examined. The judicial growth of the concept of publicity right alongside the privacy right along with the basic exceptions has been discussed in detail.

For comprehending the interlink of the publicity right has with the Intellectual Property Right, specifically with copyright and trademark, defamation, cyber law and other existing laws. The level of protection each Act can provide along with the loopholes has been discussed in detail. Another aspect i.e. passing off which is closely related to the trademark and can also be applicable for the protection of publicity right has also been examined. The judicial remedies have

⁴²Results for Right of Publicity, available at: <https://gettingthedealthrough.com/compare/results/> (last visited on July 06, 2020).

⁴³ *Supra* note 10.

⁴⁴ *Supra* note 42.

also been analysed in detail in this chapter. Comprehending how India can safeguard Publicity Right in a much better manner, a comparative study between the USA and the UK have been studied. To analyse the implication of publicity right on the general public, an empirical study has been undertaken. The responses recorded have been analysed and discussed in details. Lastly the researcher has given the final conclusion and suggestions.

❖ **Literature Review:**

▪ **Statutes:**

1. Constitution of India, 1947: Constitution of India is considered the parent law. Every law that is constructed in India has to be along the same lines as that of the Constitution of India, otherwise, they become ultra-vires. Publicity right has been analysed with the Art. 21 “Right to life and personal liberty”, with the privacy right being recognized as an extension of Art. 21. Art. 19 (1) (a) and (g) for the publicity right have been analysed. The “freedom of speech and expression” is with everyone, the journalist does not have a right to violate it, but at the same time, the publicity right cannot curb the journalist's rights of expression as well. The right to practice any profession is with everyone. Though COI fails to examine the IPR perspective, the same has to be examined.

2. Copyright Act, 1957: The copyright is a part of the Intellectual Property Right. It protects the dramatic, artistic, cinematographic, sound, performance, and broadcasting rights of the owners. Publicity right has been analysed with the photographic, drawing and performance aspect of the copyright. The different levels of protection provided through the Act and the loopholes present. There is another Trademark Act, that should be analysed, along with the aspects of penal provision.

3. Indian Penal Code, 1860: Indian Penal Code protects the victims against the crime of body, reputation, state, etc. The concept of defamation in relation to the publicity right has been analysed using this Code. The different elements of

defamation and its applicability to publicity right along with the level of punishment.

4. Information Technology Act, 2000: This Act aims at protecting an individual against the crime done by cyber law. All the cybercrimes are regulated through this Act. Even the action of child pornography, voyeurism, etc. Are regulated through this Act. The aspect of using memes, online defamation, and disclosure of pictures on the online forum, the different aspects of publicity right can be regulated through this Act. Though there are loopholes here too.

5. Trademark Act, 1999: This Act aims at protecting the trademark of one in relation to goods and services provided to that of another. The Act can protect one's name, likeness and signature in relation to goods and services. There are 45 classes defined, for which a person can get registration of the trademark. Publicity right features of name, signature and likeness have been analysed and discussed at length. The loopholes have been analysed.

▪ **Articles:**

1. In the article “*The Commodification of Celebrities: Right of Publicity*”, has shed light on the concept of how media plays a significant part in the upbringing of a superstar. Be she an entertainer, film star, sports star, etc. how these stars have the right to publicity, so that they can gain from their popularity. The age of media has coincided with the age of growing consumerization. The fact the famous personality's image, voice, likeness, and themselves are being used for the purpose of advertisement is not a new trend, but is a concept as early as the 19th century. In the United States of America, the concept of the Right to Publicity has emerged from the Privacy right and in the UK the view was that a person cannot be a property, but it gradually changed. The misuse of the personality of the celebrity can cause harm to their reputation. The personality right of celebrities can be protected through the help of copyright, trademark law and passing off. The same was discussed with the help of many case laws. The conclusion drawn was that India can face the publicity right

problem with the existing laws for the time being but the same might not be true in the coming future.⁴⁵

2. In the article “*India- Publicity right and its Scope in Intellectual Property Laws*” the Publicity Law through the courts have been recognized under art. 21 of the Constitution of India under the guise of the privacy right. Though the Publicity right is now emerging as an Intellectual Property Right. To support such an argument it was stated that the Publicity right has been laid down not just to protect the celebrities from any emotional harm but also so that they can have some kind of monetary benefit from the same. A comparison between USA and UK has been done, whereby it has been stated that the publicity right has been properly protected in the USA through the medium of state enacted separate statutes on the Publicity right. Though the UK is still lagging behind, as they have only recognized the right through case laws, and no proper enactment has been made on the topic of the Publicity Right. Still, the UK is able to provide sufficient protection for the right.⁴⁶

3. Ashima Obhan and Pooja Katara in their article “*Personality Rights in India*” have discussed how the right has grown in India, through the help of various landmark judgments as to the Personality right is a case born right in India. They have argued that the right is continually growing in India. As more and more celebrities are becoming aware of their right, they are fighting to protect the same. For e.g. Amitabh Bachchan, being aggrieved with the use of a voice-alike for the advertisement of Tobacco spoke out that this is an unauthorised use and such a use is also negatively affecting his image. Even Rajnikant before the release of his movie has issued notices prohibiting the use and damaging of any form of his screen persona in advertisements and even by comedians who impersonate actors for financial gain. The authors have pointed out that Personality right though can be protected through trademarks, copyright, and Passing off but not completely. As the time is increasing along

⁴⁵ *Supra* note 3.

⁴⁶ India- Publicity right and its Scope in Intellectual Property Laws (12 March 2020), available at: <http://www.conventuslaw.com/report/india-publicity-rights-and-its-scope-in/> (last visited on July 13, 2020).

with the technology growth, the personality right will take a huge place for the famous personalities to safeguard their interest.⁴⁷

4. Garima Bhdhiraja, in her article *“Publicity Rights of Celebrities: An Analysis Under The Intellectual Property Regime”*, has talked about the different dimensions of celebrities' rights. The author has recognized three dimensions where the celebrity right can be protected or divided for identification purposes: - a) Moral, b) Privacy and c) Publicity. The author has analysed how Publicity Rights have given protection in India under the Constitution of India, The Trademark and the Copyright Laws. Celebrities are starting to recognize their publicity right and trying to protect against the misuse of their different indicia of personality. Some of the actors who have registered their names as Trademark are Rajnikant, Kajol, Malika Sherawat, Chef Sanjeev, etc. The author has discussed the well laid down publicity right laws in the US, UK and other countries.⁴⁸

5. Dr. Gurmeet Kaur in her article, *“Right to Privacy and the Right of Personality: Legal Discourse in India”*, has discussed in detail the notion of privacy right and publicity right, stating that, the privacy right is a private right and the Publicity right a proprietary right. The fact that Publicity right has emerged from the privacy rights, has been engrossed. The growth of the Right of Publicity has been insinuated through many case laws. The researcher has pointed out different remedies of infringement available to the aggrieved person due to non-authorized use of their image, voice, personality and airing of the dirty laundry by the media. The remedies are in the form of injunction, claim for damages, defamation, passing off, copyright and trademark, Constitution of India, these can come in handy, as there is no separate law protecting Publicity right in India. Importantly the article is discussing the exceptions that are there to the publicity right, namely the defence of public good, public interest, and

⁴⁷ Ashima Obhan and Pooja Katara, Personality Rights in India, available at: <https://www.obhanandassociates.com/blog/personality-rights-in-india/> (last visited on July 13, 2020).

⁴⁸Supra note 13.

fair comment, resulting in the tarnishing of the public image of the personalities.⁴⁹

6. “Prakash Sharma and Devesh Tripathi” in their article “*Celebrities’ Agony: Locating the Publicity Right in the Existing IPR Framework*” have discussed the basic definition of celebrity, that a person who through his hard work and accomplishment has become a person of interest for the general public. Celebrities have some rights like personality right and privacy right. The authors further described how such rights can be protected like the privacy right can be protected through the Constitution of India. The Personality right can be to a limit and be protected through the Trademark, Copyright and Passing off. These existing laws are able to protect some of the aspects of the Personality like the name, signature image, and likeness, but other features such as the voice, style of speaking, etc. are not sufficiently protected by any law. Concluding the authors stated that India is still lagging behind, but were USA, Germany and Franc have taken a huge leap and protected their rights through legislation.⁵⁰

7. “Kelli L. Sager and Davis Wright Tremaine LLP” in their article “*Summary of Right of Publicity issues*” have discussed in length how the different aspects of the publicity right have been misappropriated and supported their argument with the help of many case laws. Like the celebrity's persona, look-alike and sound-alike, Characters (fictional characters), name, images, dialogue delivery style, and even the dead celebrities, being used in magazines, advertisements, videogames, newspapers, books, and motion pictures. The remedies that the celebrities have are in the form of injunction, damages paid, destroying of such work which has been obtained without the consent of the celebrities.⁵¹

⁴⁹ Dr. Gurmeet Kaur, “Right to Privacy and Right of Personality: Legal Discourse in India” 6(1) *International Journal of Research and Analytical Reviews* 758-764 (2019).

⁵⁰ Prakash Sharma and Devesh Tripathi, *Celebrities’ Agony: Locating the Publicity Right in the Existing IPR Framework* (August 1, 2019), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3430422 (last visited on July 13, 2020).

⁵¹ Kelli L. Sager and Davis Wright Tremaine LLP, “Summary of Right of Publicity issues” *MLRC Conference* 1-18 (2012).

8. “Tabrez Ahmad and Satya Ranjan Swain” in their article “*Celebrity Right: Protection under IP law*” have recognized the different rights the celebrities should get such as the privacy right, personality right and publicity right. The authors have also recognized different laws whereby such rights can be protected at the national level (such as in India, the US, UK, Canada, and France) and at the international level by way of international conventions and treaties such as the Rome Convention, TRIPS, WPPT. The Authors have also recognized some of the laws where the celebrities can seek protection and remedies like the TR law, The CR Law and the Passing off action under torts. The authors have also tried and identified some of the areas where the celebrity's right are required to be protected such as performance, digital image and digital merchandising.⁵²

9. Sanhita Ambast, in her article “*Protection Performer’s Right: Does India Need Law Reforms?*” have recognized different aspects of performer's right which also include publicity right. The author has pointed out some lacunas that are present in the Indian laws, as they are not able to afford protection to the performers in the form of performer's right. The author has also pointed out lacunas at the international level and in US laws and UK laws with regards to the same matter and has compared their laws with the laws in India. The UK gives protection to the performers under the Copyright law and India tries to do the same. But the lacuna here is that the Copyright law is not able to give a defence to the moral rights and the intangible rights/publicity rights of the performers.⁵³

10. Johann Neethling in his article “*Publicity rights: a comparative overview*”, has laid down how different countries' are providing protection to the personality right. The comparison started with Germany, was the criminal sanctions on a person's dignity were considered sufficient, but later on, with the amendments in the Constitution, many changes were brought to light. Later on, many different facets of the personality of a person were protected through

⁵² *Supra* note 18.

⁵³ Sanhita Ambast, “Protection Performer’s Right: Does India Need Law Reforms?” 13 *Journal of Intellectual Property Right* 574-582 (2008).

different laws. Austria's civil code expressly protects publicity rights. Netherlands, Dutch Laws and English laws recognize the Right of Publicity through common laws. Switzerland and USA recognize the right through statutory provisions. Many specific personality rights were discussed like the right to life, reputation, dignity, privacy identity, physical liberty, and physical-psychological integrity. Even the fact that the famous personality has post mortem right entitled to them.⁵⁴

11. Susanne Bergmann in her article "*Publicity Right in the United States and Germany: A Comparative Analysis*" has made comparisons within the laws for the protection of the personality right in the US and Germany. The USA has provided the protection through the Lanham Act, the Copyright Act and through the state's enacted legislation on the Right to Publicity Acts. Whereas Germany has provided protection through the common law principles and the already enacted laws. Different aspects like the protection of name, image, personality, likeness, etc. were comparatively discussed in detail.⁵⁵

12. Stephen R. Barnett, in his article "*the right to one's own image: publicity and privacy rights in the US and Spain*" has compared the Publicity Right in the US and the practice of using one's image under Spain's Law. The Author has discussed some of the contemporary issues in relation to Publicity Right such as the Marketable use, use of one's appearance or identity, etc., post-mortem rights have also been discussed in this article and the author has discussed the duration for which the right can be protected in different laws, such as in Spain the post-mortem rights are with the family members and it lasts up to 80 years after the death.⁵⁶

13. "Roberta Rosenthal Kwall" in his article "*The Right of Publicity vs. the First Amendment: A property and Liability Rule Analysis*", the author has made

⁵⁴ Johann Neethling, "Personality Right: A Comparative Overview" 38(2) *The Comparative and International Law Journal of Southern Africa* 210-245 (2005).

⁵⁵ Susanne Bergmann, "Publicity Rights in the United States and Germany: A Comparative Analysis" 19 *Loyola of Los Angeles Entertainment Law Journal* 479-522 (1999).

⁵⁶ Stephen R. Barnett, "The Right To One's Own Image": Publicity And Privacy Rights in the US and Spain." 47 *AJCL* 555-582 (1999).

the comparison between the freedom of expression (First Amendment) and the publicity right. The problem is that the Publicity Right is a part of the privacy right, and therefore they are interlinked, but such an issue has to be solved. The right has to be considered separated. The publicity right does encroach upon the right of “freedom of speech and expression”, a way to solve this problem can be the liability clause, along with the fair use and the public need to know and true comments bases. There should not be any kind of unjust enrichment caused due to such a clash of the Publicity Right with the right of freedom of speech and expression.⁵⁷

14. Gillan Black in her book “*Publicity Rights and Image: Exploitation and Legal control*” has in detail explained the basic concept of Publicity Right. That the right is to give control to the individual over the use of one’s own persona. How such rights are being exploited on a daily bases, being used in commercialization without any benefit to the persons? The Publicity right in being emerged as a part of privacy rights but later on gained its separate identity and became an independent property right. The defence for the acknowledgement of the Publicity right is the natural law theory, utilitarian theory, economic interest, the different nature of the Publicity right and discussed in detail the concept of exception that are there to Publicity right.⁵⁸

▪ **Case Laws:**

1. “*Sourav Ganguly v. Tata Tea Ltd.*”⁵⁹ The petitioner “Sourav Ganguly”, is one of the famous cricketers in India. The plaintiff has reverted from England after giving a phenomenal performance there. Tata tea ltd., the defendant, started an advertisement, giving a chance to congratulate “Sourav Ganguly” through a card. The postcards were to be in the tea bags brought by the customers. The

⁵⁷ Roberta Rosenthal Kwall, “The Right of Publicity Vs. The First Amendment: A Property And Liability Rule Analysis” 70 *Indian Law Journal* 47-118 (1994).

⁵⁸ Gillan Black, *Publicity Rights and Image: Exploitation and Legal control* 1-222 (Bloomsbury Publishing, 2020), available at: https://books.google.co.in/books?hl=en&lr=&id=1y_KDwAAQBAJ&oi=fnd&pg=PP1&dq=%22comparative+perspective%22+right+of+publicity&ots=ctMQfmtuAo&sig=YGWQjEdeSDrYp_DKUDtdQYTQQIs&redir_esc=y#v=onepage&q&f=false (last visited on July 13, 2020).

⁵⁹ Calcutta High Court CS No. 361 of 1997.

plaintiff after learning about the advertisement, approach Calcutta High Court for an order of injunction, claiming that the people are led to believe that the plaintiff has endorsed such products. The Court conceded an order in favour of the plaintiff, affirming that the fame popularity, etc. are all the result of the hard work of the plaintiff and therefore they are his intellectual property, giving him the right to use the same as and when he likes.⁶⁰

2. “*Titan Industries Limited v Ramkumar Jewellers*”⁶¹ the hoarding of Amitabh Bachchan and Jaya Bachchan was being used by Tanishq jewellers, as they had given all their publicity rights to “Tanishq” for the purpose of advertisement. The defendant dealing in the same line of business used the same hoarding for the promotion of his business, without the permission of the plaintiff or the persons in question. The plaintiff in the name of “Amitabh and Jaya Bachchan” approached the court for an order of injunction and for the misappropriation of their publicity rights. The court passed an order of injunction and stated that Amitabh and Jaya Bachchan being famous persons have personality right over the use of their image. They have the right to decide when and how and where it should be used.⁶²

3. In the case of “*Tata Sons Limited & Anr v Aniket Singh*”⁶³, the plaintiffs had appointed, in 2012, Mr. Cyrus Mistry as a deputy chairman. Being well aware of the reputation and popularity of Mr. Cyrus Mistry, the defendant one month prior to the appointment had recorded the domain names “www.cyrusmistry.co.uk” and “www.cybermistry.co”. The defendants then went on to approach the plaintiff stating that, several entities have approached them to purchase these above-mentioned domain names. They requested the plaintiff to approach the defendants at the earliest. If the possession of the domain names were to go into erroneous hands and be misused. Then it might

⁶⁰ Shamnad Basheer, Publicity Rights: Sourav Ganguly vs. Tata Tea, available at: <https://spicyip.com/2009/12/publicity-rights-sourav-ganguly-vs-tata.html> (last visited on July 10, 2020).

⁶¹ CS (OS) 2662, Delhi High Court, decided 26 April 2012.

⁶² Personality Rights in Indian Scenario, available at: <https://iiprd.wordpress.com/tag/ramkumar-jewellers/> (last visited on July 10, 2020).

⁶³ CS (OS) 681 of 2012, Delhi High Court, 17 November 2015.

heavily affect the reputation and goodwill of the plaintiff. Delhi High Court recognised the well-known status and personality and that Mr. Cyrus Mistry's popularity has spread in many different fields. The court passed an order of infringement and passing-off, stating that the defendants cannot misuse the famous name and personality and reputation associated with Mr. Cyrus Mistry. The court also accepted the privacy right and publicity rights of Mr. Cyrus Mistry under section 21 of the Constitution of India.⁶⁴

4. "*Ritu Primalani v State of Karnataka*"⁶⁵, Lady Thimakka being an activist, had made a movement of planting 384 banyan trees. For such an act of her, she gained popularity. The accused has started to use her name without her permission and made a profit for herself out of such use. The accused had started a charitable fund under the name "Thimakka Resources for Environmental Education in California, US". Aggrieved with such misappropriation of the plaintiff's name use, she approached the court for a remedy. She stated that she comes under the definition of performer right as described under the copyright act. The court held that her act of activism does not make her a performer as per the definition of the performer under the copyright act. Therefore she is not entitled to any remedy. The court also stated that if she had come under the protection of publicity rights, then her case would have held merit.⁶⁶

5. "*Shivaji Rao Gaikwad v Varsha Productions*"⁶⁷ Rajinikanth was successful against the claim of personality right. He was being misrepresented in the movie "Mein hon Rajinikant" the producer claimed that the movie was based on himself, but the people were directly relating the movie to the famous movie star, as the plaintiff's name dialogued delivery style and caricature were being used. The court passed the order stating that the Rajinikanth's personality right or the Right of Publicity is being infringed due to the movie.⁶⁸

⁶⁴ Tata Sons Limited & Anr v Aniket Singh, available at: <http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=105102902400> (last visited on July 11, 2020).

⁶⁵ Karnataka High Court, 16th October 2015.

⁶⁶ Ritu Primalani v State of Karnataka, available at: <https://www.casemine.com/judgement/in/56e10953607dba3896611a4e> (last visited on July 11, 2020).

⁶⁷ 2015 (62) PTC 351 (Madras).

⁶⁸ *Supra* note 26.

6. "*Rajat Sharma & Anr. v Ashok Venkatramani & Anr.*"⁶⁹, where Rajat Sharma's personality rights were upheld along with the right in the show "App ki Adalat". "Zee Media Corporation" wanting to encourage its new TV anchor-less news station, took a dig at many famous TV journalists.⁷⁰ The Delhi High Court stated that "Sharma had an unassailable right in his public persona and identity as a famous television show host. It also stated that the use of the Statement in the Advertisement amounted to false advertising."⁷¹ An order of injunction was passed in the favour of the plaintiff.⁷²

❖ **Research Gap:**

Through the review of literature, the researcher found that:

- Publicity right is a grey area of law which needs to be explored thoroughly as it is fast taking root in India.
- The Researcher's purpose in studying this topic is to bring the limelight to the Publicity right, which has been recognized in many countries and has been formally recognized in the form of a statute or through amendment in the existing common law.
- Through the literature review done above, it has been observed that the Publicity Right is associated with the famous people, even when the right can be properly applied to the general public.
- There is no empirical and comparative study which has focused on the importance of the Publicity Right in India.

❖ **Scope of Study:**

The study will emphasise the Publicity Right in relation to the "Intellectual Property Rights", along with the art. 21 and 19 of the Constitution of India. The researcher will highlight how the different intellectual properties can define, identify and provide protection to the Publicity rights. The researcher

⁶⁹ CS (COMM) 15/2019.

⁷⁰ *Supra* note 28.

⁷¹ *Supra* note 29.

⁷² *Supra* note 30.

will also analyse if the Publicity Right can be provided protection through the existing laws. That the Publicity Right is not being in contradiction to the Constitution of India. The researcher shall also examine the English Jurisprudence on the subject matter of publicity right.

❖ **Research Objectives:**

From the above literature review, the following objectives were framed:

- 1- To study and understand the Publicity Right as needed of the time.
- 2- To study and establish that the Publicity Right is in consonance with the Constitution of India.
- 3- To understand and appraise the legal framework governing the Publicity rights in India in the light of Intellectual property rights.
- 4- To study and analyse any interlink between the Publicity Right and other existing laws.
- 5- To identify and compare the Publicity Rights as recognized in different countries and India.
- 6- To examine the scope of the level of protection that Publicity Right can endow on celebrities as well as an individual or general public.
- 7- To conduct an empirical study and analyse the result for the applicability of the Publicity Right to the general public.

❖ **Research Questions:**

The Following questions shall be especially pondered upon in the dissertation:

1. Whether Publicity Right is the need of the time?
2. Whether Publicity Right in consonance with the Constitution of India?
3. Whether the existing Intellectual Property Right, specifically copyright and trademark, are able to provide protection to the publicity right?
4. What are the other existing laws in India, where publicity right can find protection?
5. Whether protection provided against infringement of publicity right in India sufficient, as compared to other countries?

6. Whether the publicity right can extend its protection to the general public as well?
7. Whether there is a need for separate legislation for the protection of publicity right in India?

❖ **Hypotheses:**

In order to achieve the above-said objectives, the researcher has come out with the following hypothesis:

H₁:- Publicity right is applicable to the celebrities only, the protection of the right does not extend towards the general public.

H₂ :- General Public is well aware of the Publicity Right.

❖ **Research Methodology:**

The topic of research is wide and to cover almost every aspect of the concept of publicity right, the researcher has used the empirical and non-empirical methods of research.

In non-empirical research, the secondary data shall be used for analysing the basic concept of publicity right. Through this method, the research aims at reviewing the point, that publicity right is the need of the time, to understand what publicity right is and how it is effective in India. What laws can govern publicity rights and how effective they are? For the purpose of case analysis, comparative study methods shall be employed towards the data collected. With the help of online journals, research gateways, libraries, books, newspapers, etc. Shall be employed.

Empirical research has been undertaken for collecting primary data. The data shall be collected with the help of a Questionnaire, which shall be given to the general public. India will be the universe for data collection and 300 respondents shall be recognized for the collection of data. The questionnaire shall be mailed, whatsapp and even the help of social media shall be

undertaken for the collection of data. Snowballing sampling method of research shall be used for the same. This shall be done due to the convenience of the researcher.

With the help of this data, the research aims at identifying the basic awareness of the concept of publicity right among the general public and the level of infringement that has been faced by the general public, which can be categorized as the infringement of publicity right.

❖ **Limitation:**

- The researcher would not be able to go to various countries, therefore the primary data collected will be limited to India.
- The second limitation of the research study is the lack of time and money.
- Third limitation- almost 24 countries have recognised Publicity Right, but due to the non-availability of primary or the secondary data on all the states. The researcher has limited the scope of comparative study to only some countries.

❖ **Framework of the study:**

CHAPTER 1- INTRODUCTION

Chapter 1 deals with the introduction, importance of the study, Objectives of the study, Hypothesis, Research Objectives and Questions, Scope of study and Research Methodology.

CHAPTER 2- PUBLICITY RIGHT: AN ANALYSIS

Chapter 2 will deal with the meaning of publicity right, and their historical background. The international level protection of publicity rights, if any, shall be examined. The question of eligibility, i.e. celebrity and the general public, for the protection of Publicity rights shall be discussed in detail. Various different features of publicity right will be dealt with in detail. The concept of

who will be the owner of the publicity right and exceptions will also be dealt with in detail.

CHAPTER 3- PUBLICITY RIGHTS AND THE CONSTITUTION OF INDIA

Chapter 3 will deal with the interjection of Publicity Right with the Constitution of India, especially with the relationship between Privacy right and the “Freedom of speech and expression” the Publicity Right.

CHAPTER 4- PUBLICITY RIGHT AND INTELLECTUAL PROPERTY RIGHT

Chapter 4 will deal with the growth of Publicity Right as a part of “Intellectual Property Rights” and the justification for the same. The concept of Publicity Right being protected by passing off will be dealt with in detail.

CHAPTER 5- PUBLICITY RIGHT INTERLINK WITH OTHER LAWS

Chapter 5 will deal with the interrelationship between Publicity Right and the other existing laws, such as defamation, cyber laws, torts laws, etc. The remedies available to deal with the aspects of Publicity Right falling within their regime shall also be discussed.

CHAPTER 6- PUBLICITY RIGHT IN USA AND UK:

Chapter 6 comparative analysis of India with the USA and UK be done. Every aspect of publicity right shall be compared. How each country are protecting its rights, either through a separate statute or through the existing laws? How efficient are there methods? This would be no-empirical research based on secondary data.

CHAPTER 7- EMPIRICAL STUDY

Chapter 7 will emphasize on the principle outcomes of the primary data collected and analyse the same.

CHAPTER 8-CONCLUSION AND SUGGESTIONS

Chapter 8 relates to the conclusion and suggestions pertaining to the research work.

Chapter 2

Publicity Right: An Analysis

Chapter 2

Publicity Right: An Analysis

2.1 Publicity Right:-

“The right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent” is defined as Publicity right by “Black’s law dictionary”.⁷³ It is also known as right in persona, as it is “the right to control the commercial use of one’s identity⁷⁴ or the right to control the use of one's name, voice, image, and likenesses for commercial purposes.”⁷⁵ Publicity Right is also referred to as property rights, because the individual has control over the commercialization of his own "name, image, voice, signature, photograph, likeness, distinctive appearance, gestures or mannerism.”⁷⁶ If one wants to commercialize any of the elements of a person’s persona, they have to pay revenue for it.

The author in this chapter the author will discuss the different beneficiaries entitled to the Publicity Right. Generally, the Publicity Right is associated with celebrities, but the author will also deliberate upon the matter of the availability of this right to an individual person as well. In order to work upon this thought, the author will explain the scope of celebrity, the difference between a celebrity and an ordinary person and the qualifications required for availing the Publicity Right of a celebrity and an ordinary person. To have a better understanding of the concept of Publicity Right, how it even came into conception has to be understood.

2.2 Celebrity:

According to Oxford law Dictionary, Merriam- Webster and Cambridge Dictionary, the term Celebrity has been defined as a “state of being famous;”⁷⁷ a

⁷³ *Supra* note 4 at 1665.

⁷⁴ *Supra* note 5.

⁷⁵ *Supra* note 6.

⁷⁶ *Supra* note 5.

⁷⁷ Celebrity, available at: <https://dictionary.cambridge.org/dictionary/english/celebrity> (last visited on March 19, 2021).

state of being celebrated”⁷⁸ the term celebrity has been derived from the Old French “*Celebrite*”, Latin “*Celebritas*” which means honoured or frequented. The term celebrity is linked with the basic idea of celebration, but here the celebration is not in relation to an event but it is in relation to the persons who have attained a degree of ‘fame.’⁷⁹

In the case of “*Martin Luther King Jr Center for Social Change v American Heritage Products Inc.*”⁸⁰ the court was of the opinion that the term 'celebrity' should be interpreted in a broader sense, it should not be limited to the traditional categories of 'celebrities' including just the movie stars, rock stars, and the ballplayers. With the help of the "direct commercial exploitation of identity test", here when a person's identity without their permission is being used, the user should be for the motivation by commercialization and should be direct. In this case, the person whose identity has been so misappropriated for the purpose of the right to publicity can be defined as becoming a celebrity.⁸¹

The concept of celebrity is not a new concept and has been in existence from previous times, in fact, the use of celebrities for the purpose of attracting consumers' ideas has been in existence as well (in short commodification of personality).

2.3 Development of Celebrity:

The concept of celebrity was there in the ancient times as well and can be traced back to the time where Greek and Roman when the first major sports event was held, it is generally said that the growth of celebrity is through a major social

⁷⁸ Definition of Celebrity, available at: <https://www.merriam-webster.com/dictionary/celebrity> (last visited on March 19, 2021).

⁷⁹ Celebrity Capital: Assessing the value of Fame, available at: https://books.google.co.in/books?id=IzxeBAAQBAJ&pg=PA14&lpq=PA14&dq=how+to+categorize+who+is+a+celebrity?&source=bl&ots=EHMzGX_RIJ&sig=LDph0rH1sSWIdKbD6DCbNDh5afE&hl=en&sa=X&ved=0ahUKEwievaqdobfZAhVJkZQKHVbCBxYQ6AEIYzAF#v=onepage&q=how%20to%20categorize%20who%20is%20a%20celebrity%3F&f=false (last visited on March 19, 2021).

⁸⁰ *Martin Luther King Jr Centre for Social Change v American Heritage Products Inc.*, 694 F.2d 674 (11th Cir 1983).

⁸¹ Tabrez Ahmad and Satya Ranjan Swain, “Celebrity Rights: Protection under IP Laws”, 16 *JIPR* 7 (2011).

event, in ancient times this was prominent in the form of sports it was the time when the mass media has yet not taken roots and still when a person taking part in such events like sports and winning at that was widely loved and appreciated by the people.⁸² In the sports event held by the Greeks and Romans, the slaves were the ones who participated in them, the most successful competitor amongst them gained a fan base and their fame was made more prominent by the use of their likeness and image in the form of the work of arts.⁸³

Another way of gaining fame was through the help of titles like the monarchs, politicians, royalties or warriors, the ancient Romans through the help of sculptures or by imprinting the faces of the famous persons on the coins gave the recognition to the famous people (in short they commodified them),⁸⁴ another way of celebrating the then famous people was through the help of paintings, portraits, and sculptures, that were put up for public display.⁸⁵

The use of the images of the famous people for the purpose of business had taken roots in the second half of the 18th century, when Josiah Wedgwood has used the help of "Illustrious Moderns" in the form of production of portrait medallions which immediately became a hit with the people and he started to produce the same in a regular manner, he then incorporated the use in the plates, earthenware, pitchers, or in general a lot of household objects.⁸⁶

The evolution of society also helped in the evolution or emergence of new celebrity figures such as artists, poets, and writers. During the 20th century, society saw the growth of Hollywood film actors, singers, etc. An earlier form of representing the famous people was by way of coins, paintings, and statues, but the growth of the printing press saw the use of the images in the form of pamphlets, image circulation in the books, sketches, and photographs.⁸⁷

⁸² *Supra* note 79.

⁸³ *Ibid.*

⁸⁴ History of celebrities and Heroes, available at: https://www.lsrhs.net/departments/history/ShenM/Site/Pop_Culture_classwork_handout_files/History%20of%20Celebrity%20%26%20Heroes.pdf (Visited on March 19, 2018).

⁸⁵ *Supra* note 79 at 25.

⁸⁶ Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights"

⁸¹ *CLR* (1993).

⁸⁷ *Supra* note 79 at 26.

Then came the use of famous people in the films, television shows, videos, etc. some became famous because of this and some made the shows famous because they were in them. Earlier the status of "celebrity was achieved from the events, but through the development of the mass media in the 20th century, the "celebrities" came to be defined in the terms of societal acceptance along with the rise of consumerism, it gained more potential. The star status in this era could be determined with the help of media producers or rather with the help of the spread of the multi-faceted publicity campaigns done by the companies using the help of the famous people irrespective of the field they were from.⁸⁸

The growth of celebrities can be summed up in different aspects and forms. It started with the help of sports when the mass media was in play, and then came the printing press era, which paved the way for the use of images and the use of personal life information to help increase the sale of newspapers and magazines, etc. Then came the era of theatrical performances, authors such as the Shakespeare who wrote the plays on which the theatrical presentation can be done, gained fame, Rome and Juliet are one such example, and live performances took place. Even poets such as Lord Byron, and writers such as Charles Dickens gained the status of a high public profile with the help of their writing and also because of being a journalist.⁸⁹

When the films in the Hollywood took roots then the era changed and the growth of celebrities came more prominent and the use of their images, likeness, etc. came to be used more for attracting the consumers and the development of Radio also played an important role, as now with the help of radio the voices of the famous people can be heard by just sitting in your houses.⁹⁰

In the 1950s and 1960s the world saw the emergence of the musicians, singers were by through their songs they gained the status of celebrities, before for them to be recognized they had to appear in movies, etc. for recognition, but the help of music videos, the singers were no longer required to be a part of films for

⁸⁸ *Ibid.*

⁸⁹ *Id* at 27.

⁹⁰ *Ibid.*

gaining recognition and fame. Televisions programmes also played an important role here, it not only included the shows coming on TV but it also includes the factual representation like the quiz and games shows, also the broadcast of the talent shows, then the emergence of the reality TV took place, which helped even ordinary people to attain the status of celebrity. Even the Doctors came on talk shows, chef prepared the dishes on the TV, designers came to provide fashion tips, etc.⁹¹

With the progression of knowledge and the introduction of the internet, a person to become famous just have to upload a video on any social media site like Facebook, YouTube, etc. as compared to the olden times where only the help of mass media could be availed for the purpose.⁹² The celebrity status of the individual can be determined, by taking into count number of views, sharing, and their production in memes and GIF. Justin Bibber is one such example where when he uploaded his video on YouTube and it was mostly seen by the people and then a company approached to sign him up.⁹³

The only common point among all the different diversities of celebrities is that they all bring fame and with fame fortune is also almost every time associated. The celebrities have gained a status where they have also become role models for many, and when wrong information is made published, it also becomes possible that they would lose the interest and respect of the public and it has adverse effect on the image of the celebrity such as the exposé of them getting drunk, taking drugs, being sexually promiscuous being unfaithful to their spouses or even they make extreme comments, as these celebrities have also gained a place where they have the power to influence the others. For e.g. they have the power to change the trends of the society.⁹⁴

The growth of celebrities have been dynamic, from the sports to the modern era of internet, from gaining the status of being influential, role models, etc. but is

⁹¹ *Supra* note 79 at 27.

⁹² *Ibid.*

⁹³ *Supra* note 79 at 28.

⁹⁴ *Supra* note 79 at 28.

there any categories of celebrities, are is there a way to define the level or different types of celebrities.

2.4 Different types of celebrities:

The celebrities have a value attached to them due to their images, voice, etc. being able to be used for the purpose of gaining revenues, money, to promote a brand, even to promote any social causes, etc. The celebrities do have a value of their own, but the people who associate themselves with the celebrities also gain a kind of value status. The celebrities are different from the ordinary people. Reason being celebrities are known all over the world or at least by the nationals, but an ordinary person may be known by his friends, relatives, or some day to day acquaintances.⁹⁵ Due to the name, fame, and glory attached to the persona of a celebrity, made them competitive among the different brands to endorse them as brand ambassador for their respective business.

It is no one's argument that the ordinary person does not have the right to protect the use of their name, voice, image, etc. as a person can be locally famous, i.e. within its state, or even if they are famous within their locality. An ordinary person can approach the court under the genesis of the Publicity Right. The court will recognize his right provided the ordinary person is able to discharge the necessary burden in that reference. He needs to show that he is a well-known person within the state or the locality, and any unauthorized use of his name, image, etc. is being used to gain a commercial interest will be prejudicial to his interest. There are people who gain popularity as they are good teachers, or they can be good singers in their locality, or the persons are such that they are famous only in their particular state, but are unknown to other state residences. Such persons being famous within their locality or state can exploit it commercially. Some persons are such who are famous in their particular field but unknown in others. The main requirement for the person is that they are able to prove before the court of their well knownness and having any commercial benefits or able to attract consumers in any way.

⁹⁵*Ibid.*

Singers, authors, artists, politicians, journalists are some others who have been recognized as celebrities other than the actors, now the specialists in fields such as cookery, personal therapy, self-improvements, motivational speakers have the status of celebrities which is equivalent to that of the movie or sport stars and their fame is capable of being commodified.⁹⁶

Many writers have tried to come up with a scheme of classification for the celebrities. In the historical aspect, Monaco in 1978 identified three different types of celebrities:⁹⁷

- 1- **Heroes:** A person who has achieved something which is different from the ones working in the field of entertainment or arts, but that achievement is of great significance. E.g. military commander but in today's era can also include adventures, scientist.⁹⁸
- 2- **Star:** This category is for high achievers, who were able to capture more public attention it can be in the field of entertainment, acting, highest performing sportsmen and women and can also include charismatic business people and politicians.⁹⁹
- 3- **Quasar:** This is the category where the people have attained the status of a celebrity due to accidents or their involvement in some events which are of significance such as disasters or criminal activities, by way of scandals or that they were associated with famous people in some way or the other.¹⁰⁰

Rojek in 2001 also have recognized three forms of celebrity status:

- 1- **Ascribed:** The celebrity status derived from the bloodline that is by being born in the family that is already famous, for e.g. the one born in the royal families, a child born in the family of Amitabh Bachchan, etc.¹⁰¹

⁹⁶ *Supra* note 79 at 30.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 79 at 31.

⁹⁹ *Ibid.*

¹⁰⁰ *Supra* note 79 at 35.

¹⁰¹ *Ibid.*

- 2- **Achieved:** The persons have earned the status through their talent and efforts. The actors, other entertainers or sportspersons who have become famous due to their own personal achievements. David Beckham is a good example he was the professional football player who has reached the highest level of competition. He had attained major sponsorships due to his performance in football.¹⁰²
- 3- **Attributed:** This category is when a person has attracted the media attention and have gained a short-term fame due to some specific actions. For e.g. persons appearing on reality shows, being associated with other established celebrities, or where actions have attracted the media attention such as when Monica Lewinsky who was an intern in the White House had gained media attention due to her sexual relationship with President Bill Clinton. Such persons should be differentiated from the other celebrities and to do so Rojek have coined a term known as “celetoids.”¹⁰³

Any person be it a celebrity or an individual citizen, if they are able to prove and establish that there has been an abuse of the Publicity Right in the court on such grounds/ elements to prove the Publicity Right claims:

- 1- There has been a utilization of the plaintiff’s identity.
- 2- That such identity have a commercial value (the identity is sufficiently recognized) attached to it.
- 3- That such commercial value has been appropriated for the purpose of trade.
- 4- There was no consent taken from the plaintiff.
- 5- The consequence of this is that there has been some kind of commercial injury caused to the plaintiff.

This is a person or celebrity is not able to prove before the court of law these elements then their Publicity Right claim fails.¹⁰⁴

¹⁰² *Supra* note 79 at 36.

¹⁰³ *Ibid.*

¹⁰⁴ The Evolution of Intellectual Property Theory and the Right of Publicity in the U.S. Contemporary Application in the Entertainment and Sport Industry, available at: <https://www.kaburakis.com/wp-content/uploads/2012/02/Kaburakis-2012-The-Evolution-of-IP-Theory.pdf> (last visited on March 19, 2021).

2.5 Celebrity Rights:

There are some rights which are affiliated with the celebrities due to their status, such rights are diverse and exclusive in nature. Such exclusivity is required as they are almost all the time being encroached upon by the media. Such rights can be categorized into three categories broadly, they are:

1. Moral rights/Personality rights:

“Personality works as an identification, by way of which one can be differentiated by another.¹⁰⁵ Every person is perceived in a different manner by the society¹⁰⁶ and each personality contributes differently to the society.¹⁰⁷ When an individual or a celebrity works on creating an image or persona in the society¹⁰⁸ such a persona is nothing but a projection of the celebrity and it is his brainchild which fulfils the essentials of intellectual property resulting in a livelihood and therefore the protection is required.¹⁰⁹ Such efforts are the extension of their personality and therefore has a right of property over it, a justification for this can be derived from the Kant and Hegel personality theory of intellectual property rights, where they were of the view that the private property of an individual is the embodiment of the personality. The efforts put in the creation of the persona by an individual or celebrity represent the emotional intellectual and physical efforts which essentially fulfil all the requisites of a typical intellectual property”.¹¹⁰

2- Privacy Right:

The right of privacy is with the individuals and the celebrities and such a right when gets violated and been used in the unauthorized and wrong manner, which ultimately affects the image, causes injury to the individual

¹⁰⁵ *Supra* note 81.

¹⁰⁶ *Supra* note 13.

¹⁰⁷ *Supra* note 81 at 18.

¹⁰⁸ *Supra* note 13.

¹⁰⁹ *Supra* note 81 at 20.

¹¹⁰ *Id* at 18.

or celebrity should not be allowed. The violation of such a right has been discussed in length in the further topic.

3. **Publicity Right:**

Publicity Right has evolved from the right of privacy and it gives the right to the celebrity or an individual over the control of the use of their name voice, likeness, image, etc. hence only the celebrity and the individual has the right to authorise the use of any aspect of their persona by anybody.¹¹¹ The same has been discussed in details in the previous chapter.

The Publicity Right can be perceived as an intellectual property right for the following reasons:

a. **Labour theory:**

“John Lockean propounder of the theory was of the opinion that the person who puts in the effort to sow the seeds are only entitled to reap the fruit of the same. The one puts in the effort to make something different from the existing natural resources gains the right of property over it. In the case of creating a persona, the efforts are immense and are comparable to that of authors and hence the individuals or the celebrities who have created the persona have the right of property over it and as they have used their intellect for the purpose of such production have the intellectual property rights over it as well.”¹¹²

b. **Utilitarian Theory:**

“The theory has been advocated by Bentham and Mill. They believed in the pleasure and pain theory, the thing which can be used for the greater good of the society. When the persona of a celebrity is being used in the

¹¹¹ *Supra* note 13.

¹¹² *Supra* note 13.

commercial market for the purpose of attracting the consumers and increasing the sale in the market. The consumers also are demanding such products more, they also have faith in the products which are sold by the celebrities. Because they have a belief that the product or anything which is advocated by the celebrities should be good, as they have a trust factor in the celebrities, and this is one of the main reasons for the companies to endorse celebrities for their brand merchandising”.

The celebrities have a right of property over their persona as justified above and therefore they also have a right of ownership over the persona as the ownership and property right goes hand in hand.

2.6 Ownership:

Ownership as defined in the Black Law's Dictionary: "The collection of rights allowing one to use and enjoy the property, including the right to convey it to others.

- Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and inheritable.”¹¹³

Ownership in a legal sense would amount to the relationship between a person who is the owner of the right and things over which such right can be executed or exercised. There are majorly four rights associated with the owner, they are¹¹⁴

- a) To use a thing.
- b) Restrict others from using the thing.
- c) Power to dispose of the thing.
- d) Power to destroy the thing.¹¹⁵

There are 5 characteristics laid down for determining ownership. If these 5 characteristics can be fulfilled by the person in relation to the Publicity Right,

¹¹³ *Supra* note 4 at 2055.

¹¹⁴ N K Jayakumar, *Lectures in Jurisprudence* 209 (LexisNexis, New Delhi, 2004).

¹¹⁵ *Ibid.*

then a person can claim ownership over the Publicity Right. The characteristics are as followed:

1. **Right to possess:** Basic concept here is that the person who owns a thing has the right of possession over it.¹¹⁶ In the case of the Publicity Right, the person is responsible for the creation of their own persona, since they have created it they have possession rights over it as well. The possession be with the owner is not always necessary.¹¹⁷ The Publicity Right is a transferable and assignable right, so the individual or a celebrity has the right to transfer their right over their image, name, voice, etc. to some other company, for the purpose of being used in commercialization, this way the ownership is with the individual or the celebrity but the possession is with the company.
2. **Right to use and enjoy:** The things which is owned by the owner has the right to use it as well, they have the right to manage it i.e. they have the right to decide in what manner the thing shall be used and even have the right to use the thing for the purpose of earning an income.¹¹⁸ The Publicity Right is all about giving the legal owner the right to have a control over the use of any property of their persona and to generate an income out of that use.
3. **Right to capital:** The principle that can explain this right in a much better manner is "*Nemo dat quod non habet*" which means "no man can give a better title than that which he himself has." This right gives the authority to the owner to consume, destroy or alienate the thing owned. Once the possession of the right has been given to another, that another person cannot further transfer the ownership to other as they do not own it but the only posse it.¹¹⁹ When the right to one's image, voice, etc. has been transferred for the purpose of commercialization, then the one who

¹¹⁶ *Id* at 210.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Supra* note 114.

has got the transferable right only have possession over the image or voice, etc. Hence they cannot further transfer such rights as the real owner is the individual or celebrity whose image right has been transferred.

4. **Perpetual Right:** Ownership is not bound by time, here the position of the owner is different from that of the only possessor. The possessor's right will come to an end when the deed is over,¹²⁰ in case the right on the image has been transferred, but the transferred right is limited, i.e. it is only for a fixed period and when that period gets over the right of possession also gets over¹²¹ but the right of the owner remains forever, as they are the owner of their persona.
5. **Residual Rights:** the nature of ownership is residuary. For e.g. the landowner of X has given the right of easement to A, right of property to B, but even after such division some of the rights still remain like profit, etc. such remaining rights are known as residuary and the owner still retains the ownership over such remaining right.¹²² The same way when an individual or celebrity has given the right to use their name, image, etc. to some other person for use, even after that there are some rights which are in the hands of the individual or the celebrity and they are the owner of those remaining rights.

It can be concluded, in regards to the above discussion, that the Publicity Right is able to fulfill the 5 characteristics of ownership, and therefore it can be said that the person has the right. From the above discussion we can determine that the Publicity Right is able to fulfill the 5 characteristics.

In the USA where the Publicity Right is protected via statutes in some of the states, and within the statute there is also provision laid down in regards to the transferability and assignment and such transferability and assignment is only

¹²⁰ *Ibid.*

¹²¹ *Id* at 215.

¹²² *Ibid.*

possible if the individual have the ownership over their persona. Since India still has not made any legislation for the regulation of the Publicity Right, it does not mean the Publicity Right cannot be protected within India, but the only problem is whether such protection is adequate enough.

It can be understood that not only a celebrity but also an individual who is able to prove that their personality has been affected or misappropriated can approach the court for the claim of damages over such unconsented use.

The main question to be asked is, what are the features that can actually be misappropriated by the industry in order to invoke the question of misappropriation of Publicity Right? Just a passing reference is enough to invoke Publicity Right, or the mentioning of the name, or the use of the personality has to be specific? What are the traits of a personal that can be considered for the misappropriation of Publicity Right? The featured to be considered for the misappropriation of the Publicity right can be many and few. Even where such features are used have to be examined?

2.7 What can evoke the Publicity Right:

Publicity Right basically provides protection to one's name (*nickname, former names, and pseudonyms*), image, signature, likeness, voice, or any feature of a personal that can directly identify the personality in question. The silhouette of a person that can directly help recognize the person, can also be a subject matter of Publicity Right. The incorporation of a person in the form of dolls, animated character used for insulting them (not being covered by the fair use doctrine), all form the subject matter for the infringement of Publicity Right. Even the use of famous phrases used by the personality, and can help to directly link the personality to the phrase will be entitled as the infringement of the Publicity Right. There is not much precedent established in India, but in USA, UK they have provided compensation for the said infringements.

A. Persona:

The meaning of persona according to the Cambridge Dictionary is “The particular type of character that a person seems to have.” Or “The aspect of someone's character that is presented to or perceived by others.”¹²³ The aspects that can be presented and perceived by others are a person's name, voice, style of speaking, walking, gestures, image, signature and even if they have a repetitive phrase that they use a lot. Whenever any of the mentioned features are used, without the consent of the person, and is directly being related to the person by the general public. It means that there has been an infringement of Publicity Right. For e.g. the most famous case of Rajinikanth¹²⁴, when he brought the case of infringement of Publicity Right case in the Madras High Court, against the movie “Maine Hoon Rajinikanth”. The Movie has used the special features directly related to the Rajinikanth in the Movie. Like the way of walking by the actor, dialog delivering style, way of fighting, and his complete caricature has been set to resemble Rajinikanth. The public were able to identify the actor directly. The court upheld that there is direct violation of the actors Publicity right.¹²⁵ This example justifies the misuse of one's name, image, style of walking, talking, dialogue delivery, image used of a persona.

Incorporation of one's voice, style of dance (uniquely identifiable to the person), even in the form of dolls constitute to the infringement of the Publicity Right of the person, when done without their consent. The most famous example for this is the use of the song “Tunak tunak Tun, Tunak tunak Tun, Tunak Tunal Tun, Ta ra ra ra” by Daler Mehendi¹²⁶, in the form of dolls. The doll was made to sing the song, in the voice of Daler Mehendi

¹²³ The Cambridge Dictionary, “Persona”, available at: <https://dictionary.cambridge.org/dictionary/english/persona> (last visited on March 9, 2021).

¹²⁴ *Shivaji Rao Gaikwad vs. Varsha Productions*, 2015 (62) PTC 351 (Madras).

¹²⁵ Zoya Nafis and Aditi Halder, *Rajinikanth Re-Mouldes 'Personality Rights' After Eleven Years*, Mondaq, available at: <https://www.mondaq.com/india/copyright/423792/rajinikanth-re-mouldes-personality-rights39-after-eleven-years> (last visited on March 9, 2021).

¹²⁶ *DM Entertainment v Baby Gift House and Ors*, (CS(OS) 893/2002).

and to dance like him. The Court upheld the violation of the Singer Publicity right.¹²⁷

The catch phrase of famous personality if misuse can also bring forth the case of infringement of Publicity Right. For e.g. the catch phrase “Here’s Johnny” was used by portable toilets for advertisements.¹²⁸ The catch phrase was directly associated with the famous television show incorporating the actor Johnny Carson’s and his entrance on the show using the catch phrase. The court upheld the Publicity Right violation and awarded damages to the plaintiff for the same.¹²⁹

Most of the cases for the Publicity Right infringement are brought due to the misuse of one’s name or image or likeness. For e.g. The Titan jewellery case¹³⁰, where the company had used the image of Amitabh and Jaya Bachchan for advertisement. Another company without the permission either from the actors or the company used the same image for their product advertisement. The court ruled in the favour of the Titan jewellery case and stated that the actors have the authority in their images. Meaning that the actors can decide where and when and who will use their image and name for the purpose of advertisement.¹³¹

The use of even a likeness of the person, when the person is being identifiable directly, without the permission of the person in question, rises a sure case for the infringement of the Publicity Right case. For e.g. in Vanna White case¹³², Samsung had done an advertisement. In the advertisement a robot was made to dress in a blond wig, jewellery and a gown, against a Wheel of Fortune. The Wheel of Fortune was a famous game and Vanna

¹²⁷ Kumar Anjani, *Publicity Rights in India (Part I)*, BananaIP, available at: <https://www.bananaip.com/ip-news-center/publicity-rights-in-india-part-i/> (last visited on March 9, 2021).

¹²⁸ *Carson vs. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

¹²⁹ *Supra* note 51.

¹³⁰ *Titan Industries Limited v Ramkumar Jewellers*, (CS(OS) 2662), Delhi High Court.

¹³¹ *Personality Rights in Indian Scenario*, Khurana & khurana, available at: <https://www.khuranaandkhurana.com/2018/02/26/personality-rights-in-indian-scenario/> (last visited on March 11, 2021).

¹³² *Vanna White vs. Samsung Electronics America, et al.*, 971 F.2d 1395 (9th Cir. 1992).

White use to host the game, while dressed up like in the advertisement. The court held that it was a violation of the Publicity Right of the Celebrity. The judge explained that the Publicity Right not only protects a person's identity but also anything that can invoke a person's personality will also amount to the violation of the Publicity Right.¹³³

B. Look alike and Sound alike:

The entertainment industry is growing fast. They for the purpose of advancement use the help of famous personalities who are easily recognizable by the public. Most of the times the companies approaching the personalities are able to meet the demands of the personalities in question. In many situations they are unable to meet with the requirements of the personalities. They then go for an unorthodox situation, they make use of sound alike or look alike actors for promotion. Before the Publicity Right came into picture, it was difficult for the personalities to safeguard their interest from being misused by such companies.¹³⁴ As the companies never used their image or name, but they used a look alike or sound alike. They help in recognising the person, but they were not the actual people. The courts in many cases have recognized Publicity Right even in the look and sound alike situations.

The look alike claims have been approved by many courts, where people were deliberately made to look alike famous personalities. In the Tin Pan Apple case¹³⁵, the actors were made to bore resemblance to a famous rap group, for the promotion of a beer company based in New York.

The voice alike claims have also succeeded in the courts. When the imitators were made to imitate famous singers voice for the purpose of advertisement.

¹³³ *Supra* note 51.

¹³⁴ Barry M. Benjamin, *Grand Implications: The Use of Celebrity Look-Alikes in Advertising and the Interplay Between State Right of Publicity and Federal False Endorsement (Trademark Infringement) Claims*, Lexology, available at: <https://www.lexology.com/library/detail.aspx?g=c29600ca-8ef8-4ff6-a678-5a5ccb95b6f0> (last visited on March 11, 2021).

¹³⁵ *Tin Pan Apple, Inc. Vs. Miller Brewing Co.*, 737 F. Supp. 826, 837 (S.D.N.Y. 1990).

In *Waits* case¹³⁶, a radio company had used a famous singer voice, for commercial of Doritos.

There are many situations that can arise the case for the Publicity Right. The instances of using one's name, personality, styles, image, likeness and even when there is the use of lookalike and sound alike situations.

2.8 Conclusion:

Publicity Right is mostly associated with the celebrities. Though the protection to be solely limited to them is not important. The protection can be extended towards any natural person. The ownership is theirs only. They have the right over the use of when and where. Without consent, nobody is allowed to have access to any particular feature of personality of a person. Though the rule is not stone written. Like every rules have some exceptions, the Publicity Right also have some exceptions. Like the use by magazines, newspapers, social media, memes, GIF, etc. To what extent and are the exceptions liable and where the exception does comes to an end and the Publicity Right begins. There constitutional validation and the exceptions which basically are covered under the "Freedom of speech and expression" shall be discussed in details in the following chapters.

¹³⁶ *Waits v. Fritolay, Inc.*, 978 F.2d 1093, 1098-1101 (9th Cir. 1992).

CHAPTER- 3
PUBLICITY RIGHTS AND
CONSTITUTION OF INDIA

CHAPTER- 3

PUBLICITY RIGHTS AND CONSTITUTION OF INDIA

3.1 Introduction

“Human Rights are the rights and freedom to which every human being is entitled.”¹³⁷ “The Human rights are originated to protect, defend and render peaceful enjoyment of the fruits of humanity.”¹³⁸ Part III of the COI deals with the concept of Fundamental Rights, they are more like the tangible fruit for all the efforts of the framers of the Constitution to ensure basic human rights for every human being. Regardless of the British opinion, the Constitutional framers introduced the concept of fundamental rights to vouch for individual liberty and to ensure social, economic, and political justice to all members of society. These basic rights are guaranteed to create circumstances in which every individual can advance his personality making life worth living. In this way, such rights impose negative obligations upon the State so that individual liberty of a person may be preserved. These rights work as limitations not only upon the Executive but Judicial actions as well.

It was opined in the case, “*A.K Gopalan vs. State of Madras*”,¹³⁹ that, “the aim behind having a declaration of fundamental rights is to make inviolable certain elementary rights appertaining to the individual and to keep them unaffected by the shifting majorities in the legislatures”.¹⁴⁰ These Constitutional norms of the Indian society are applied, enforced, protected and evolved by the Courts of law. “Now, judicial review is a necessary concomitant of ‘fundamental rights’, for, it is meaningless to enshrine individual rights in a written constitution as fundamental rights, if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive.”¹⁴¹ The fundamental rights are not a

¹³⁷ V.K. Anand, *Human Rights* 1 (Allahabad Law Agency, Faridabad, 3rd edn., 2018).

¹³⁸ Adish C. Aggarwala, *Constitution of India* 37 (Amish Publications, New Delhi, 4th revised edn., 2014).

¹³⁹ AIR 1950 SC 27.

¹⁴⁰ Narender Kumar, *Constitutional Law of India* 76 (Allahabad Law Agency, Faridabad, 10th edn. Reprint, 2021).

¹⁴¹ Durga Das Basu, *Introduction to the Constitution of India* 43 (LexisNexis, Gurgaon, 23rd edn., 2018).

set of axioms; it is the Constitution and Judiciary of a State that give them proper validation over different sets of time.

Constitutional interpretations play a significant part in recognising the latest and emerging claims from society. It is the competency of the Higher Indian Judiciary that has gone a step further while acting as a whistle-blower, protector, and upholder of the democratic principles for serving justice to the marginalised by protecting individual's fundamental rights so that the vision of the 'Constituent Assembly' of creating a new social order in a society of multiple cultures, languages do not go in vain and are modestly discerned and valued. Through beautiful interpretations, the Indian judiciary has given statutory provisions broader meanings and explanations.

The "Publicity Right" is also a judicially conceived principle which has been strengthened over time with the help of judicial activism. It is an IPR that prohibits the unauthorized commercial use of a person's "name, likeness, or other indications of personal identity, such as a nickname, pseudonym, voice, signature, likeness, or photograph". The intrinsic worth of a celebrity's public appearance is enormous, as it involves the monetary value associated to it. As a result, it is absolutely essential for a superstar to defend his or her right in order to prevent others from taking advantage of it or gaining unauthorised profits from it. "Creating a space to its own in the market, and not allowing or restricting others to enter the space provides a monopoly as well as enhanced profitability."¹⁴²

Thus, granting an individual the right to publicity becomes a intermediate of permitting domination to him as a armament saving his name and repute from unauthorized functioning. It is an intangible and non-transferrable right granted to prevent unfair riding or unjust enrichment. "It shall be highlighted that the concept of publicity rights traces its theoretical origins in John Locke's 'Fruits of Labour' theory, wherein a celebrity shall be granted an exclusive proprietary

¹⁴² Niranjana Pani and Sandhyarani Nayak, *Intellectual Property Rights: An Overview* 38 (SSDN Publishers & Distributors, New Delhi, 1st edn., 2014).

interest in their hard-won reputability as an incentive for the efforts put in by them.”¹⁴³

“It may only be natural that people who believe in the worth and dignity of individual should feel that material happiness is not enough, if they are deprived of intellectual or political freedom.”¹⁴⁴ In the former years, “Publicity Rights” have garnered substantial acknowledgement in the field of “Intellectual Property Rights”. These rights are attached to the existence of an individual, his personality traits, voice, styling, gestures, art, and skills. “Celebrity rights have been acknowledged for the benefit of those who have worked hard to be known as distinguished personalities. It gives them the right to publicity, which allows them to control the commercial use of their identity and entitles them to the money that arises from their fame. Such celebrity rights are assignable and licensable for commercial benefits.”¹⁴⁵

This right trace its roots to Art. 19 and 21 of the Constitution. There exists a “friction between two competing ideals—a right to control the use of one's identity and a right to create expressive works—presents a constitutional dilemma”.¹⁴⁶ Therefore, on one hand, it is concerned with the protection of a personality's “right to life and personal liberty” and on the other hand, it cushions the “freedom of speech and expression”. This chapter will endeavour to cover the interlinking of Art. 19 and 21 with the “Right to Publicity” which has been discussed as under:

¹⁴³ Aryan Bhat and Yashendra, “Whose Photo is it, really?: Dichotomy of rights and copyrightability of paparazzi photographs” available at <https://rmlnlulawreview.com/2021/09/20/copyrightability-of-paparazzi-photographs/> (last visited on January 30, 2022).

¹⁴⁴ L.M. Singhvi, *Jagdish Swarup Constitution of India* 675 (Modern Law Publications, Allahabad, Vol. 1, 2nd edn. reprint, 2008).

¹⁴⁵ *Krishna Kishore Singh vs. Sarla A. Saraogi & Ors.*, CS(COMM) 187/2021.

¹⁴⁶ Thomas E. Kadri, “Fumbling the First Amendment: The Right of Publicity Goes 2–0 Against Freedom of Expression” 112.8 *MLR* 1521 (2014) available at: <https://www.jstor.org/stable/23816865> (last visited on January 30, 2022).

3.2 Publicity Rights and Fundamental Freedoms.

Primarily, we find “Publicity Rights” as an intellectual property right. However, this right, like the umbilical cord, is linked to the mother Constitution in a variety of ways. First of all, it is linked to Art. 19 of the COI in two ways which are discussed as under:

3.2.1 “Right to Freedom of Speech and Expression” and Publicity Rights.

In this era of commercialization, the world has become a “global market” where everything is available to shop, but it comes with a price, as nothing here comes for free. Similar is the case in matters related to “celebrity rights”, if a person is licensing another person under an agreement to use his name, signature etc., he would charge a price for that. The price paid to a person for the usage of his title, etc., is the fruit of his celebrity status, which he is legally entitled to gain. Commercial speeches too are part of one’s “right to freedom of speech and expression”, however, “it must not be deceptive, misleading, unfair or untrue, otherwise, it would not come within the scope of Article 19 (1) (a).”¹⁴⁷ Celebrities usually render commercial speeches on various platforms due to their commercial value. Such a commercial value control is handed over to the celebrities for a reason, and it is to allocate exclusive rights i.e. property rights to them.¹⁴⁸ The leading exposition author on the publicity right, “J. Thomas McCarthy”, has contended that “the only kind of speech impacted by the right of publicity is commercial speech- advertising.”¹⁴⁹

In *Tata Press vs. M.T.N.L.*,¹⁵⁰ it was said that “the right to commercial speech or advertisement is an integral part of freedom of speech and expression.” It is an entity’s fundamental right to have “freedom of speech and expression”¹⁵¹,

¹⁴⁷ *Hamdard Dawakhana vs Union of India*, AIR 1960 SC 554.

¹⁴⁸ Rosemary J. Coombe, “The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender” 14.3 *Discourse, Summer* 61 (1992) available at: <https://www.jstor.org/stable/41389233> (Visited on January 30, 2022).

¹⁴⁹ Jennifer E. Rothman, “Commercial Speech, Commercial Use, and the Intellectual Property Quagmire” 101.7 *VLR* 1950 (2015) available at : <https://www.jstor.org/stable/24643631> (Visited on January 30, 2022).

¹⁵⁰ (1995) 5 SCC 139.

¹⁵¹ Article 19(1) (a) of The Constitution of India, 1950.

which enables him to put forward his views on anything happening or not happening in the world. “The freedom of free speech and expression means the right to express one’s convictions, and opinions freely by word of mouth, writing, printing, pictures, electronic media or any other mode (addressed to the eyes or ears).”¹⁵² The use of the identities of public figures or celebrities puts a greater impact upon the mind of the prospective consumers. Indian consumers are especially, always interested in and, find worthwhile evidence about the goods that celebrities uses, whether it's the bathing soap that Aishwarya Rai uses or the motorcycle that M.S Dhoni drives. Product owners and advertising agencies skim huge profits from the influencing power of public figures.

The advertising agencies also resort to “comparative advertising” tactics, to gain more profits by deteriorating the market value of other similar products available in the market. “The term “comparative advertising” refers to any form of advertising wherein an owner of a trademark attempts to make financial gains for himself by comparing his product or service with his competitors.”¹⁵³ “It might be possible that while puffing up their product, the advertisers end up portraying others product into negative light. Comparative advertisement is also protected by Article 19 (1) (a) of the Constitution of India as a part of free commercial speech.”¹⁵⁴ However, it is subject to reasonable restrictions. In “*Reckitt & Colman of India Ltd. vs. M.P. Ramchandran*”,¹⁵⁵ the Calcutta High Court has laid down five basic principles to determine whether the comparative advertisement has any element of disparaging other related products available in the market or not. “These are as follows:

1. A trader has all the rights to declare his product as the best in market, even though the statement is untrue.
2. He can also compare his product with other similar products in the market.

¹⁵² Ashok K. Jain, *Constitutional Law of India* 100 (Ascent Publications, Delhi, Part-II, 3rd edn.,2017).

¹⁵³ Mayank Kapila, “Intellectual Property Issues in Comparative Advertisements: Legal Aspects and Strategy for its use in Digital India” in Shefali Raizada, Meenu Gupta *et.al.*(eds.), *Laws Governing in Media and Entertainment Industry* 120 (Satyam Law International, 2017).

¹⁵⁴ *Ibid.*

¹⁵⁵ 1999 P.T.C.

3. For the purpose of claiming his superiority, he can further enlist the advantages attached with the product.
4. While claiming his product's superiority, he cannot say that other similar products which are available in the market are not good and purchasing them would not be a wise decision.
5. No action would lie, if there is no defamation of the product or the manufacturers but if there is any slight possibility of defamation, then the Court is empowered to grant injunction order restraining the repetition of such defamatory content along with the recovery of damages.”¹⁵⁶

In another similar case, “*Pepsi Co. Inc. vs Hindustan Coca Cola Ltd.*”¹⁵⁷ the commercial advertisement released by the defendant's depicted Pepsi as a bachhon wali drink and suggested the viewers that if they want their children to grow up than they should prefer Thums Up over Pepsi. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior. There is no doubt that comparison is permissible so long it does not undervalue the product of the rival.”

The root of above discussion is connected to the “freedom of speech and expression”. Here, “Free speech and expression” includes the superstar's right to utilize his nickname, voice, signature, likeness, or photograph through which he communicates his views to the whole world, which has the ability to persuade their conceptions. “The right to freedom of speech and expression guaranteed under Article 19 (1) (a) of the Constitution means the right to express one's convictions and expressions freely by word of mouth, writing, printing, picture, or in any other manner.”¹⁵⁸

Where a celebrity assents to be a part of a product endorsement and shoots an advertisement where he renders a commercial comparative speech, defaming other similar products in the market. He can cannot claim the defence of his

¹⁵⁶ 1999 P.T.C.

¹⁵⁷ 2003 (27) PTC 305 Del.

¹⁵⁸ *Supra* note 114 at 677.

right to free speech and expression as it is subjected to judicious constraint under Art. 19 (2). The basic idea behind hiring a public figure to endorse any product is basically to attract the customers, on their belief, that if a celebrity has endorsed the product, then it, might have some value in it, this is in its own kind a “Social Engineering”¹⁵⁹ and therefore, it should not be misused not only by the celebrities but their image consultants as well.

The other side of the coin is that, for the sake of free speech and expression, no person has the right to injure the goodwill of any person, which also comprises a public figure by publishing anything libellous or slanderous. In “*Gertz vs. Welch*”¹⁶⁰, “Jefferson” endorsed “Madison’s” formula that “Congress shall make no law abridging the freedom of speech or the press” only afterward he proposed:

*“The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others....”*¹⁶¹

Publicity rights are not available to a public figure against the general public only but other celebrities as well. For the sake of free speech and expression, no celebrity can defame any other public figure nor publish the private affairs of another's life for the sake of his “right to free speech and expression”. Therefore when an arrangement is made for the defence on the worth of an individual’s identity, then the right of other to be able to make comments on that identity gets infringed. Hence they become the natural enemy to each other. There are few tests available which were evolved by the Courts to ponder the interests supporting the publicity right and the “freedom of speech and expression”.

¹⁵⁹ “Social Engineering” here means a balance between the competing interests in society. B.N. Mani Tripathi & Rajiv Mani, *Jurisprudence (The Legal Theory)* 50 (Allahabad Law Agency, Faridabad, 19th edn, reprint, 2019).

¹⁶⁰ 41 L ed 2d. 789.

¹⁶¹ *Supra* note 144 at 748.

1. *The Transforming Use Test*- This test was created by the SC of California which considers five main factors before determining a celebrity's publicity right and another person's "freedom of speech and expression".
 - a. First factor of determination is the concept of likeness being used as a "raw material" from the same concept from which the original work have been derived.
 - b. Second, whether the work which has been produced in the above mentioned, if the work is actually the authors own expression or not.
 - c. Third, if the work is the self-expression of the author, then does it involve a creative element in the work, or is it a derivative work of the original script.
 - d. Fourth, the most important question to raise is that, if any economic consideration have been gained, then such a gain is based on the original work, i.e. the person on whom the work was based, or the economic value earned is through the work of self-expression.
 - e. Fifth and the last, if the work done by the artist is such that, the work is expressing the unique style and manner of portrayal, which has helped in advancing some commercial value of the person so portrayed.

The test identifies, that "what the right of publicity holder possesses is a right to prevent other people from misusing the commercial value yielded by the celebrity's fame." This inquiry is more "quantitative than qualitative" in nature. The test should allow some space for inspired assistances that employ with honest and unbiased recording of facts with fictional representations. In reality, however, this test has not demonstrated so satisfactory. The use of the transformative use test was employed through 2 California Sta.C., they have analysed the portrayal of the public figures, it was concluded that the portrayal of such characters were not depicted properly, and rather the portrayal was unrealistic. Hence, this test was held to be conceived very poorly yielding no fruitful results.¹⁶²

¹⁶² Kevin Chin, "The Transformative Use Test Fails to Protect Actor-Celebrities' Rights of Publicity" 13(2) *Northwestern Journal of Technology and Intellectual Property* 198 (2015).

2. *The Bright Line Test*- This test is also famously known as the “*Rogers Test*” or even as the “*Reinstate Test*”. The test is applicable when there has to be an analysis whether the publicity right speech is either commercial or expressive. “Commercial speech does no more than propose a transaction.”¹⁶³ If the speech is purely commercial, the claim may be allowed to pursue; if it is expressive, the investigation continues. The bright-line test would then assume that the use of the person's likeness in the artistic work is acceptable only if it is totally unconnected to the content of the work or is merely a camouflaged commercial advertisement for the sale of goods or services. This *test* is more preferred than the *transforming use test* as it protects an artist's right to use realistic portrayals of public figures in an expressive work without needing to transform the person's likeness. The bright-line test also preserves the right of publicity for its principal use: preventing commercial exploitation through forged endorsements. It saves media that rely on realism in a way that the former test could not.

Before resorting to this test, the Courts must ensure that the public figures do not turn their right to publicity into the right to censorship. This test leaves no room of suspicion for judges to be a critic of art as it sets certain clear standards that will not injure the speech. Importantly, though, the bright-line test's enhanced protection of realistic portrayal will not prevent public figures from fighting misuse of their identity through other viable causes of action, including defamation, false light, invasion of privacy, and public disclosure of private facts.

This test also preserves two targets of right to publicity claims viz. public figures may still challenge unauthorized use in purely commercial expression and the disguised commercial advertisement a principal goal of the right of publicity: it refuses to acknowledge commercial exploitation through false endorsements.

¹⁶³ *Cent Hudson Gas & Elec. Corp. vs. Public Service Commissioner*, (1980) U.S.

3.2.2 “Right to practise any Profession, or to carry on any Occupation, Trade or Business and Publicity Rights”.

Where a celebrity endorses a product and gives a commercial speech, it is his “freedom to speech and expression”, which on the further hand, is a part of his “freedom of profession, occupation or trade”.¹⁶⁴ Giving a commercial speech by a celebrity or a person having wide recognition in society would definitely attract the public towards the product he is endorsing, and for this act, he will receive a huge sum as part of his endorsement agreement. Thus, Publicity Rights has two facets attached to Art. 19 i.e., “freedom of free speech and expression” under Art. 19 (1) (a) and “freedom to practise any profession, or to carry on any occupation, trade or business” under Art. 19 (1) (g).

“The State can prohibit certain trades and callings which are obnoxious, dangerous and, injurious to public health, morality and social justice.”¹⁶⁵ The State is also empowered to make laws to prohibit such activities under Article 19 (6). These restrictions however, be reasonable and, regard must be given to the nature of commercial activities. “These factors differ from trade to trade and no hard and fast rules concerning all trades can be laid down, any celebrity cannot use his influencing power; which comes as a part and parcel of his celebrity rights, to mislead the public.”¹⁶⁶

The totally opposite view of this discussion involves the violation of a celebrity’s publicity rights by the rapidly growing paparazzi culture in India. The paparazzi cluster follows the celebrities quite closely. Recently, Imitating dolls of “Taimur Ali Khan” who is son of movie actors, “Saif Ali Khan and Kareena Kapoor Khan” were found being sold on an online portal for 980 rupees.¹⁶⁷ Many times we see paparazzi clicking pictures of celebrity kids that

¹⁶⁴ Article 19 (1) (g) of The Constitution of India, 1950.

¹⁶⁵ P.K. Majumdar & R.P. Kataria, *Commentary on the Constitution of India* 807 (Orient Publishing Company, Allahabad, Vol. 1, 10th edn., 2009).

¹⁶⁶ M.P. Jain, *Indian Constitutional Law* 1114-1115 (LexisNexis, Haryana, 8th edn., 2018).

¹⁶⁷ Seen the Taimur Ali Khan doll? This is how much it costs, available at: <https://www.indiatoday.in/trending-news/story/seen-the-taimur-ali-khan-doll-this-is-how-much-it-costs-1393273-2018-11-21> (last visited on January 30, 2022).

too, without permission and they sale these photographs to websites charging high prices and if complained, they claim it as their constitutional right under Art. 19 (1) (a) and (g). This is how publicity rights of famous personalities as well as of their family members are violated just because still there is a big legal hollow dealing with such matters.

3.3 **“Right to Life and Personal Liberty” and Publicity Rights.**

Part-III of the Constitution in such a way provides about Fundamental rights which are ensured to every individual and the epitome of these rights is Article 21. The two basic flanks of Art. 21 of the COI are “Right to Life” and “Right to Personal Liberty”. Indian Judiciary has attributed wider meanings and explanations to the basic law letters of Article 21 through beautiful interpretations in such a way that it has become the safeguard of human rights. Almost every Judge of the SC and HC have contributed their bit to expand the meaning of Right to Life by transforming the negative connotations to positive assertions making life worth living. In the case of “*I.R. Coelho vs. State of Tamil Nadu*”,¹⁶⁸ this right has been held to be the most important part of the COI, the most organic, and open-minded provision in our living Constitution.

“Right to Privacy does not find any definition in any statute, however, the Supreme Court of India has time and again held the Right to Privacy to be encompassing within Article 21 of the Constitution of India, which guarantees a citizen the right to life and liberty.”¹⁶⁹ In India, this right is not a constructive right as it comes into consequence only in the situation of abuse. It has failed to acquire the status of an absolute right. “Alan F. Westin defines privacy as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated.”¹⁷⁰ He has grouped privacy in a democratic society under the following headings:

¹⁶⁸ AIR 2007 SC 861.

¹⁶⁹ Neetika Gandhi, “Right to Privacy and Publicity: Two Sides of the Same Coin” available at <https://www.candcip.com/single-post/2020/09/16/Right-to-Privacy-and-Publicity-Two-Sides-of-the-Same-Coin> (last visited on January 31, 2022).

¹⁷⁰ Alan F. Westin, “*Privacy and Freedom*” 32 (IG Publishing, New York, 1967).

- a) “Personal Autonomy.
- b) Emotional Release.
- c) Self Evaluation.
- d) Limited and Protected Communication”.

The Right to Privacy emerged as a legal concept when two young lawyers, “Samuel Warren and Louis Brandeis” wrote an article on this issue in “*Harvard Law Review*”. “Warren and Brandeis argued that it was necessary for the legal system to recognize the right to privacy because, when information about an individual’s private life is made available to others, it tends to influence and even to injure the very core of an individual’s personality.”¹⁷¹ “In simplest terms, for Warren and Brandeis the right to privacy was the right of each individual to protect his or her psychological integrity by exercising control over information which both reflected and affected that individual’s personality.”¹⁷² “While an individual’s right to privacy generally ends when the individual dies, publicity rights associated with the commercial value connected with an individual’s name, image or voice may continue.”¹⁷³

“The Right to Privacy as an independent and distinctive concept originated in the field of Torts Law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized.”¹⁷⁴ “Privacy torts protect photographs and voice recordings of individuals’ private activities and communications in ways that may constrain how those materials can be used in art without consent.”¹⁷⁵ The tort of unreasonable intrusion, which provides sufficient room to “an individual’s claim to have a right to a personal space, where other citizens and the government are normally not allowed to trespass. To prove the first element of the tort, that an intrusion actually occurred, the plaintiff must have had an objectively reasonable expectation of privacy in the place, conversation or activity upon which the defendant allegedly intruded.”¹⁷⁶

¹⁷¹ Warren & Brandeis, “The Right to Privacy”, 4 *HLR* 193 (1890).

¹⁷² Dorothy J. Glancy, “The Invention of The Right to Privacy”, 21.1 *ALR* 2 (1979).

¹⁷³ “Privacy and Publicity Rights” available at <https://memory.loc.gov/ammem/copothr.html> (last visited on January 31, 2022).

¹⁷⁴ *Supra* note 141 at 2401.

¹⁷⁵ *Supra* note 173.

¹⁷⁶ *Deteresa vs. American Broadcasting Companies Inc.*, 9th circuit, 1997.

Intellectual property is stolen but, but privacy is violated.¹⁷⁷ This right involves two basic aspects which are like the two faces of the same coin. Firstly, the universal invasion of privacy attracts an action under the law of torts for unliquidated damages and secondly, invoking a constitutional remedy for the protection individual's privacy against the unlawful invasion of the government.

3.3.1 Celebrity's Publicity and Privacy Rights in the world of Paparazzi

In India, following the foreign trend celebrities are now watched and photographed by paparazzi since past decade. "The rapid growth of social media platforms and the paparazzi industry has sparked a debate about the unresolved conflict between a celebrity's right to publicity i.e., the right to decide how the celebrity's public image shall be circulated and regulated in the eyes of the public and the copyright ability of paparazzi photographs. Paparazzi encroach upon celebrities' privacy in two key arenas; public and private."¹⁷⁸

When an individual is in such a public forum, where they cannot expect any reasonable form of privacy, then everyone assumes that they have a right to photograph them. The paparazzi cluster follows them quite closely, sometimes on celebrity's own call, and if complained they claim it as their constitutional right under Art. 19 (1) (a) and (g). This is how journalists and various media houses earn profit by offering the audience sensationalized news and stories. Such sensationalized and many a times morphed photographs, videos and news articles not only harms celebrity's privacy rights but also destroys his personal life. In "*Galella vs. Onassis*",¹⁷⁹ the Court held that disclosing celebrity's daily habits are not essential for any public's well-being. Therefore, it is a violation of a celebrity's privacy.

¹⁷⁷ Renée Marlin- Bennett, *Knowledge Power: Intellectual Property, Information & Privacy* 174 (Viva Books Private Limited, New Delhi, 1st Indian edn., 2006).

¹⁷⁸ Lakhwinder Singh, "*Right to Privacy and Freedom of Media*", 98 (Satyam Law International, New Delhi, 1st edn., 2016).

¹⁷⁹ 487 F. 2d 986, (2d Circ. 1973).

3.3.2 Privacy Rights and Publicity Rights of Dead Personalities

“While an individual’s right to privacy generally ends when the individual dies, publicity rights associated with the commercial value connected with an individual’s name, image or voice may continue.”¹⁸⁰ “They also offer posthumous protection to the legal heirs of the celebrities, and cannot be used by third parties for commercial advantage without the consent of their legal heir”¹⁸¹ In “*Deepa Jayakumar vs. A.L. Vijay*,”¹⁸² No publicity were granted to the niece of deceased politician J. Jayalalitha. “The Madras High Court adjudged that an individual’s right to privacy is not inheritable after death and all rights relating to personality, reputation or privacy, enjoyed during a person’s lifetime, cease with death.”¹⁸³ But the Apex Court is yet to provide its views upon this issue as it has been saved for later discussion.

3.3.3 Privacy Rights vis-à-vis Publicity Rights: Judicial Developments

Initially, the Supreme Court accepted the right to privacy but not in its entirety in the case “*Kharak Singh vs. State of U.P.*”,¹⁸⁴ “But with time, the Courts saw ‘*R. Rajagopal vs. State of Tamil Nadu*,’¹⁸⁵ (the popular Auto Shankar Case), in which a division bench recognised the right to privacy not only as right in tort but also as a constitutional right.”¹⁸⁶ “In this case the Supreme Court recognized right of publicity in the form of right of privacy as follows: the first aspect of this 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.”¹⁸⁷

¹⁸⁰ “Guide to Privacy and Publicity Rights”, available at <https://www.library.miami.edu/guide-to-privacy-and-publicity-rights.html> (last visited on January 30, 2022).

¹⁸¹ *Krishna Kishore Singh vs. Sarla A. Saraogi & Ors.*, CS(COMM) 187/2021.

¹⁸² MANU/TN/3107/2021.

¹⁸³ Tanmay Patnaik, “Until death do us part’: Can a celebrity’s publicity rights be inherited?” available at https://privateclient.cyrilamarchandblogs.com/2021/06/until-death-do-us-part-can-a-celebritys-publicity-rights-be-inherited/#_ftn9 (last visited on January 30, 2022).

¹⁸⁴ AIR 1964 SC 1295.

¹⁸⁵ AIR 1995 SC 264.

¹⁸⁶ “Right to Privacy as a Fundamental Right: A Proactive Step”, 45.4 IBR 184 (2018).

¹⁸⁷ “Publicity And Image Rights – Indian Context”, available at https://www.kandkassociates.in/article_description.php?article_id=8 (last visited on January 30, 2022).

It is pertinent to note that the first case dealing with the claim of publicity rights is “*Phoolan Devi vs. Shekhar Kapoor & Others*,”¹⁸⁸ case was one of “the earliest instances of the explicit recognition of the right to one’s personality and privacy by the Indian judiciary. The defendants had produced and released the feature film ‘The Bandit Queen’ showcasing several aspects of the plaintiff’s personal life, including her involvement in alleged criminal acts as well as graphic depictions of sexual abuse faced by her, among others. In order to decide the dispute effectively, the Delhi High Court first decided the preliminary question of the plaintiff being a ‘public figure’, since such determination was a prerequisite for a right of privacy allegation, especially when details regarding the personality were otherwise available on the public domain as well.”

“The Court decided in favour of the plaintiff, holding that she was indeed a public figure as far as the legal requirement was concerned. Furthermore, the court proceeded to restrain the defendants from exhibiting the film in any format, since the depictions in the film regarding several aspects of the plaintiffs’ personal life were injurious to her reputation and has far-reaching consequences.”

“*I.C.C Development (International) vs. Arvee Enterprises and Another*,”¹⁸⁹ the DHC has ascertained in this case that the publicity right is inherent by an individual and all the different aspects of the individual. “The Court further established a claim for breach of publicity rights as an independent tort, evident from the sentence that use of a celebrity’s persona without their express authorisation would entitle them to a claim for damages.”¹⁹⁰

“*Manisha Koirala v. Shashi Lal Nair*,”¹⁹¹ the Bombay High Court got a request of injunction on the grounds that Manisha’s privacy has been violated through the movie so being made. In the movie, the initial plot was to represent Manisha’s naked body on the screen through the use of a body double. At first

¹⁸⁸ 57 (1995) DLT 154.

¹⁸⁹ 2003 VIIAD Delhi 405, 2003 (26) PTC 245 Del, 2004 (1) Raj 10.

¹⁹⁰ *Supra* note 143.

¹⁹¹ 2002 SCC Online Bom 827; (2003) 2 Bom CR 136.

the actress had agreed to the script, but later on made an objection that it would portray her in the wrong light and hence does not want to move forward with the particular scene in the movie. She brought a case for defamation and malicious injury to her body. She also contented that her privacy right shall also be violated through such portrayal.

*“D.M. Entertainment Pvt. Ltd. vs. Baby Gift House,”*¹⁹² is a well-known case. This is one of the few instances that go into great detail about the Right to Publicity and False Endorsements. The Plaintiff in this lawsuit represents Daler Mehndi, a well-known vocalist on the Indian subcontinent. The defendant sold dolls that looked like him and could also sing some of his popular songs. The plaintiffs argued that there was an obvious violation of the right to publicity, and that the defendants' appropriation of Daler Mehndi persona had harmed his persona. The Court ruled in favour of the plaintiff, holding that an individual's right to authorize or forbid marketable abuse of his or her name is his right to allow or prohibit, and so the defendants are culpable for their actions of selling dolls with similar characteristics to the celebrity. Furthermore, the accusation of fraudulent endorsement was sustained, as consumers were led to have faith in the celebrities in question to endorse their goods.

“In the present instance the commercial use of an individual's identity is intended to increase the sales of product by fusing the celebrity's identity with the product and thereby the Defendants were selling those dolls, on the basis of publicity value or goodwill in the artist's persona into the product i.e., doll.”¹⁹³

In the famous case of *“Titan Industries vs. Ramkumar Jewellers,”*¹⁹⁴ the hording of Amitabh Bachchan and Jaya Bachchan was being used by Tanishq jewellers, as they had given all their publicity rights to “Tanshiq” for the purpose of advertisement. The defendant dealing in the same line of business used the same hording for the promotion of his business, without the permission of the plaintiff

¹⁹² CS(OS) No. 893 of 2002.

¹⁹³ Titan industries, *available at*: <https://indiankanoon.org/docfragment/181125261/?> (last visited on January 30, 2022).

¹⁹⁴ CS(OS) No.2662/2011.

or the persons in question. Plaintiff in the name of “Amitabh and Jaya Bachchan” approach court for an order of injunction and for the misappropriation of their publicity rights. The court passed an order of injunction and stated that Amitabh and Jaya Bachchan being famous persons, have personality right over the use of their image. They have the right to decide when and how and where it should be used. “As the defendant had neither sought permission from the couple to use their photograph, nor been authorized to do so by the plaintiff, the court held it liable not only for infringement of the plaintiff’s copyright in the advertisement, but also for misappropriation of the couple’s personality rights.”¹⁹⁵ “the Court defined the right to publicity of a celebrity as the right to control the commercial use of their personality, which includes the right to determine when, where, and how the identity shall be used.”¹⁹⁶

In “*Sourav Ganguly vs. Tata Tea Ltd.*,”¹⁹⁷ “Cricketer Sourav Ganguly who returned from Lords after 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 there inside each packet of tea”¹⁹⁸ In a way, the company’s intention was to indirectly encourage the sale of its tea packets in the Indian market, where “Sourav” is a renowned celebrity having huge fan following. The court ruled in “Sourav’s” favour, acknowledging that his fame and status are his IPR. The Court granted “Sourav Ganguly” relief by ruling that his fame is his IPR, and that selling tea under his name without his consent is a serious breach, despite the fact that he was an employee of the defendants. Because there is no statutory framework that allows celebrities to sue for misuse of their persona or likeness, the plaintiff has previously sought an injunction prohibiting the use of their persona or reputation, as well as damages for the loss incurred.

¹⁹⁵ *Supra* note 187.

¹⁹⁶ *Supra* note 143.

¹⁹⁷ Civil Suit No. 361 of 1997.

¹⁹⁸ *Supra* note 60.

In “*Mr. Shivaji Rao Gaikwad vs M/Varsha Productions*,”¹⁹⁹ Rajinikant was successful against the claim of personality right. He was being misrepresented in the movie “Mein hon Rajinikant” the producer claimed that the movie was based on himself, but the people were directly relating the movie to the famous movie star, as the plaintiff’s name dialogued delivery style and caricature were being used. The court passed the order stating that the Rajinikants personality right or the Right of Publicity is being infringed due to the movie.

Sec. 228 of the “*Indian Penal Code*” makes admission of the identification of a rape victim a punishable offence. In “*Tata Institute of Social Sciences rape case*”, “Six students, arrested for allegedly raping a 23-year-old American student of Tata Institute of Social Sciences (TISS) last year, were acquitted by a court due to lack of evidence.”²⁰⁰ During the pendency of this case, media compromised with the privacy of the victim as well as the educational institution where the alleged incident was reported to be occurred. Though the case had been closed by the lower court a decade ago but the media trial besmirched the goodwill of the institution which is also a violation of the institution’s publicity rights as a reputed business house of India is running the institution. As the victim and all the suspects were medical students, the Pharmacy Council of India too warned the journalists not to give excessive publicity to victims, witnesses, suspects as it amounts as an invasion to their privacy rights.

In the recent landmark case of “*K.S. Puttaswamy vs. Union of India*,”²⁰¹ (also referred to as the Aadhar Case), a 9 judge panel of the SC discussed and declared publicity to be an element of privacy that is protected as a basic right. However, out of nine Judges only “Justice Sanjay Kishan Kaul”, in his concurring opinion, brought publicity rights within the ambit of the right to privacy. Even though concurring, “Justice Kaul’s” opinion did not constitute the “lead judgement” or the “leading judgement.” As a result, regrettably for the destiny of publicity

¹⁹⁹ Civil Suit No.598 of 2014.

²⁰⁰ “Six acquitted of raping American student” available at <https://www.hindustantimes.com/mumbai/six-acquitted-of-raping-american-student/story-QfJ4RME5QWWLm0Fa0aDL0J.html> (last visited on January 31, 2022).

²⁰¹ AIR 2015 SC 3081.

rights in India, it would not provide mandatory value, instead being merely influential and parting these rights in an undetermined state.²⁰²

Out of many other important issues in this 685-page long judgement, one main question raised before the Court was that whether Publicity Rights extends to every person or not? Justice Kaul opined that it is not confined only to celebrities but to every common person. The right to publicity encompasses an individual's interest in sovereign self-definition, which inhibits others from meddling with the connotations associated with an individual.

Recently, after the suicide of film actor Sushant Singh Rajput, his father objected the use of his deceased son's name, his life's story etc. to be used without permission by anyone. The case "*Krishna Kishore Singh vs. Sarla A. Saraogi & Ors.*,"²⁰³ revolves around the publicity or celebrity rights of the deceased film actor. The plaintiff, his father claimed a copyright over the life of the deceased actor, as the defendants, Sarla Saraogi and others made a film over his life without prior approval of his family, knowing the fact that his father has publicly stated that nobody is allowed to write a book or direct a movie, serial or play over the life of Sushant, without obtaining the prior consent of the family. A fictional movie as a self-proclaimed "tribute to Sushant Singh Rajput", titled "Nyay: The Justice" was made and then father of deceased actor claiming him as his legal heir objected the release and filed a suit.

The Court after hearing both the parties, put rest to all the claims made by the plaintiff, held that "If the film will not be released at this point, the defendants will suffer irreparable harm. The right to publicity subsists only in an individual and he alone is entitled to gain profits from it and none else. Thus, no claim of publicity rights and ad-interim, ex-parte injunction was granted."

²⁰² Samarth Krishan Luthra and Vasundhara Bakhru, "Publicity Rights And The Right To Privacy In India" 31 NLSI Rev. 125-148 (2019).

²⁰³ CS (COMM) 187/2021.

3.3.4 Exceptions or defence available:

- i. *Written Consent*: The party involved, through written consent had made it clear, that he has given the authority to the individuals to use any feature of their personalities. This is the most basic rule of exception, i.e. volunteered the consent, allowing that person to publish the particular things related to them.
- ii. *It should be relatable to the individual*: Publicity right only extends towards an individual, it does not extent towards a structure or a building. Therefore, when a publication is being made, for commercial benefit, it must be directly relatable to the referred individual.
- iii. *The recognisability of individual*: for an individual to have claim for the publicity right, they have to show the most important element of the publicity right, i.e. recognisability. If the person in question is being recognized, in any form, then only can they have a claim for publicity right. In the case of “*Pesina v. Midway Mfg. Co.*”,²⁰⁴ Pesina is a martial artist, he was hired by the company, to model for the character of one of the famous arcade games, Mortal Combat and Mortal Combat II, which are coin-operated. Pesina allegation was that, his character, name and likeness have been used in the subsequent home video games. Pesina showed that the name only appeared for mere 8 seconds, only after a player wins the game and hence Pesina was not recognisable through these games. The court held that, the mere mention of Pesina’s name, even though it is unauthorised, does not amount to the case of Publicity right claims.
- iv. *Newsworthiness*: the law permits the use of such information which amount to newsworthiness. In the case of *Ann Margaret v. High Society Magazine*²⁰⁵, a famous actress Ann Margaret had sued the magazine for using her image without her consent. The Court in the case held that, “And

²⁰⁴ 948 F Supp 40 (ND III 1996).

²⁰⁵ 498 F Supp 401 (SDNY 1980).

while such an event may not appear overtly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters entertainment and amusement, concerning interesting phases of human activity in general”.²⁰⁶ The same was held in the subsequent case, stating that the term newsworthiness should be construed in a wider sense in “*Martin Luther King v. American Heritage Products*.”²⁰⁷

- v. *Use of public record: Matthews v. Wozencraft*²⁰⁸ held that “a book detailing the author's and her ex-husband's experiences as undercover agents did not violate the privacy or publicity rights of her ex-husband. Information concerning their activities and convictions were the subject of news reports. Thus, it was a matter of public record and considered newsworthy events.”²⁰⁹

These are some of the exceptions that can be availed in the court against the claim of Publicity Right.

3.5 Conclusion:

The aforesaid discussion makes it clear that publicity rights are born out judicial womb. It is a result of judicial activism that publicity rights are considered as an inherent part of Art. 21. Furthermore, the relation of publicity rights affecting the freedom of speech and expression and “right to practise any profession, or to carry on any occupation, trade or business”. Besides this the relation of publicity rights as a tort, celebrity rights of dead personalities have been given due regard.

However, a limited protection is available under the law relating to the protection of intellectual property of a celebrity like copyright, trademark and

²⁰⁶ *Ann Margaret v. High Society Magazine*, 498 F Supp 401 (SDNY 1980).

²⁰⁷ 25 Ga 135; 296 SE 2d 697 (Ga 1982).

²⁰⁸ 15 F 3d 432 (5th Cir 1994) the Fifth Circuit U.S. Court of Appeals.

²⁰⁹ Navin Kumar Jaggi, “Privacy and Publicity Rights”, available at: <https://www.legalserviceindia.com/legal/article-4684-privacy-and-publicity-rights.html> (last visited on April 08, 2022).

designs. Some protection is available in the law of torts. However, still a large change is required in the laws of India so that the publicity rights of celebrities are duly protected in case of unauthorised commercial exploitation. It is the time that India shall also follow USA in protecting the publicity rights of celebrities and frame necessary comprehensive legal framework for the same.

CHAPTER 4
PUBLICITY RIGHT AND
INTELLECTUAL PROPERTY RIGHT

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PUBLICITY RIGHT AND INTELLECTUAL PROPERTY RIGHT

The publicity right has multiple facets which includes an element of copyright law, trademark law, goodwill, trade name, trade dress. These multiple facets owe its origin from Article 19 and 21 of the India Constitution. Due to the limited scope of writ jurisdiction, the practice enforceability of such right under Constitution is not feasible. Therefore, the legislatures have promulgated Copyright Act of 1957 and Trademark Act of 1999 based and premised on common law principles, practices, and Constitutional values. Under the umbrella term of Intellectual property right, Trademark, Copyright and Patent has developed which are not mutually exclusive rather interfaced with each other.

Right of publicity and copyright are connected to each other. Though the Copyright Act, it does not describe the term “celebrity” or “individual” but recognized separate class in the form of “performer.” The “sec. 2 (qq)” defines performer as a “performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.”²¹⁰ The concept of celebrity is similar but not identical with the concept of performer. Hence, copyright law can partially recognize the right to publicity. The part of this chapter shall examine the nature, extent, efficiency, and feasibility of the protection of publicity right through copyright law. The chapter will be discussed in two parts. The first part ‘A’ detailing the linkage with the copyright act and publicity right.

A. Publicity Right vis-à-vis Copyright

4.1 What is copyright?

According to the Black Law’s Dictionary, copyright is:

²¹⁰ Indian Copyright Act, 1957 (as amended by Copyright (Amendment) Bill, 2010), available at: <file:///C:/Users/Windows/Desktop/amended-copyright-act.pdf> (last visited on May 05, 2021).

“1. A property right in an original work of authorship (such as a literary, musical, artistic, photographic or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.

2. The body of law relating to such works.”²¹¹

The copyright protection is not given to idea, concepts, events, but is given to the formal expression of the work. If the idea is in the tangible form then the copyright is accorded to it. The copyright protection is automatic and not bound by registration. If one gets their work registered it can be beneficial for them, as it works as a conclusive proof of ownership, and also makes it easier in case their work has been infringed. Otherwise to be able to protect the work, they will have to prove the ownership over that work, prior use, prior publication, etc. just to be able to acquire the remedy they deserve. If the work is registered under the Copyright Act, 1957 all such problems can be easily solved. For better understanding of the importance of the copyright, it is paramount to appreciate the exponential growth of the copyright law.

4.2 Evolution of Copyright:

In the ancient times when a writer, musician or an artist's, wrote a book, composed a song or painted a painting, it was not for the purpose of earning a living but rather to earn fame, recognition in the society. At the ancient times as there was no printing press the method of copying was only by way of hand, i.e. if a person wishes to copy something, they had to do the work manually. It was a laborious work, as well as, took a lot of time, therefore the copying of any work was not at that larger quantity as it is now. The importance of copyright was felt only after the “Guttenberg’s printing press” was invented in “Germany” in 1436, which enabled the copying and reproduction of the books in a larger number possible and easier. Thus a requirement was felt to offer some kind of defence and privileges to the printers, publishers and the authors and the same

²¹¹ *Supra* note 4.

was granted to them as well. England had quickly adopted the art of printing and soon developed as a most important centre for printing trade in 1483.

The technical development had helped in the creation of another group of intermediaries, who helped and invested for bringing out a book and they were known as the printers who also worked as the booksellers, and they started to be known as “stationers” in England. In the year 1557, a privilege over the ruling of the book trade was provided to the stationer's companies in “London by Queen Mary I”. In 1662 the very first clear law for the protection and checking the piracy of the literary work was passed which was known as the Licensing Act in England. This Act provided for the registration and licensing provision in relation to a book with the Stationers’ Company, thereby prohibiting the unauthorized publication of the book. The licensing era did not last for a long time.

The real, formal and legal protection to the authors of the copyright was only provided after the passing of the Statue of Anne Act in 1709. The Act gave complete legal control to the authors to print and reproduce their books. This right was divided into two sects, the first sect was before the enactment of this Act, the authors who have produced the work had the legal control over their work for a period of 21 years. The second, that the authors who have produced their works after the enactment of this Act had the privilege of the reproducing it for the next 14 years period. The main purpose for the enactment of the Act was to destroy the monopoly of the booksellers and to promote and encourage the people to learn and gain knowledge as well as to preserve the culture.

Later on, the duration of protection provided to the authors was increased subsequently through The Copyright Act of 1814 (14 to 28 years) and The Copyright Act of 1842 (42 years of protection).²¹² Since the last 300 years the horizons of the Copyright laws have expanded, to accommodate new technologies. The main aim is to expand and accommodate such new age so that

²¹² Charu Dureja, “Historical Development of Copyright Law in India”, 4:1 *IJARMSS* 50 (2015).

there won't be any hindrance in the coming future. Even India has changed with time and the growth is exponential.²¹³

4.3 Evolution of Copyright in India:

India's copyright developed within a time period of 150 years. The first enactment in terms of copyright was in the year 1847 which was done during the "East India Companies" regime. The "Governor General of India" had passed the Act, through this Act the English Copyright law was to be made enforceable in India. The term of protection during the enforcement of this Act was for a timelimit of lifetime of author in addition to 7 years post-mortem, but the total time period cannot exceed 42 years and if the author has refused the publication of the work, even after their death, then the administration prevalent at that time, had the power to provide the licensing for publishing the said work of the author. The protection to the copyright work was not automatic within this Act, the registration of the work was compulsory with the Home Office in order to avail the protection of this Act.

The infringement can also occur when an unauthorized copy of the copyrighted work was made for the reason of either sale, hire or export or even if it is for the reason of either selling, exposing or publishing the work in order to sale or hire the work. The situation for the violation can be filed with the "highest local court exercising original civil jurisdiction."

The Act of 1847 was replaced with the introduction of the "Copyright Act 1911", the Act was made pertinent to all the "British Colonies" which included India as well. The CR Act 1914 modified and added some new sections to the Act of 1911. The CR Act 1957 replaced the Act of 1914. The Act of 1957 has been altered for 5 times in the year of "1983, 1984, 1992, 1999 and 2012". The amendment of 2012 was one of the major ones, as the scope of the Copyright Act was increased, now the copyright work also extended and gave recognition

²¹³ *Copyright Timeline: A History of Copyright in the United States*, Association of Research Libraries, available at: <https://www.arl.org/copyright-timeline/> (last visited on May 05, 2021).

to the related or neighbouring right's, these rights includes the routine performed by the performer, the producer of the phonograms and the Broadcasting Organization. Through this amendment, the performer's right was recognized under the Indian Copyright Act of 1957 under section 38 and newly introduced section of 38A and 38B.²¹⁴

4.4 International Conventions, Treaties etc. on Copyright:

The protection of copyright is not just at the domestic level, the need to protect and regulate copyright was felt at international level as well to have some kind of standard copyright protection. The same was done through various treaties and conventions, some of them are as follows:

Berne Convention is the first convention which came in 1886 and gave recognition to the copyright and related rights. The state wise action and most favoured nation action principles were recognized under this convention. Then came the Universal Copyright Convention (hear in after referred to as UCC) in 1952 which was formed under “United Nations Educational, Scientific and Cultural Organization (UNESCO)” as USSR and USA were not a part of the Berne Convention. Rome Convention in 1961 was formed to formally give protection and recognition to the neighbouring rights such as the routine performed by the performer, producer of the phonogram and broadcasts of the broadcasting organization, there economic as well as moral rights were recognized along with exclusive control over the fixation of such works.

Geneva Convention in 1971 provided protection form the unauthorized duplication of the phonograms. The member states can do so by recognizing the right within the copyright or any other specific rights. Film Register Treaty in 1989 provided for the mechanism for the international registration of the audiovisual work. “Trade Related Aspects of Intellectual Property Rights” (hear in after referred to as TRIPS) in 1994 under Art. 9 to 14 have recognized the copyright and the related rights. “World Intellectual Property Organization

²¹⁴ Mr. Rupendra Singh, Assistant Professor, *Lovely Professional University*, January 25, 2018.

(WIPO)” Copyright Treaty (herein after referred to as WCT) in 1996 provided the status of computer programme and compilation of data as a part of copyright works. “WIPO Performances and Phonograms Treaty” (hear in after referred to as WPPT) in 1996 provided for the safety of the performer’s and producers of phonograms but the defence is for the nationals of any other contracting parties. All the states to be eligible for the protection under this treaty have to fulfill criteria laid down by Rome Convention.²¹⁵

India is part of the TRIPS, Berne Convention, UCC, but is not part to the WCT and WPPT though through the 2012 amendment to the Indian Copyright Act 1957 these rights have been provided recognition.²¹⁶ It is visible from the above convention and treaties that the scope of copyright has been increased.

4.5 Copyright in India:

The bases for providing the copyright protection is "Thou Shall Not Steal," nobody is allowed to gain benefit from the production of another's labour, capital, and skill. The Copyright Act of 1957 (for further reference “Act of 1957”) came into enactment on January 21st, 1958. The main purpose for granting a longer period of copyright protection was to encourage the authors, singers, artists, etc. to produce more work. As it helps them to protect their work from any unlawful exploitation or reproduction. The Act allots for the provision for the setting up of Copyright office under the Registrar of Copyright. The function of the Registrar was to maintain the books of registration and other works and to perform certain functions as authorised by the Act. To deal with the disputes arising in relation to copyright a Copyright Board was established.²¹⁷

²¹⁵ *Supra* note 214.

²¹⁶ *Ibid.*

²¹⁷ P. Narayanan, *Law of Copyright and Industrial Designs* (Eastern Law House, Kolkata, 4th edn., 2017).

4.5.1 Works protected within the preview of the Copyright Act:

The works which are provided protected under copyright are specific, and the works to get protection under the copyright have to be in fixed form. Sec. 13(1) of the Act of 1957 mentions the works in which copyright shall subsist.

“13.Works in which copyright subsists:-

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,

- (a) Original literary, dramatic, musical and artistic works;
- (b) Cinematograph films; and
- (c) Sound recordings.”²¹⁸

The works which are provided protection under sec. 13 of the “Act of 1957” is:

1. Original works [s. 13(1) (a)].
2. Derivative works [s. 13(1) (b) and (c)].²¹⁹

The different works protected are:

1. Original Literary work:

The literary work is described as per the Sec. 2(o) of the Act of 1957 as “literary work includes computer programmes²²⁰, tables and compilations including computer databases.”²²¹ The definition of the literary is not exhaustive, the literal meaning includes the novels, poems, history or books in writing or printed form in any language.²²² The ambit of the literary work has been increased and

²¹⁸ The Copyright Act 1957, s. 13.

²¹⁹ V.K. Ahuja, *Law of Copyright and Neighbouring Rights* (LexisNexis, Haryana, 2nd edn., 2015).

²²⁰ The Copyright Act 1957, s. 2(ffc): “computer programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result”.

²²¹ *Supra* note 210.

²²² *Supra* note 217.

included within the computer programmer, tables, and compilations. The work should be original for getting the protection. The term original does not mean the originality of idea but the originality of expression. The work produced should not be copied from anyone. The idea can be same but the work produced should involve an author's independent skill, judgment and creative labor²²³ (modicum of creativity²²⁴). The copyright does not exist in the events²²⁵, idea, themes, plots,²²⁶ slogans²²⁷. Computer programmer and computer software are also considered a part of literary work.

2. Original Dramatic Works:

Sec. 2(h) describes Dramatic Works as: "Dramatic work includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film."²²⁸ The original dramatic work is a result of the production of a human's mind, skill, and creative labor. The main requirement for a work to be considered as dramatic work is through acting or dancing, the dramatic work has to be performed before the public companies with some action²²⁹ i.e. it should be in motion form, even without music, voice, etc. which has the capability to be recorded in writing. Choreography work and scenic arrangement can be considered as copyrighted work, only if they are reduced to some writing or permanent form.²³⁰

3. Original Musical Work:

Sec. 2 (p) describes the term musical work as: "Musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music."²³¹ The musical work has to be original, the main aspect for it

²²³ *Supra* note 219.

²²⁴ *Feist Publication Inc. v. Rural Telephone Service*, 499 US 340.

²²⁵ *Indian Express Newspaper (Bombay) Pvt. Ltd. V Jagmohan Mundhara*, AIR 1985 Bom 229.

²²⁶ *Donoghue v. Allied Newspapers Ltd.*, (1937) 3 ALL ER 503.

²²⁷ *Pepsico Inc. v Hindustan Coca-Cola*, 2001 (21) PTC 699 (Del.).

²²⁸ The Copyright Act 1957, s. 2(h).

²²⁹ *Institute for Inner Studies v. Charlotte Anderson*, 2014 (57) PTC 228 (Del.).

²³⁰ *Supra* note 219.

²³¹ The Copyright Act 1957, s. 2 (p).

to be protected under CR Act is that it should consist of only sound, it should not include any words or even actions, and the sound should be accompanied with the song which is either being performed, spoken or sung besides the music. Another main requirement of the music work to be protected is that it should consist only of music and should be capable of being represented graphically.²³²

4. **Original Artistic Works:**

Sec. 2 (c) describes the term Artistic work: “Artistic work means,-

- (i) A painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
- (ii) A work of architecture and
- (iii) Any other work of artistic craftsmanship;”²³³

Engraving is a form where the desired design, is encrypted on hard metal, stones, wood, other hard surfaces. Painting and drawing are not the same, painting includes all the colours, etc. on a surface such as canvas, walls, etc. whereas drawing includes the drawings in mechanical engineering, etc. Sculpture is when the desired figure is carved with the help of clay, stones, ice, metals, etc. Photograph is taken with the help of light, x-ray, etc. The work of architecture includes the shape of the buildings, etc. and the work of artistic craftsmanship includes the person who with the help of their skill, labour and judgment have produced which is unique, e.g. pottery, handicraft, etc.²³⁴

5. **“Cinematograph Films”:**

Sec. 2 (f) defines the cinematograph films: “Cinematograph film means any work of visual recording and includes a sound recording accompanying such visual recording and cinematograph shall be construed as including any work produced by any process analogous to cinematography including video

²³² *Supra* note 219.

²³³ The Copyright Act 1957, s. 2 (c).

²³⁴ *Supra* note 219.

films.”²³⁵ The cinematography films for the protection under copyright does not require it to be original. It also includes the motion picture and audiovisual work. Cinematography films were not protected before 1911, the protection used to be provided in the form of series of work.²³⁶

6. “Sound Recording”:

Sec. 2 (xx) defines sound recording as: “Sound recording means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.”²³⁷ The recording has to be done of any sound irrespective of its way of production. The term was included in the 1944 amendment.²³⁸

4.5.2 Authors Right:

The term author has been described under the sec. 2 (d) as: “Author means:

- (i) In relation to a literary or dramatic work, the author of the work;
- (ii) In relation to a musical work, the composer;
- (iii) In relation to an artistic work other than a photograph, the artist;
- (iv) In relation to a photograph, the person taking the photograph;
- (v) In relation to a cinematograph film or sound recording, the producer; and
- (vi) In relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.”

The person who has produced the work shall be the author of the same. The authors are entitled with two types of rights within the Act of 1957, they are:

1. Economic Right
2. Moral Right

²³⁵ The Copyright Act 1957, s. 2 (f).

²³⁶ *Supra* note 219 at 125.

²³⁷ The Copyright Act 1957, s. 2 (xx).

²³⁸ *Supra* note 219 at 126.

1. **Economic right:**

Copyright is considered as the bundle of rights, and these bundle of rights can be independently transferred and assigned. Section 14 of the Act of 1957 gives out the rights which the author of the copyright work shall consist, these rights include the right over the reproduction, adaptation, translation, abridgment, selling or hiring, saving in electronic form, publication, publication of copies of the work, “selling or hiring” or offering to sell or heir, etc. These are considered as exclusive rights over the work, giving monopolization over the above-mentioned rights, the rights are capable of being transferred and assignment, either combined or independently.

2. **Moral Right:**

Copyright also protects another set of rights of authors known as the moral rights of the author are provided sec. 57²³⁹ of the “Act of 1957”. The moral rights is based on the two belief’s that: First, the creation of the author is not just to earn a livelihood, but in fact a bit more than that and Second, that the creation of the work of an author is the reflection of their personality. Moral rights have automatically come into existence with the production of work. The moral rights are such that they will remain even after the passing of the author [here the author would mean as defined under section 2(d)]. Moral rights cannot be transferred or assigned. Moral rights term of protection is same as that of the copyright i.e. lifetime of author + 60 years after the passing of an author. The special rights granted to an author under section 57 are:²⁴⁰

- Paternity Right
- Integrity Right

²³⁹ The Copyright Act 1957, s. 57: “Author’s special rights.— 1 [(1) Independently of the author’s copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right— (a) to claim authorship of the work; and (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation: Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of section 52 applies. Explanation.— Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.] (2) The right conferred upon an author of a work by sub-section (1), may be exercised by the legal representatives of the author.”

²⁴⁰ *Supra* note 214 at 5.

➤ **Paternity/Attribution Rights:**

The right is related to the use and affixation of the author's work (Sec. 57(1) (a) of the “Act of 1957”). These rights can be explained in three related protections accorded to an author:²⁴¹

1. The author has a right of recognition in the work produced by them.²⁴²
2. The author has the right to stop others from producing the work under their name. With this right, the problem of plagiarism is avoided.²⁴³
3. The author has a right to prevent others from attributing the work which they have not written.

This provision also allows an author not to let the public know their identity, they can use a pen name and be anonymous.²⁴⁴

➤ **Integrity Right:**

Section 57 (1) (b) talks about the right of integrity, which is considered to be the most important moral right of an author, as this right helps the author claim damages in case of any alteration, modification, dismemberment or any other kind of work, that would result in prejudicing the authors reputation or honour. The modifications, etc. can be done only with the authorisation of the author. This right helps the author after the work is made public, through this right the authors even after assignment or transfer either wholly or partially can claim right over the work, and if any adverse action is taken towards their work, they have the right to stop the others from doing so.²⁴⁵

4.5.3 Related Rights:

The related rights include the rights of the performer in their performance, the producer of records and the broadcasting organization. The introduction of these rights under the copyright was done as they are parallel rights to the copyright,

²⁴¹ *Supra* note 214 at 6.

²⁴² *Id* at 7.

²⁴³ *Ibid.*

²⁴⁴ *Supra* note 214 at 8.

²⁴⁵ *Ibid.*

the need to protect the intermediaries who assist and are responsible for the communication of work of an author to the public.²⁴⁶ The related rights provided protection under the Act of 1957 are:

1. Performer rights
2. Broadcasting rights.

1. Performers Rights:

With the amendment of the Act of 1957 in 1994, the protection to the performers was not granted and the reason behind it was that, it did not form any part of the literary, sound recording, artistic, dramatic, musical, and cinematographic film. The performer's right was included within the Indian Copyright Act of 1957 to become a part of the upcoming treaties, i.e. TRIPS. TRIPS recognized a right known as the performer's rights whereby the right of a performer was recognized in their performance which formed a part of sound recording or visual recording which is limited to their live performance. The definition of performer and performance was included within the Act of 1957.²⁴⁷

1.1 Exclusive rights:

With the modification of the "CR Act of 1957" in 2012, brought a huge change, it introduced an exclusive right for the performers (section 38A was included). These rights were similar in nature to that of the economic rights established to the authors under sec. 14 of the Act of 1957, through this amendment, the performer's rights were given the same status to that of an author. The right of the performer is limited to only the live performance given by them (as defined under section 2 (q) of performance). The exclusive right of the performer in their performance in relation to the sound recording and visual recording along with the right to record in any form, which also includes any electronic form, reproduction of the work to the public, communication to the public or selling or giving for rental or even offering to do the same (Section 38A (a)) and even

²⁴⁶ *Supra* note 219 at 250.

²⁴⁷ *Ibid.*

have right over the communication and broadcasting the performance for the public, on condition that the performance should already not be broadcasted.

Proviso of the section 38A provides that once the performer has incorporated his performance in any cinematographic films, and by way of agreement, then the performer does not have any right to object over the enjoyment over the cinematographic film production by the producer in any way, but the performer is still entitled to royalties if such a performance is being used for any commercial purpose. Commercial use arises when any of the rights mentioned under section 38A has been violated i.e. the exclusive rights available to the performer. The royalties generated from the use of such performer's rights have to be equally distributed between the performer and any other copyright owner.²⁴⁸

1.2 Moral Rights:

The moral rights of the performer were also introduced with the 2012 amendment of the Act of 1957 (Section 38B was introduced). The section 38B is similar to the Sec. 57 of the "Act of 1957". The reason for incorporation of these moral rights of the performer was to bring the Indian Copyright Act of 1957, in consonance with the requirements laid down in "WIPO Performances and Phonograms Treaty, 1966". There are two moral rights available within this section, they are:²⁴⁹

- i. The performer has a right to be recognized for their performance, this right can be avoided only if such omission is dictated by way of the performance.
- ii. The performer has a right to demand compensations if there is any alteration, dismemberment, or modification done to the performance, and in turn will be harmful to their reputation.²⁵⁰

²⁴⁸ *Supra* note 219 at 251.

²⁴⁹ *Ibid.*

²⁵⁰ *Supra* note 219 at 252.

If any of the above act is done without the permission of the author, but such omission,, edition, shorting of the length is allowed if it is for the purpose of limiting the time of the recording of such live performance (as the performance has to be live to be subject to protection under the Act of 1957) as it has to be displayed only for a limited time, editing or any other modification, but it should be technical reasons only, only then it would be deemed that the moral right of the performer has not been prejudiced.²⁵¹

The term of defence for the performance is 50 years, which has to be calculated from the end of the calendar year, in which the performance was given.²⁵²

2. Broadcasting Rights:

The broadcasting rights are protected under sec. 37 and 39 of the Act of 1957. Sec. 2(dd) defines the term broadcast as: “Broadcast means communication to the public— (i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast.”²⁵³ The concept of communication to public has been further explained under the Sec. 2(ff) as: “Communication to the public means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation.— For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.”²⁵⁴ The definition of the communication of the public also includes satellite

²⁵¹ *Id* at 253.

²⁵² *Ibid*.

²⁵³ The Copyright Act 1957, s. 2(dd).

²⁵⁴ The Copyright Act 1957, s. 2(ff).

broadcasting and cable television. Cable programmes have not been defined independently. The exclusive rights available to the broadcaster are in relation to the re-broadcasting the broadcasts, communicating to the public by making it seen or heard, creating any sound or any visual recordings of any broadcasts, replication of such sound and visual broadcasts and have a right to sell or rent it commercially (section 37). The term of safety is for 25 years from the start of the calendar year in which the broadcasting is made.²⁵⁵

Apart from the authors and related rights provided by the Act of 1957, the provisions in relation to infringement is also made. If any of the rights mentioned under section 14 and 38A are violated or invaded, then the proprietor has the right to sue for infringement. The remedies available are of two types:²⁵⁶

1. The civil remedy which includes damages, an account of profits, costs, and an injunction.
2. Criminal remedies which include imprisonment from 6 months extended to 3 years and fine which cannot be less than Rs. 50,000/- and it may extend upto Rs. 2 lakhs, search and seizures and delivery up of the infringement goods to the owner.²⁵⁷

4.6: Publicity Right and Copyright:

The speculation that some features of the publicity right can be protected within the ambit of the CR Act, are to be examined within this section. The aspects such as an image, drawing or tattoos on any one's body, or the performance of a person. Each of these aspects of the publicity right shall be studied in details. The protection in regards to the image and drawings on an individual can be protected through the artistic work under the CR Act.

²⁵⁵ *Supra* note 219 at 251.

²⁵⁶ *Ibid.*

²⁵⁷ What the remedies available for copyright infringement in India, *available at: <https://blog.ipleaders.in/remedies-available-copyright-infringement-india/>* (last visited on April 23, 2021).

i. The aspect of image and drawings protected through the artistic work of CR Act:

a. Photograph:

The very first thing a person perceives of another is the image of that person. Therefore it is important to protect the image of another as well as their own. Reason why any photographer is provided recognition is, that because they provide a still or rather a photograph of the image as perceived by another.

The main reason as to why any photographer becomes famous is that, they have the ability to produce an image in such a manner which is appealing to another's eyes and hence their work is also provided protection. They by definition of author as understood within the CR Act, becomes the first owner of that work. It is not only because they have produced the work, but also because they have used their intellect and time and put in labour for the production of that work.²⁵⁸

If the ownership lies with the author, then how is the publicity right of an individual's image can be protected through CR Act? It can only be done if the person whose image has been captured gets the CR assigned to him through the main author. If it is not done, then the right of publicity will not be prevailing in that image, and CR Act will fail in providing protection to the image.²⁵⁹

The work for the production of a good photograph is not only done by the photographer but also by the person whose photo has to be captured. The photographer gives basic instructions for capturing a photo, but it is up to the intellect of the person whose image has to be captured, to understand the

²⁵⁸ Kiran George, *Right of Publicity in India – An Unfinished Story*, available at: <https://spicyip.com/2016/01/right-of-publicity-in-india-an-unfinished-story.html> (last visited on August 15, 2021).

²⁵⁹ Inika Charles, *Brosnan's 'Pan'demonium – The Right of Publicity and a Possible Contractual Breach*, available at: <https://spicyip.com/2016/10/brosnans-pandemonium-the-right-of-publicity-and-a-possible-contractual-breach.html> (last visited on August 15, 2021).

main purpose and deliver the proper image to him. Therefore the image rights cannot be provided solely to the author of the photo, but should be extended towards the person whose image is being capture.

The point has been strengthen by DHC in the case of “*Titan Industries Ltd. vs. Ramkumar Jewellers*”²⁶⁰, the hording of Amitabh Bachchan and Jaya Bachchan was being used by Tanishq jewellers, as they had given all their publicity rights to “Tanshiq” for the purpose of advertisement. The defendant dealing in the same line of business used the same hording for the promotion of his business, without the permission of the plaintiff or the persons in question. Plaintiff in the name of “Amitabh and Jaya Bachchan” approach court for an order of injuncion and for the misappropriation of their publicity rights. The court passed an order of injuncion and stated that Amitabh and Jaya Bachchan being famous persons, have personality right over the use of their image. They have the right to decide when and how and where it should be used.²⁶¹

b. Drawings and paintings:

This part shall cover the concept of Tattoos being incorporated as a part of CR as well as forms a feature for the protection within the ambit of Publicity right. The concept of recognizing the tattoos as a part and parcel of publicity right is very recent. The question was raised due to the use of Mike Tysons face tattoo in the movie of Hangover II²⁶². The incorporation was done without the permission of the Mike Tyson.

The issue was raised, and debated that, the tattoo also forms a part of personality of an individual. When the tattoo is used, and it puts in the mind

²⁶⁰ 2012 (50) PTC 486 (Del).

²⁶¹ Arushi Gupta, *Hello Identity, Are You There? It's Me, the Right of Publicity*, available at: <https://spicyip.com/2019/09/hello-identity-are-you-there-its-me-the-right-of-publicity.html> (last visited on August 15, 2021).

²⁶² Jim Dossey, *The Copyright on Mike Tyson's Face*, available at: <https://www.dossey.com/blog/2014/january/the-copyright-on-mike-tysons-face/> (last visited on August 16, 2021).

of others, that the tattoo is the same one as seen before, and it invokes the image of a particular individual, then it becomes a part of publicity right.

It was argued that tattoos form a part of CR Act. Then again the issue of ownership arises, as it also forms a feature of publicity right. The same confusion as to how the CR shall be able to protect tattoos along with the publicity right arises. The answer is simple that the R can give right to the one who is making the tattoo, but fails to provide protection to the one on whom the tattoo is finally being incorporated.²⁶³

ii. Defence of publicity right elements within the preview of performers right of CR Act 1957:

The Act of 1957 has never defined the terminology “celebrity”. A connection can be done with the definition of the terminology “performer”, which is defined under sec. 2(qq) of the CR Act as: “performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.”²⁶⁴ The definition is limited, and the concept of celebrity to an extent can be protected within the performer’s right.

For the protection of performer’s right Sec. 38 was incorporated within the CR Act. Through this section a performer has a right of protection in their work for the period of 50 years. After the 2012 amendment section 38A and 38B were also introduced. Sec. 38A protects a performers economic rights. Whereas sec. 38B protects a performers moral rights.²⁶⁵ Which states that: “the performer after assigning his rights either wholly or partially, still have rights over the performance in as much as, a. the right to be identified as the performer and b. to detain or even have a right to claim damages, if any modification, distortion, mutilation has been done to the performance

²⁶³ *Hangover II, Mike Tyson, and copyright claim in a tattoo design*, available at: <https://rightofpublicity.com/hangover-ii-mike-tyson-and-copyright-claims-in-a-tattoo-design> (last visited on August 16, 2021).

²⁶⁴ *Supra* note 210.

²⁶⁵ Vandana Mahalwar, *Burgeoning right of publicity: An overview of the Indian experiences*, available at: <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12185> (last visited on August 17, 2021).

without the permission, especially if it has an adverse impact on the reputation of the performance”.²⁶⁶

Even Sec. 57 of the CR Act protects the moral rights to an author. The same rights which are incorporated within sec. 38B for the protection of the performer’s right, are incorporated within the sec. 57.²⁶⁷

Some case to provide solid proof as to how CR Act fails in providing sufficient protection to the publicity right features are as follows:

- a. “*Miss Kajal Agarwal v. The Managing Director, M/s. V.V.D & Sons*”²⁶⁸.
“Kajal Agarwal, the appellant, an actress with a colossal fan following. V.V.D & sons, the respondent, approached the appellant, with the interest that she will endorse their product through a commercial advertisement. Appellant having agreed to the agreement amounting to only one year. She made the advertisement which shall be considered as a cinematographic work and also did a photo shoot in order to advance the respondents product. The responded even after the stipulated time period continued to exploit the, even after receiving legal notice to desist the using of the profile. The Madras High Court, using the Section 17 (b) and (c)”²⁶⁹ of the Copyright Act, 1957, “stated that, the original author of the work is the responded. The Copyright Act, provides sixty years period to the original author of the cinematographic work to enjoy the work, at their own disposal. Therefore the agreement entered in by

²⁶⁶ The Copyright Act, 1957, S. 38B, available at: <https://lawgist.in/copyright-act/38B> (last visited on August 17, 2021).

²⁶⁷ The Copyright Act, 1957, S.57, available at: <https://www.lawyerservices.in/Copyright-Act-1957-SECTION-57-Authors-specialrights> (last visited on August 17, 2021).

²⁶⁸ *Miss Kajal Agarwal v. The Managing Director, M/s. V.V.D & Sons* OSA. No. 269 of 2017.

²⁶⁹ The Copyright Act, S. 17. available at: <https://www.advocatekhaj.com/library/bareacts/copyright/17.php?Title=Copyright%20Act,%201957&STitle=First%20owner%20of%20copyright> (last visited on August 2021). “Section 17: First owner of copyright: b. Subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. c. In the case of a work made in the course of the author’s employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.”

the appellant and he respondent does not stand valid. The respondent is free to use the work for the next period of sixty years.”²⁷⁰

- b. “*Ritu Primalani v State of Karnataka*”²⁷¹, Lady Thimakka being an activist, had made a movement of planting 384 banyan trees. For such an act of her, she gained popularity. The accused has started to use her name without her permission and made a profit for herself out of such use. The accused had started a charitable fund under the name “Thimakka Resources for Environmental Education in California, US”. Aggrieved with such misappropriation of the plaintiff name use, she approached court for remedy. She stated that she comes under the definition of performer right as described under the copyright act. The court held that, her act of activism, does not make her a performer as per the definition of performer under the copyright act. Therefore she is not entitled to any remedy. The court also stated that if she had come under the protection of publicity right, then her case would have held merit.²⁷²

The above mentioned cases, prove that the protection sought within the ambit of CR Act are limited, and are not fully equipped to provide protection to the features of publicity right, which are presumed to be able to be protected through the current CR Act.

B. Publicity Right vis-à-vis Trademark:

The publicity right has many similarities with trademark. This part shall analyses, if those similarities are enough to be protected by the Trademark Act. Rather there are some fallbacks in the Act like Copyright. What are the features

²⁷⁰ Mathews P. George, *Madras HC in Miss Kajal Aggarwal v. The Managing Director, M/s V.V. D & Sons Pvt. Ltd.*, available at: <https://spicyip.com/2018/09/madras-hc-in-miss-kajal-aggarwal-v-the-managing-director-m-s-v-v-d-sons-pvt-ltd.html> (last visited on August 17, 2021).

²⁷¹ Karnataka High Court, 16th October 2015.

²⁷² *Ritu Primalani v State of Karnataka*, available at: <https://www.casemine.com/judgement/in/56e10953607dba3896611a4e> (last visited on August 17, 2021).

that can be covered by the Trademark Act? First it is significant to comprehend what Trademark is.

4.7. What is Trademark?

“Black Law’s Dictionary” describes Trademark as:

1. “A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from that of others.

- The main purpose of the trademark is to guarantee a product's genuineness. In effect, the trademark is the commercial substitute for one's signature. To receive federal protection, a trademark must be

1. Distinctive rather than merely descriptive.
2. Affixed to a product that is actually sold in the marketplace
3. Registered with the U.S. patent and trademark office.

In its broadest sense, the term trademark includes a service mark.

2. The body of law dealing with how businesses distinctively identify their products.”²⁷³

The main purpose of the protection of trademark, is to distinguish the goods and services from that of another. If a person does not get their trade name registered under the trademark act, then they do not get to avail the protection of the infringement of the right as provided under the trademark law. The protection can still be sought through the common law of torts, i.e. passing off provision. The same has also been mentioned in the Trademark Act. To better understand the growth of trademark, the development has to be understood.

1.8 Development of Trademark:

In the ancient times when the writing, number, letters have yet to be developed, signs, symbols, etc. were the only way of communication. It was the barbarian

²⁷³ *Supra* note 4.

times, where the symbols became the most logical way of communication or letting the people distinguish what belongs to whom? The most earlier symbols that were used was that of animals, so animals became a way of identifying who is a farmer, a landlord, etc. as the development took place, commerce came into existence, so did the use of the marks, symbols took a new meaning.²⁷⁴

In Egypt during an excavation, the scientist have come across articles bearing marks which were connected to religion or superstitious beliefs. As the commercialization took footing, during the Greek and Roman “potters Mark” came into existence, it was used to identify the marks of the potters in relation to a particular vessel. The marks latter on developed to be used for the persistence of identifying the possession of the goods or possessions from that of another’s known as “proprietary Marks”.

During the 10th Century the marks were in larger started to be used by the merchants and traders and they came to be referred as the "Merchants Marks". It had the same features as that of the proprietary mark. As the development started going on, Guilds started to be formed and they started to use marks in the largest numbers they used the arks to give the authenticity of the products as well as the quality assurance, and if anyone was found to be using such marks without providing the proper assurance and authentication, then they were liable to be punished. These marks came to be known as the “Production Marks.” These symbols helped the customers to classify the product and to assign accountability in case the product was not up to the mark.²⁷⁵

Gradually the industrial revolution took place and the system of the guilds started to disintegrate allowing the scope of free trade in the system, and due to this a need for civil protection was felt for stopping the others to use the mark of another.²⁷⁶ The major development in this field took place through the case of “*Southern v How*”, (1617), there was a clothier who had expanded his

²⁷⁴ Trademarks; history and evolution of trademark system, available at: <https://www.bananaip.com/ip-news-center/history-and-evolution-of-trademark/> (last visited on August 18, 2021).

²⁷⁵ *Supra* note 214 at 7.

²⁷⁶ *Supra* note 274.

standing through his weaving and us to put a mark on all his clothes for the purpose of identification, but the mark was used by another for the purpose of personal gain and deceiving the consumers. The famous dictum in regards to the trademarks protection was laid down in this case through the courts, they were “nobody has any right to represent his goods as the goods of somebody else” and “nobody has the right to pass off his goods as the goods of somebody else.”

The remedies of passing off started to be granted on these principles. The statutory protection accorded to the trademark was accorded through the Act of The British Trademark Act of 1875, before the enactment of this act the trademark use to be protected by way of common law marks. This Act laid down the provision for registration of the trademark, on the fulfilment of some criteria’s laid down by it, it was important for the trademark to differentiate the goods and services that of another.²⁷⁷

Because of this Act registration started to become a prima facie proof of ownership in relation to trademark. Later on, the Act of 1875 was repelled through the introduction of the Patents, Design and Trademarks Act 1883, which increased the scope of trademark and introduced the possibility of the registration of the Fancy Words which were not in common use and also the possibility for the registration of the brands. The Act was further revoked through the institution of the Trademarks Act of 1905 and finally, the main Act prevailing was the Trademark Act of 1938.²⁷⁸

4.9 Evolution of Trademark in India:

In India, there were no specific laws for the protection of trademark, prior to the Trademark Act of 1940. In past the protection used to be accorded by way of Sec. 54 of the “Specific Relief Act of 1877”, the problems related to infringement and passing off etc. used to be solved through the Act. In matters

²⁷⁷ *Supra* note 214 at 7.

²⁷⁸ *Supra* note 274.

regarding the registration for the proof of ownership, this was done with the help of the registration under the Indian Registration Act 1908.²⁷⁹

To solve the problems in regards to registration and infringement, the Trademarks Act of 1940 was passed, this was done in the lines of the English Trademark Act. Even this Act failed to provide sufficient protection, the major reason for its fall back was the growth of commerce and trade in the world. With the passing of the Trademark and Merchandise Act of 1958, the previous Act was made inadmissible. The passing of this Act helped in a lot of ways, this Act provided for easy registration and also accorded elite rights over the use of the trademark, and this helped in curbing the use of fraudulent marks on merchandise, as it also had provisions in relation for providing protection to the trademarks.²⁸⁰

After the failure of the above Act, a new attempt was made in the form of Trademark Act 1999. This Act was introduced to bring the Indian trademark system at par with the rules and regulations laid down through the TRIPS agreement. Through this Act, both types of marks, i.e. collective mark and service marks came to be protected. Even a basic difference between the general trademark and a well-known trademark was introduced.²⁸¹

This Act has introduced the classes within which the trademarks shall get registration, there are 45 classes in total which are divided between the goods and services, the classes from 1 to 34 deals with the goods and classes from the 35 to 45 deals with services. From September 15th 2003, the duo came into enactment, which helped in the guiding of the trademark law in India, the duo is the Trademark Act 1999 and the Trademark Rules 2002.²⁸²

²⁷⁹ Evolution of Trademarks Laws in India, available at: <https://www.altacit.com/publication/evolution-of-trademark-laws-in-india/> (last visited on August 20, 2021).

²⁸⁰ *Ibid.*

²⁸¹ *Supra* note 279.

²⁸² *Ibid.*

4.10 International Treaties and Conventions in relation to Trademarks:

With the advancement of trade and commerce and the active use of trademark throughout the world, a need was felt to regulate the same at the international as well as national level. Some attempts were made in this field, they are as follows:

1. Paris Convention of 1833 was the very first convention to recognize the trademark at international forum. The concept of favoured nations and national treatment were incorporated within the convention.
2. Then came the Madrid system, which introduced the protection of trademark at all the states which are signatory to it, to register with only one application.²⁸³
3. Nice agreement of 1957 was the reason why we have specific classes for goods and services. The basic classification of goods and services within 34 and 11 classes, for goods and services respectively were introduced.²⁸⁴
4. Vienna Agreement took a step further and provided protection to even the figurative elements encompassed in a trademark.²⁸⁵
5. With the introduction of the Trademark Law Treaty of 1994 even the three dimensional marks can get registered and a uniform system of registration was introduced for the same.²⁸⁶
6. TRIPS agreement of 1994 was a major step forward in bringing uniformity in all the nations worldwide.
7. The protection was also afforded to holograms, movement marks, even non-traditional marks such as taste mark, feel mark or even the sound mark, smell mark came to be protected through the Singapore Treaty of 2006.²⁸⁷

²⁸³ Summaries of Conventions, Treaties and Agreements Administered by WIPO, available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/442/wipo_pub_442.pdf (last visited on August 20, 2021).

²⁸⁴ International Treaties and Conventions on Intellectual Property, available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf> (last visited on August 20, 2021).

²⁸⁵ *Supra* note 283.

²⁸⁶ *Supra* note 284.

²⁸⁷ *Supra* note 283.

India is signatory to most of the conventions and treaties. The most famous ones which India has taken an initiative to be a part of are: the Paris Convention, the Madrid system and the Trips agreement. Other conventions and treaties, India has not taken active participation. Even then the basic elements of other conventions and treaties to an extent have found protection within the Indian Law.

4.11 Indian Trademark system:

The protection to marks is not limited to only one type of marks. Both the service mark and the trademark. The Act of 1999 was incorporated for the protection of trade related marks in India. A provision for providing certification for the registration of mark was introduced. For a mark to be able to get proper registration within the Act of 1999, it should possess 3 basic elements, apart from being able to be presented in a graphical form, are:

1. “Distinctiveness
2. Dissimilarity of goods
3. Dissimilarity of services.”²⁸⁸

The Act provides such provisions where by the registrar, either has absolute ground for the refusal of registration of a mark under sec. 9 or has relative grounds for the refusal of registration of a mark under sec. 11 of the Act of 1999. Under section 9 the registrar has the power to refuse the recording of the trademark if it is deceptively similar to another mark, if it consists of any generic terms if the mark is such that it is descriptive in nature, capable of telling the kind, type, quantity, etc. The registrar can also refuse the registration of the mark if it is hurting any religion, or is against the public morals, obscene or scandalous (though for some products it is allowed e.g. contraceptive pills, etc.), the mark is devoid of registration if the shape of the good is such it is telling the description of the goods, essential to obtain the scientific result or gives the significant value of the goods. Section 11 lays down the relative grounds on

²⁸⁸ T.R. Srinivasa Iyengar, *Commentary on The Trademark Act* (LexisNexis, Haryana 5th edn., 2016).

which anyone can raise objection, if the mark is comparable or identical to the mark already registered for a particular class or services, even if the class and services are different the mark is similar or identical to a well-known mark and if the registration of the mark is prohibited under any act either by way of copyright or passing off.²⁸⁹

The Act provides for the situation when the trademark is infringed, under sec. 29. The remedies under sec. 135 in regards to the infringement of the trademark in relation to the goods and services are, in the form of either damages, injunctions, costs, and even the delivery of the all the infringed goods or services. In case the mark is not registered within the Act of 1999, another remedy which can be availed is in the form of passing off. The period of protection is 10 years and it is perpetual, on the bases of renewability.²⁹⁰ “The Act of 1999 has laid down provisions for the establishment of Appellate Board (section 83 to 100 of Act of 1999). The board is established to hear the appeal cases from the trademark, patents and copyright.”²⁹¹

4.12 Publicity Right and Trademarks:

Within the basic provisions of Trademark Act of 1999, the publicity right does not find any protection provisionally, but the name and signature feature of the publicity right does find defence through the definition of mark as described under sec. 2 (1) (m) of the Act of 1999. Following this provision, there are many celebrities who have been successful in registering their names or even their signatures within the Act of 1999. Some of the successful celebrities are: “Shahrukh Khan, Amitabh Bachchan, Kajol, Baba Ramdev, Sachin Tendulkar, Sanjeev Kapoor, Priyanka Chopra, Kareena Kapoor, Katrina Kaif.”²⁹²

Under the Act of 1999, the provision allows anyone to register any feature of their personality as long as it has some distinctive quality associated to it and

²⁸⁹ *Supra* note 288 at 250.

²⁹⁰ *Id* at 260.

²⁹¹ *Ibid*.

²⁹² *Supra* note 265.

further that it can also be symbolised graphically, otherwise, the registration is not possible. The basic features such as the name and signature are able to fulfil such criteria, but other features of publicity right such as the voice or likeness cannot be symbolized graphically. Though the provision of the registration of unconventional trademark is also there, but then to fit under that criteria, the mark should have formed a secondary meaning to it, and it should also be able to be used for a long period of time without any change. The same can be registered only after a long use in the market. Even the name and signature should have some distinctive qualities to it only then can they be registered, otherwise not. If anyone has a common name such as “divya, pooja” which can be found anywhere and anytime, then the issue of distinctiveness arises. How can a person get registered then? This is the main lacuna with the protection sought under the Act of 1999.²⁹³

Second lacuna which arises with the registration within the Act of 1999, is that it can only be registered within the 45 classes provided. And even then a person is not able to get the mark registered in all the 45 classes simultaneously. There is another provision which states that if the mark is not being used for a period of 5 consecutive years then the mark automatically gets deregistered from the Act.²⁹⁴

Third form of protection is in the form of sec. 14 of the Act, which states that a reference to a living person or a dead person cannot be done for a period of 20 years.²⁹⁵ If the reference is to be made, then it has to be done with the consent of the legal heirs. The lacuna here is that, the fame of a person doesn't cease to exist just within 20 years of their demise. It extends further. The provision fails to take that into account, hence not being able to provide sufficient protection to the person involved.²⁹⁶

²⁹³ *Supra* note 13.

²⁹⁴ Diganth Raj Sehgal, *What are publicity rights and do they fall within the ambit of IPR*, , available at: <https://blog.ipleaders.in/publicity-rights-fall-within-ambit-ipr/> (last visited on September 5, 2021).

²⁹⁵ Trademark Act, 1999, sec. 29.

²⁹⁶ Trademark Act, 1999, sec. 14.

Some case laws to justify the above laid down lacunas are: *Mr. Arun Jaitley vs. Network Solutions Private Limited and Ors.*²⁹⁷. In this case the court held that a person is entitled to register their name under the Act of 1999, only after they have gained some form of distinctive quality and also have gained popularity through such use, though it might take a lot of time for that to happen. This particular right is in addition to the publicity right associated with an individual for the protection of their name.²⁹⁸ The same applies in the case of registration of a name for the domain name aspect. This was laid down in the case of *Tata Sons Limited & Anr vs. Aniket Singh*.²⁹⁹

The Act of 1999 is able to provide a much prominent protection to the features of publicity right, but still they have many lacunas associated with it. Another remedy available to a person is in the form of passing off, it is a common law principle of torts law.

4.13 Passing off:

The passing off movements are brought in contradiction of the damage caused to one's reputation or goodwill, when such is appropriated by a different person. They are trying to pass off their goods and commercial as the goods and business of the person's goodwill being so appropriated. This principle can be employed, when a personalities goodwill have been unauthorized used.³⁰⁰ The common law principle of passing off under torts, if examined properly and analysed, is able to deliver a reasonable amount of defence to the publicity right in India. There are some prevailing situations, when the courts have protracted the protection of passing off for the misappropriation of the personalities.³⁰¹ The legal tactic for extending the protection of passing off to the publicity right can be understood with the help of se case laws.

²⁹⁷ *Mr. Arun Jaitley vs. Network Solutions Private Limited and Ors.*, CS(OS) 1745/2009.

²⁹⁸ *Mr. Arun Jaitley vs. Network Solutions Private Limited and Ors*, VLEX, available at: <https://vlex.in/vid/mr-arun-jaitley-vs-571918918> (last visited on September 5, 2021).

²⁹⁹ *Tata Sons Limited & Anr vs. Aniket Singh*, CS (OS) No. 681 (2012).

³⁰⁰ *Supra* note 81.

³⁰¹ *Supra* note 265.

“*D. M. Entertainment v. Baby Gift House & Ors*”³⁰² was the first case, where the recognition was awarded towards the commercial misappropriation of the personality i.e. recognizing an aspect of the publicity right in this case. The details of the case are: the Plaintiff being a famous singer, performer, lyricist and composer, with many famous albums, banked under his name. He sued the gift house, for incorporating his image, famous songs and voice into a doll, without his authorization. The gift house was gaining profit in Daler Mehndi’s name and fame. Due to such unauthorized use, it amounts to breach of the publicity right of the singer.³⁰³

The HC while recognizing the singer’s publicity right, favoured the plaintiff. The court also ruled that such an unauthorized use shall result in the erosion of uniqueness and would dilute the plaintiff rights. The court not only passed the judgement in the favour of the plaintiff, alongside laid down rules which would be recognized further in case of infringement of the publicity right. They are: “Identifiability of plaintiff from the defendant’s unauthorized use. The use made by defendant must be sufficient, adequate or substantial enough to identify the appropriation of persona.”³⁰⁴

Another landmark case in regards to the publicity right in India is “*ICC Development (International) Ltd. vs. Arvee Enterprises and Anr.*”³⁰⁵ The case established that the publicity right has developed from the prominent concepts of liberty and dignity, as protected under Art. 19 and 21 of the COI. The court ruling on the point of publicity right that: “it has evolved from the right of 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. On the issue as to whether nonhuman entities are also eligible for such protection, the court

³⁰² *D. M. Entertainment vs. Baby Gift House & Ors*, 2003 (26) PTC 245 (Del).

³⁰³ Admin Lawnn, *IPR Case-D.M. Entertainment Pvt. Ltd Vs. Baby Gift House & Ors.*, LAWNN (Jun. 12, 2021, 11:39 PM), <https://www.lawnn.com/ipr/>.

³⁰⁴ Shouvik Kumar Guha, *Suit involving Daler Mehndi’s Trademark*, SPICYIP (Jun. 12, 2021, 11:41 PM), <https://spicyip.com/2010/09/guest-post-on-suit-involving-daler.html>.

³⁰⁵ *ICC Development (International) Ltd. vs. Arvee Enterprises and Anr* 2003 (26) PTC 245 (Del).

refused to allow the right to nonhuman entities, while clarifying it vests in an individual and he or she alone is entitled to profit from it.”³⁰⁶

In the renowned case of “*Titan Industries Limited vs. Ramkumar Jewellers*”³⁰⁷, the court held that the defendant has violated the publicity right of the well-known actors of “Amitabh Bachchan and Jaya Bachchan”. The actors had allotted their image rights to the complainant, the defendants without permission used the banner of the plaintiff for promoting their own jewellery brand. The court alongside developed two basic elements, which has to be proved for amounting the infringement of the publicity right, they are: “Validity” and “Identifiability”. “Validity implies that the plaintiff has an enforceability right in his identity or persona. Identifiability denotes that the celebrity must be recognizable by the public infringement of the publicity right”.³⁰⁸

Other famous case are “*Shivaji Rao Gaikwad vs. M/S. Varsha Production*”³⁰⁹ and a very recent case involving news anchor Rajat Sharma in the case of “*Rajat Sharma vs. Ashok Venkatramani and Anr*”.³¹⁰ These are some of the cases, where the publicity right had been protected successfully under the collective law tort of passing off.

4.14 Conclusion:

The publicity right having many similarities with Copyright and Trademark, also have the same amount of dissimilarities. After having a thorough examination of the relationship between them, it can be concluded that, some of the elements of publicity right do find some kind of defence within the realm of copyright, trademark and passing off. Still the protection is limited and strict.

³⁰⁶ M. Sai Krupa, *Personality Rights in Indian Scenario*, available at: <https://www.khuranaandkhurana.com/2018/02/26/personality-rights-in-indian-scenario/> (last visited on September 10, 2021).

³⁰⁷ *Titan Industries Limited v Ramkumar Jewellers*, (CS(OS) 2662), Delhi High Court.

³⁰⁸ *Titan Industries Limited vs. Ramkumar Jewellers*, available at: <https://indiancaselaws.wordpress.com/2015/07/19/titan-industries-ltd-v-ms-ramkumar-jewellers/> (last visited on September 15, 2021).

³⁰⁹ *Shivaji Rao Gaikwad vs. Varsha Productions*, 2015 (62) PTC 351 (Madras).

³¹⁰ *Rajat Sharma in the case of Rajat Sharma vs. Ashok Venkatramani and Anr*, CS(COMM) 15/2019.

The concept of publicity right is quite vast. Which is not being sufficiently protected through the existing copyright and trademark laws. Therefore, copyright, trademark and passing off have failed to provide sufficient protection to the publicity right. Hence, even though publicity right being considered as an IPR, it still cannot be construed within the existing IPR. Further there are some other Acts, which have the potential for protecting the publicity right, the same shall be examined in details in the further chapters.

Chapter 5

Publicity Right Interlink with Other Laws

Chapter 5

Publicity Right Interlink with Other Laws

Publicity right interlink is not limited to the Intellectual Property Rights and the Constitution of India. There are other laws as well in India, where Publicity right to an extent can try and find protection. Some of the prominent laws are defamation, unfair trade practices, cyber law. The connection of publicity right with such laws shall be examined in the current chapter.

5.1 Defamation:

In the previous chapters we understood the basic principles of protection of publicity right within the ambit of the right to privacy. Though the right has been recognized recently and therefore the protection accorded to the publicity right is not adequate. There are some ways in which the publicity right can find protection through defamation.

In the case of *Themo v. New England Newspaper Pub. Co.*³¹¹, the basic difference between the protection ensured within the right of privacy and defamation has been defined. It was elaborated that where on one hand the right of privacy is concerned with one's peace of mind, on the other hand defamation is primarily concerned with one's own reputation.³¹²

Publicity right tries to protect one's own image from being tarnished, i.e. reputation of an individual. Hence, in the cases where a person's reputation has been in question due to the unauthorised used, they can always go for the defence of defamation.

³¹¹ 306 Mass. 54, 27 N.E.2d. 753, 755.

³¹² Raman Mittal, "Licensing One's Persona: Analysing the Practice of Personality Merchandising", 52(1) *Indian Law Institute* 16-33, 23 (2010).

Defamation as defined by Underhill, “defamation is false statement to blame one's reputation. Defamation can be done by words, signs, or scenes. The aim of defamation is to down plaintiff's reputation.”³¹³

In India defamation case can be instigated as civil wrong and criminal wrong. Defamation as civil wrong is protected through law of torts, punishment in the form of damages, injunction are awarded. Defamation as Criminal wrong can be instigated under the sec. 499 and 500 of the Indian Penal Code, 1860.³¹⁴

Defamation can be done in two ways. First through Libel, i.e. when false statement are published. The publication can be in any form, for e.g. an article, cartoon, pictures, etc. The main element for libel defamation is that it should be published, i.e. it should be in some written form. Second through slander, i.e. when any false statement has been made orally. Though the main element for slander defamation is that the false statement should be communicated to a third person. If any two people are having a conversation, then it does not amount to slander defamation. The slander defamation can be done by booing, sign languages, gestures, winking, etc. These things should be done with the intention of causing injury to one's reputation.³¹⁵

To prove the case of defamation, one has to prove these elements of defamation:

- a. The statement made should be defamatory in nature: Any statement which causes to have adverse reaction towards the person or harbours a feeling of hatred towards a person, in return causing harm to the person's reputation, business or trade, amounts to defamation.
- b. The statement made should denote to the plaintiff: Any statement made, which is defamatory in nature, should directly or indirectly refer to the person so made. That is the person should be identified through such statements.

³¹³Mohd Aqib Aslam, “Defamation and Media Law”, available at: <https://www.legalserviceindia.com/legal/article-7095-defamation-and-media-law.html> (last visited on April 07, 2022).

³¹⁴Rashmi Senthilkumar, “Defamation Law in India”, available at: <https://www.legalserviceindia.com/legal/article-2224-defamation-law-in-india.html> (last visited on April 07, 2022).

³¹⁵ Rangita Chowdhury, “Relationship between the right to privacy and the tort of defamation”, available at: <https://blog.ipleaders.in/relationship-between-the-right-to-privacy-and-the-tort-of-defamation/>, (last visited on April 07, 2022).

- c. The statement made should be communicated or published: For a statement to amount as defamatory, it should fulfil the requirements of either libel or slander. Only then will it amount to defamatory statement.
- d. The statement made should be false: It would amount to defamation only if the statement made is false in nature.
- e. The statement should be made by the defendant: If the statement are made by another person, but are published under the name of the defendant, then it does not amount to defamation.³¹⁶

If a person is able to prove any such elements in their case, then such case shall be brought under the preview of defamation. Some of the cases where the personalities have sought protection for their right of publicity under defamation, due to not having a publicity right legislature are.

1. Persona used for the promotion of goods, in the case of *Tolley v. J.S. Fry & Sons Ltd.*,³¹⁷ In this case Fry's is a chocolate company, well known for its product. They made an advertisement incorporating the personality of famous amateur golfer Tolley. In this advertisement, the golfer while playing his game, has a Fry's chocolate sticking out of his pocket. He is accompanied by a caddy, who also bares a Fry's chocolate cartoon. The plaintiff aggrieved, sued the chocolate company under defamation, stating that he has never authorized to such advertisement. Further people will think that he is compromising his amateur golfer status to make money through advertisements. The House of Lords ruled in favour of plaintiff, stating that, through such advertisement, the claims made by the plaintiff can actually be presumed, resulting in lowering in the thinking of the people towards the plaintiff.³¹⁸
2. Misappropriating the celebrity's voice. In "*Midler v. Ford Motor Co.*",³¹⁹ Midler sued Ford Company for using a voice alike for making their advertisements, when she has already refused their proposal for the same.

³¹⁶ *Supra* note 313.

³¹⁷ AC 333 (1931).

³¹⁸ *Supra* note 312.

³¹⁹ 849 F.2d 460 (9th Cir. 1989).

3. In “*Waits v. Frito-Lay, Inc.*”³²⁰ Similarly waits had sued Frito Company for using his voice alike to produce songs, without his permission.
4. Using the “mark” of a rock music group as well as solo performers. In “*Bi-Rite Enterprises, Inc. v. Button Master*”³²¹. In this case many rock music groups as well as many solo performers have brought a case against a music merchandising company. The company was making buttons and selling other items involving the images of the performers or the rock music brand marks.³²²

These are some of the cases, where the persons involved were able to protect their persona through defamation. It was done because they were able to prove some of the elements of defamation. Now the question arises, what will happen when no element of defamation can be proved? Where will the personalities go for their protection?

5.2 Cyber Law:

Under cyber law i.e. the Information Technology Act 2000 the features such as the online defamation, concept of using personalities in the virtual reality and meme’s can be covered.

a. Online Defamation or Cyber Defamation:

The basic elements of defamation applies in this area. Only another feature that is added is that, the defamation so done should be done on online mode. That is through any social media platform, or through making comments in the comments section provided by many online platforms.

With the ever increasing use of various online platforms, or rather social media, such as Facebook, Instagram, Twitter, LinkedIn, etc. More and more people are using it to post their pictures, videos, reels, etc. It becomes really easy for any person to use such images, etc. for the commercial purposes, without seeking

³²⁰ 978 F.2d 1093 (9th Cir. 1992).

³²¹ 555 F. Supp. 1188 (S.D.N.Y. 1983).

³²² Megan Farrell Woodyard, “Advertising Injuries: Defamation and Right of Publicity”, available at: <https://www.natlawreview.com/article/advertising-injuries-defamation-and-right-publicity> (last visited on April 07, 2022).

consent from the said person. A case was brought in California Court, stating that Facebook has used the personality of another to endorse the products of a third party. In the absence of proper publicity right statute one can take the aid of defamation in such cases.³²³ That is only because the information was used in wrong manner and it had brought in light the fact that the person is endorsing the product, which in turn caused decline in the reputation of the person in question.³²⁴

With the advent of the internet, fans have utilized the internet the most. Some of the fans are so obsessed with their ideals that they dig deep in their idols life and know things which are not even in the public domain. There are many fan pages, blogs that have emerged in the recent times. They publish all and every details of the life of the persona they like. Stating that it is just an expression on the online forum. Some of them might even publish such information which can cause adverse effect on the personality. These personalities can bring a case against them under defamation, but most of the fan based forum are not in defamatory in nature. Some make products out of their fan pages and sell them online, using the personalities.³²⁵

b. Memes:

Memes as defined by Merriam-Webster: “an idea, behaviour, style, or usage that spreads from person to person within a culture”.³²⁶ The terminology “Meme” has been derived from the word “minema”, having Greek origin, meaning “intimated”. Richard Dawkins in 1976, who is a British Evolutionary Biologist, has coined the term “Meme” in “The Selfish Gene”.³²⁷

³²³ *Frabley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 791-92, 806 (N.D. Cal. 2011).

³²⁴ Cyberlaw and Torts- Module 4 of 5, available at: <https://lawshelf.com/videocoursesmoduleview/cyberlaw-and-torts--module-4-of-5> (last visited on April 07, 2022).

³²⁵ Cristina Fernandez, “The Right of Publicity on the Internet” 8(2) *Marquette Sports Law Review* 289-364, 295 (1998).

³²⁶ Meme, Merriam-Webster, available at: <https://www.merriam-webster.com/dictionary/meme> (last visited on April 07, 2022).

³²⁷ Mamta Kumari, “Today’s Memes Culture and Online Defamation”, available at: <https://lawlex.org/lex-pedia/todays-memes-culture-and-online-defamation/24494> (last visited on April 07, 2022).

Meme constitute from anything related to pictures, videos, any text which is humorous in Nature, quote or even a symbols. They can be passed on with the help of Facebook, Twitter, Instagram, etc. The Memes are created for various purposes such as to explain a concept, for entertainment, for gaining popularity, for spreading current affairs knowledge and even for the sole purpose of trolling or defaming another.³²⁸

When a meme is made, especially relating to a person, they generally never have any control over it. The image is used without the permission or in some of the cases without the knowledge of the person in question. If the meme goes viral, it can lead to that person gaining a quasi-celebrity status. Or it can lead to the degradation of a celebrity. Sometimes the memes so made can either be in positive connotation or sometimes lead to negative connotation. In the case of positive connotation, the situation of the famous meme “The photogenic guy”, was introduced on the internet, after a camera man was able to capture the person’s image while running a marathon.³²⁹

In the light of negative connotation the infamous meme of “Scumbag Steve” a fictions character. Mother of Boston, had taken the picture of his son wearing a backward baseball cap and a fur collared coat. Boston had uploaded the picture on his MySpace account. The picture was taken from his MySpace account and was made into a meme. The meme was associated in the wrong light, like linking the picture with the name of Scumbag Steve and further associating the name with the use of drugs, hedonistic behaviours and parting.³³⁰

In a situation of positive connotation, a person cannot use the defence of defamation, it can only be used in the situation of negative connotation.

³²⁸ *Supra* note 327.

³²⁹ Christopher R., “I Can Haz Publicity Right? – The Fragmented World Of The Right Of Publicity, Memes, & The Internet”, available at: <https://deliverypdf.ssrn.com/delivery.php?ID=506001013065022031084090082073010123025021068055070082025086091026071122090016008031057122111022009036109118001087007003083066017084012076061120007011067122090073091009075044009088078108070107031065093101069125071094096089030024007093116118083083000007&EXT=pdf&IND EX=TRUE> (last visited on April 07, 2022).

³³⁰ *Ibid.*

Some incidents which amount to online defamation in relation to memes are:

- **Mamata Banerjee case:** in this case one Priyanka Sharma was booked under defamation. Here Piyanka Sharma had posted a meme of West Bengal CM Mamata Banerjee, the picture of her head was photo shopped on Priyanka Chopra's met gala costume. She was punished with 14 days judicial custody.
- **Koffee with Karan incident involving Alia Bhatt:** In this case, while Alia Bhatt was on the show of Koffee with Karan, a question was asked from her. It was who the President of India is? To which she replied it was Prithvi Raj Chauhan. There were many memes made on this context.
- **PM Modi Case- AIB:** Tanmay Bhatt founder of the comedy group AIB "All India Bakchod". He had posted a picture of PM Modi with the dog filter using snapchat. The FIR was register against him under sec 67 of the IT Act and sec. 500 of IPC.³³¹

Exception to memes and online defamation are that it was a statement of fact, or it was an opinion or a mere modification of some photos and videos.³³²

5.3 "The Emblems and Names (Prevention of Improper Use) Act 1950":-

The Act renders protection to national significance dignitaries and institutions, from the unauthorized use of their names, without governmental permission, for commercial purposes.³³³

5.4 Judicial Remedies available in case of Violation of Publicity Rights:

Judicial Remedies are such remedies which are available to the right holder or the injured person by way of a legal action by invoking the assistance of Courts.

³³¹ *Supra* note 327.

³³² Hal Armstrong, "Defamation and Social Media: What You Need To Know", available at: <https://www.findlaw.com/injury/torts-and-personal-injuries/defamation-and-social-media--what-you-need-to-know.html> (last visited on April 08, 2022).

³³³ *Supra* note 50.

The aggrieved party may institute a suit in a Court of law to obtain redressal of his grievance. The remedies available to the owner of publicity rights are:

In the case involving cyber defamation some provisions of Indian Penal Code 1860 and the Information Technology Act 2000 can prevail.

➤ *Indian Penal Code 1860:*

- Sec. 499: It says that whoever with the intension to cause harm or having the knowledge that such an action can cause ham to a person's reputation. Action amounting to words that are either written or spoken or through visible representation or signs are published. Such actions amount to defamation and sec. 500 entitles that person to be punished with 2 years simple imprisonment or with fine or with both.
- Sec. 469: anyone who commits forgery, with any document or electronic record with the purpose of causing harm to the individual's reputation is punishable with imprisonment amounting for a term extendable for 3 years and fine.³³⁴

➤ *Information Technology Act 2000:*

- Sec. 66A: "to regulate the social media law India and assumes importance as it controls and regulates all the legal issues related to social media law India. This section clearly restricts the transmission, posting of messages, mails, comments which can be offensive or unwarranted. The offending message can be in form of text, image, audio, video or any other electronic record which is capable of being transmitted."

Though this section has been stuck down by Supreme Court of India in the famous case of Shreya Singhal and Ors. V. Union of India.

³³⁴ Aabha Bara, "What is Cyber Defamation?", available at: <https://lawlex.org/lex-pedia/what-is-cyber-defamation/25167> (last visited on April 08, 2022).

- Sec. 69A: This section gives the power to the government to block any content on various grounds from the accessibility of the public. Whoever fails to comply with the directions of the government, it can result to imprisonment up to 7 years.
- Sec. 79: “Requires an Intermediary to observe certain guidelines in order to avail of exemption from liability. These guidelines (issued in 2011) mandate that the Intermediary must take down any information that is inter alia grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, harm minors in any way or otherwise unlawful in any manner whatever, acting upon private complaint or if they discover such content on their own .”³³⁵

These are some of the provisions which can help on the online defamation or leaking of the information cases.

➤ *Injunction*- An injunction basically means a court ordering another person to stop doing some particular actions which are causing harm to the one who has instituted the case for injunction.³³⁶ For the execution of IPR which includes publicity rights as well, Art. 44 of the “Trade Related Aspects of Intellectual Property Rights” (TRIPS) talks about injunctions. Injunction may be permanent, ad-interim or preventive.

In *Weston Electronics Ltd. vs. M/s Rajesh and Co.*,³³⁷ In this case, “The case of the plaintiff is that the defendant’s use of trademark ‘WESTON’ in respect of the electric and electronic goods is resulting in immense deception and confusion and that such user by the defendant is leading to passing off the

³³⁵ Sidharthan R, “The Information Technology Act And Media Law”, available at: <https://www.legalserviceindia.com/legal/article-417-the-information-technology-act-and-media-law.html> (last visited on April 08, 2022).

³³⁶ Avtar Singh, *The Code of Civil Procedure* 363 (Central Law Publications, Allahabad, 5th edn., 2019).

³³⁷ AIR 1995, DEL 13 at 15,16,17.

inferior qualities of the defendants for those of the plaintiff.”³³⁸ “The court granted ad interim injunction restraining the defendant, its partners or proprietor, as the case may be, servants and agents from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in electric and electronic goods including washing machines, fans, electric machines including madhanis etc. under the impugned mark ‘WESTON’ till the disposal of the suit.”³³⁹ This is how even in case of false passing off of a trademark, the Court has tried to save the publicity rights of the electronic appliance brand name ‘WESTON’.

- *Writ Petition*- A right without any benefit is meaningless. In case of any infringement of the right and to acquire the benefit righteously, the legal remedy available to an individual is to approach the Court. The Supreme Court under Article 32 and the High Courts under Article 226 of the Indian Constitution are empowered to issue appropriate directions, orders or writs in the nature of *habeous corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari*. Writs can be regarded as a formal order to the government, or to a public authority under the aegis of the government or to any other organization to restore the fundamental rights of the citizens.³⁴⁰
- *Claim for Damages*- Ordinarily, damages are corresponding to the harm grieved by the plaintiff.³⁴¹ Art. 45 of the “Trade Related Aspects of Intellectual Property Rights” (TRIPS) talks about damages to pacify the loss sustained to owner of intellectual property. The court has the authority to hold the person accountable for the damages caused by them to another person in the form of damages.³⁴² Damages may be classified into following types:

³³⁸ S.C. Sarkar, *Commentary on The Code of Civil Procedure, 1908* 826 (Dwivedi Law Agency, Allahabad, Vol. 2, 4th edn., 2010).

³³⁹ *Supra* note 338.

³⁴⁰ G.S. Pandey, *Constitutional Law of India* 556 (University Book House Pvt. Ltd., Jaipur, 16th edn., 2021).

³⁴¹ R.K. Bangia, *Law of Torts* 406 (Allahabad Law Agency, Faridabad, 23rd edn., reprint 2014).

³⁴² B.L. Wadehra, *Law Relating to Intellectual Property* 557 (Universal Law Publishing, Gurgaon, 5th edn., reprint, 2016).

- (a) Nominal Damages: The Court awards such damages to the claimant not as recompense, but rather as recognition of the contravened legal right.
- (b) Contemptuous Damages: Such damages are awarded where the Court recognizes loss suffered but does not grant full compensation as claimed in the plaint. Where the injury to aggrieve is very slight and have no justification, the Court awards contemptuous damages.
- (c) Compensatory Damages: are such damages which are awarded in the form of compensation. When a loss incurred by one is due to the negligent act of another or even the result of some unlawful behaviour of another. The courts have the authority to grant such compensatory damages to the aggrieved.
- (d) Exemplary Damages: Such damages are granted where there has been a greater harm by reason of aggravating circumstances accompanying the wrong. These form of damages are awarded to prevent similar acts from happening in the future, the damages are known as “exemplary, punitive, or vindictive”.³⁴³
- (e) “Prospective Damages”: Prospective damages are future damages that can be reasonably expected to occur to a moderately large extent or degree.

5.5 Conclusion:

Publicity right has many different features. Some features can be protected through one law, some through another. Though such protection is not proper or just. It is mixed. Such a protection leaves a loophole for the defendant to exploit. Even the provisions of defamation and cyber laws are not sufficient for the protection of the publicity right.

³⁴³ *Supra* note 341.

CHAPTER 6
PUBLICITY RIGHTS- COMPARATIVE
STUDY OF U.S.A AND U.K.

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PUBLICITY RIGHTS- COMPARATIVE STUDY OF U.S.A AND U.K.

6.1 Introduction

In previous chapters it has been discussed that “the right of publicity prevents the unauthorized commercial use of an individual's name, likeness, or other recognizable aspects of one's persona. It gives an individual the exclusive right to license the use of their identity for commercial promotion.”³⁴⁴

Present chapter aims to compare the legal regulations pertaining to protection of publicity rights, currently prevalent in USA and UK. It is to be noted that “a reading of the history of privacy and publicity rights makes it clear that the development of privacy rights as we now understand them has largely stemmed from the American understanding of the same. Therefore, it is essential to chart the history and development of these rights in America. In the USA, the protection of the right to privacy and the right to publicity is separate. Even though the latter is a subset of the former, it has been developed by judicial precedents in a unique manner, such that it is now a distinct right.”³⁴⁵

6.2 Publicity Rights- Legal Framework in USA

According to Steven J. Hoffman, “the right of publicity protects against the unauthorized commercial appropriation of a person's name, likeness, achievements, or characteristics. It is more accurate to think of it as a sui generis mixture of personal rights, property rights, and rights under the law of unfair competition than to attempt, Procrustean-like, to fit it precisely into one of those categories.”³⁴⁶ In USA “there exists no federally legislated right of publicity. Rather, the right has been adopted by either judicial decision or by statute in the

³⁴⁴Publicity, *available at:* <https://www.law.cornell.edu/wex/publicity#:~:text=In%20the%20United%20States%2C%20the,of%20the%20Right%20of%20Privacy> (last visited on February 15 2022)

³⁴⁵ *Supra* note 202.

³⁴⁶ Steven J. Hoffman, “Limitations on the Right of Publicity,” 28 *Bulletin of the Copyright Society of the U.S.A.* 111-145 at 112 (1980).

majority of states. While varying state to state, the common law right of publicity is now widely seen as the right to control the commercial use and value of one's persona.”³⁴⁷

Kateryna Moskalenko highlights that “the right of publicity originally developed from the right to privacy. The privacy right doctrine in the USA is traditionally connected with the names of Samuel Warren and Louis Brandeis, who published the article titled 'The Right to Privacy' in Harvard Law Review in 1890.”³⁴⁸ The main consequence which emerged after the publication of their article is that "a new tort, akin to defamation, which would allow an injured party to claim recovery for the disclosure of truthful information that was unprivileged and non-public.”³⁴⁹ Furthermore, since then "the right to privacy has transformed into the right to be left alone. A famous American scientist, William Prosser, further enunciated the following categories, included within the personal right to privacy: protection against intrusion into one's private affairs; avoidance of disclosure of one's embarrassing private facts; protection against publicity placing one in a false light in the public eye; and remedies for appropriation, usually for commercial advantage, of one's name and likeness.”³⁵⁰

Law relating to the protection of publicity rights in USA differs from state to state. In large number of states 'right to publicity' is duly recognized and protected under a specific law, while in some of the states it is considered to be part of right to privacy and protected as part of it. In other states it is protected under the laws dealing with unfair competition as well as trademarks. Besides *the Lanham Act*, 1946 also covers certain aspects of Publicity right. However, the “the scope of the right of publicity is not consistent across states. All states with statutes cover at least the celebrity's name and likeness. Some states, such as California, Florida, Nevada, Oklahoma, Tennessee, and Texas, specifically

³⁴⁷ Dustin Marlan, "Unmasking the Right of Publicity," 2 *Hastings Law Journal* 419-474 at 426 (2020).

³⁴⁸ Kateryna Moskalenko, “The Right of Publicity in USA, UK and Ukraine” *International Comparative Jurisprudence*, 113-120 (2015), available at: <https://www.sciencedirect.com/science/article/pii/S2351667415000104#bib5> (last visited on February 16, 2022).

³⁴⁹ *Supra* note 202.

³⁵⁰ *Supra* note 348.

include photographs within their statutory coverage and some, such as California, New York, Nevada, Oklahoma, and Texas, explicitly include the right to a person's voice. Indiana has one of the broadest statutes that specifically covers one's name, voice, signature, photograph, likeness, image and distinctive appearance, gestures, and mannerisms.”³⁵¹ The existing legal framework, with reverence to defence of right to privacy in USA, is discussed as follows:

6.2.1 *Right to Publicity:*

Souvanik Mallick and Swati Narnaulia very aptly observe that “the development of the right to publicity in the US has primarily been through case-law.” They observe that the growing impact of the right was made ostensible by the US Supreme Court’s assertion in “*Zacchini v. Scripps-Howard Broadcasting Co.*”³⁵² that the publicity right stands at an independent footing. The right can be used as a remedy for the long standing grudge among the first and the 14th Amendment, which is in relation to posting any newsworthy matter for the public.³⁵³

The SC ruled in the Petitioner’s support and held that “the right to privacy was a personal right, while right of publicity was a commercial right that had a wider ambit to cover performer’s rights. Further, even though the criterion for a breach of the right to privacy and right to publicity remain identical, the distinction lay in the fact that while a personal tort could not be assigned or inherited, the right of publicity being in the nature of a property right was assignable and descendible.”³⁵⁴

In USA, for the purpose of taking legal action “the right of publicity generally requires three elements to be actionable: (1) use of an individual's persona; (2) for commercial purposes; and (3) without plaintiffs consent. However, the

³⁵¹ Ross D. Petty and Denver D'Rozario, “The Use of Dead Celebrities in Advertising and Marketing: Balancing Interests in the Right of Publicity” 38:4 *Journal of Advertising* 37-49 at 38 (2009).

³⁵² Souvanik Mullick & Swati Narnaulia, “Protecting Celebrity Rights Through Intellectual Property Conceptions” 1 *NUJS L. Rev.*, 615-635 at 619 (2008).

³⁵³ *Ibid.*

³⁵⁴ *Supra* note 202.

proper definition of “persona” is unclear and typically considered some combination of the economic value in not just one's name or likeness, but also one's image-and “image” is not just what a person looks like, but also includes audiences' beliefs about that person.”³⁵⁵

In “*Midler v. Ford Motor Company*”³⁵⁶ “which involved the protect ability of famed actress and singer Bette Midler's unique voice. Here, Ford Motor Company and its advertising agency used a sound alike of Midler on a television commercial, and Midler sued for a violation of her right of publicity. Notably, neither Midler's name nor picture was used in the commercials. While Midler's song, Do You Want to Dance, was used, Ford's advertising agency had properly licensed the copyright for it. At issue was only the nature of Midler's voice in that the sound-alike, who was hired after Midler refused to participate, sounded exactly like Midler's recorded version of the song.”³⁵⁷ The decision was given in favour of Midler and it was held that “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California. Midler has made a showing, sufficient to defeat summary judgment, that the defendants here for their own profit in selling their product did appropriate part of her identity.”³⁵⁸

In another important case “*Edison v. Edison Polyform Mfg. Co.*”³⁵⁹ “the New Jersey Chancery Court in 1907 was probably first Court to render a decision on the Right to Publicity as akin to property rights.”³⁶⁰ It was held that “If a man's name be his own property, as no less an authority than the United States Supreme Court says it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.”³⁶¹

³⁵⁵ *Supra* note 347.

³⁵⁶ 849 F.2d 463-464 (9th Cir. 1988).

³⁵⁷ *Supra* note 347 at 428.

³⁵⁸ *Supra* note 356.

³⁵⁹ 73 NJ Esq 136: 67 A 392, 395 (NJ Ch 1907).

³⁶⁰ *Supra* note 202.

³⁶¹ *Supra* note 202.

The role of the Supreme Court of Georgia, the first court to consent the privacy right and publicity rights hence under, in “*Pavesich v. New England Life Insurance Co.*”³⁶² is worth mentioning here. This case “cantered around a claim that had been brought by Mr. Pavesich against New England Life Insurance Co. for the alleged wrongful use of his picture in an advertisement for the Defendant’s insurance products. Thereafter, almost every state has addressed the issue either by judicial precedent or by way of a statute.”³⁶³

David Westfall & David Landau stress that in 1953, the “*Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*” the court coined the term right of publicity, though it was protected in several distinct forms well before *Haelan*. An older line of cases protected publicity based on a natural copyright theory—a person had a natural property right in her name and likeness.”³⁶⁴ They further observe that “In other words, *pre-Haelan* law gave celebrities the right to use their likenesses for making money and it also gave them the right to exclude others from making such uses.”³⁶⁵ They further elaborate that “in *Haelan*, a famous baseball player signed an exclusive baseball card contract with one company, *Haelan*. A rival company, Topps, printed cards with pictures of the same player. Perhaps the player could have sued Topps himself for a breach of his right to privacy, if he had not also given permission to Topps to print cards. The real question, though, was whether *Haelan*, the baseball player's assignee, could sue Topps directly. Without much discussion, the court answered in the affirmative, and in the process coined the term right of publicity.”³⁶⁶

In another case of 1962 “one of the early courts to deal with the right of publicity had to face a novel question: whether a license by Glenn Miller's widow of a publicity right to a movie production company constituted the transfer of a capital asset, and thus subject to the lower capital gains tax rate, or merely

³⁶² 122 Ga 190; 50 SE 68 (1905).

³⁶³ *Ibid.*

³⁶⁴ David Westfall and David Landau, “Publicity Rights as Property Rights,” 23 (1) *Cardozo Arts & Entertainment Law Journal* 71-124 at 76 (2005).

³⁶⁵ *Ibid.*

³⁶⁶ *Id* at 77.

ordinary taxable income. Since the Internal Revenue Code generally defines a capital asset as property held by the taxpayer, subject to specified exclusions, the question was whether the interest she transferred was property for income tax purposes. The court refused to hold that it was. In reaching that conclusion, the court first emphasized that while some courts had recognized the publicity rights of a live celebrity, these rights were not necessarily property rights, and, in fact *Haelan* carefully avoided terming publicity rights as property rights, no doubt in order to avoid the unintended consequences which might follow from such classification. Not everything that one pays for, the court noted, is property.”³⁶⁷

One more important case is *Montana v. San Jose Mercury News Inc.*³⁶⁸ “wherein San Francisco 49ERS quarterback Joe Montana was prominently featured on the front page of San Jose Mercury News editions following two of the team's Super Bowl victories and a special "souvenir section" celebrating four such victories in a decade. When these pages were reproduced as posters sold for \$5.00 each (the majority of the posters' distribution apparently was gratis), Montana sued on the basis of his common law and statutory rights. The First Amendment defeated the claim. There was no doubt that the original events were newsworthy, and the paper was privileged to report them as it did.”³⁶⁹ However, “the paper stated that it sold the posters to advertise the quality and content of its newspapers, which the court bought without consideration of what an unusual sort of advertising it is when the audience pays to buy the advertisement. The alternative reason the posters were privileged was that the posters reported on newsworthy events, which one also could question with the posters being published so long after the fact.”³⁷⁰

In *Abdul-Jabbar v. General Motors Corp.*³⁷¹, “the right of publicity or personality is violated by use of one's name in a context in which it will be recognized. The use is not limited to use of a current name. Use of "Lew

³⁶⁷ *Miller v. Comm'r*, 299 F.2d 706 (2d Cir. 1962).

³⁶⁸ 34 CalApp4th 790, 35 USPQ2d 1783.

³⁶⁹ See “Franchise Relationships” (1996) 86:6 Trademark Rep 796.

³⁷⁰ *Ibid.*

³⁷¹ 75 F3d 1391, 37 USPQ2d 1694 (CA 9 1996).

Alcindor," basketball great Kareem Abdul-Jabbar's birth name, in a "trivia quiz" portion of a televised truck commercial stated a claim, because the law is not limited to current names."³⁷²

a. California Civil Code

Christopher Kendall examines CAL. CIV. CODE § 3344(a) (2009) of *the California Civil Code* and observes that "all states have some sort of statutory right of publicity. However, due to the concentration of filmmaking in Hollywood, California's statutory right of publicity is the most relevant to analyse. Under California law, the general rule is that one may be held liable for the unauthorized use of someone else's name, voice, signature, photograph, or likeness, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services without prior consent."³⁷³ In "*Newcombe v. Adolf Coors Co.*,"³⁷⁴ it was held that In order to determine whether the use of one's name or likeness in a commercial medium qualifies under section (a) of this statute, there must be a factual determination as to whether the name or likeness was directly connected with the commercial purpose."³⁷⁵ He further stresses that "the Ninth Circuit has since clarified that the plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose."³⁷⁶

Christopher Kendall further emphasises upon § 3344(b)(1) of CAL. CIV. CODE (2009) which provides that "*the California Civil Code* also imposes an additional restriction for the reproduction of photographs in which a person must be readily identifiable from a photograph [so that] one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use."³⁷⁷

³⁷² *Supra* note 369 at 797.

³⁷³ Christopher Kendall, "The Publicity Rights of Avatar's Avatars," 18(1) *UCLA Entertainment Law Review* 180-198 at 184 (2010).

³⁷⁴ 157 F.3d 686, 693-94 (9th Cir. 1998).

³⁷⁵ *Supra* note 373 at 184.

³⁷⁶ *Id* at 185.

³⁷⁷ *Supra* note 373 at 186.

b. Indiana:

In Indiana the publicity right is a legislative made law, Indiana Code Title 32, under section 36-1. The publicity right under the title of “personality” and is described as the use of the “name, voice, signature, images, distinctive appearance, gestures, mannerisms, photographs and likeness”, of a living or deceased natural person, not gaining fame due to their criminal record. The use should be for commercial purpose defined as the use of the personality in linking with any product, goods, commercial activities, amenities or merchandise, for advertisement or even if the personality is been used for fundraising.

If the use of personality for the above stated purposes is done without taking the permission of the person, then it stands to have violated the publicity right. The term of fortification is lifetime plus 100 years after death. The right should have been transferred or assigned in whole or in part, by way of contract, gifts, testamentary document, license, if not done so, then the right stands to be terminated after the death of the personality. The relief available under the Act are punitive damages, costs, injunction, and account of profits, actual damages, or destruction, and seizer of the infringed goods. Exceptions under this Act are extended towards the work of literary, musical, radio, films, theatrical or television programs, newsworthy or political in nature, original work of fine art.³⁷⁸

c. New York:

In New York the concept of publicity right is protected as a portion of the right of privacy under section 50 & 51. The usage of a person’s name, likeness, voice and image without their consent for the resolution of advertisement or trade by

³⁷⁸ Indiana Right of Publicity Law, available at: <http://www.dmlp.org/legal-guide/indiana-right-publicity-law> (last visited on April 27, 2018).

a firm or corporation or individual, a suit can be brought against the same. The relief available are the damages, injunction.³⁷⁹

6.2.2 Right to Privacy:

“William Prosser” emphasises that “the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff” and that “these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.”³⁸⁰

Privacy Right is covered in “*Restatement of the Law, Second, Torts.*” § 652C which deals with “Appropriation of Name or Likeness’ and provides that One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”³⁸¹ It is clear that “the interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.”³⁸²

³⁷⁹ Right of Publicity: Statutes and Interactive Map, available at: <http://rightofpublicity.com/statutes> (Last visited on April 27, 2018).

³⁸⁰ William L. Prosser, “Privacy,” 48(3) *California Law Review* 383-423 at 389 (1960).

³⁸¹ Restatement of the Law, Second, Torts, s.652, available at: https://cyber.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm (last visited on February 28, 2022).

³⁸² *Ibid.*

Furthermore, “the common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.”³⁸³

In *Bonacorso Construction Co. v. Master Builders Inc.*³⁸⁴ “a cement manufacturer's unauthorized use of the name of one of its customers, and pictures of its work site, in a promotional brochure for its quick-setting cement literally violated a right of publicity/privacy statute³⁸⁵, but no damages could be recovered because no harm was done.”³⁸⁶

6.2.3 “Unfair Competition”:

In USA “the law of unfair competition is primarily comprised of torts that cause economic injury to a business through a deceptive or wrongful business practice.”³⁸⁷ Most “common examples of unfair competition are trademark infringement and misappropriation.”³⁸⁸ It is to be noted that “the Right of Publicity is often invoked in misappropriation issues.”³⁸⁹

6.2.4 Trademarks or Lanham Act 1946:

For the purpose of protecting publicity right under trademark “a person can establish an aspect of his or her identity as a trademark, protection may be

³⁸³ *Supra* note 381.

³⁸⁴ 20 USPQ2d 1215 (D Mass 1991).

³⁸⁵ Mass Gen L ch 214 §3A, cited in “Rights of Publicity and Privacy” 82(6) Trademark Rep 1252 at 1253 (1992).

³⁸⁶ *Ibid.*

³⁸⁷ Unfair competition, available at: https://www.law.cornell.edu/wex/unfair_competition (last visited on February 28, 2022).

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

provided by Federal law.”³⁹⁰ In USA, “trademarks are generally words, phrases, logos and symbols used by producers to identify their goods. However, shapes, sounds, fragrances and colors may also be registered as trademarks.”³⁹¹

As stated by Steven J. Hoffman “the right of publicity typically protects against commercial exploitation of those facets of the celebrity's persona which are most readily identifiable: name (which may be real or a stage name)" and likeness."'- Concomitantly, protection may extend to the publicity value of the celebrity's achievements, such as the career statistics of a professional athlete.”³⁹² He underlines that “deceptive trade practices are present in many right of publicity cases. Particularly when the celebrity's name or likeness is used without permission in connection with advertising, the public is easily misled into believing the celebrity has endorsed the advertised product.”³⁹³

The Act can provide protection “where a person's identity is used to falsely advertise a product or designate its origin.”³⁹⁴ Jonathon Schlegelmilch states that “the Lanham act, has two primary purposes: to protect consumers from misrepresentations or deceptions and to protect trademark owners from the misperception that they are associated with or endorse a product.”³⁹⁵

Melvin Simensky, cites “*Perin Film Enterprises, Ltd. v. TWG Productions, Inc*”.³⁹⁶ and articulates that “in *Perin*, the court held that plaintiff stated a valid cause of action for unfair competition in claiming that he had been denied credit as the executive producer of a television series, while someone else was billed as the series' executive in charge of production. Plaintiff had been the executive

³⁹⁰ *Supra* note 344.

³⁹¹ Trademark, available at: <https://www.law.cornell.edu/wex/Trademark> (last visited on February 28, 2022).

³⁹² See *Palmer v. Schonhorn*, 96 N.J. Super. 72, 232 A.2d 458 (Super. Ct. 1967).

³⁹³ See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974).

³⁹⁴ *Supra* note 344.

³⁹⁵ Barbara A. Solomon, "Can The Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity," 94 Trademark Rep. 1206 (2004) cited in Jonathon Schlegelmilch, “Publicity Rights In The U.K. And The U.S.A.: It Is Time For The United Kingdom To Follow America’s Lead” 1 *Gonzaga Law Review Online*, 101-119 at 104 (2016).

³⁹⁶ Melvin Simensky, "Defining Entertainment Law," 4(3) *Entertainment and Sports Lawyer* 13-22 (1986).

producer of the nationally syndicated television series *For You ... Black Woman*. At the time of suit, the series was in its second year, and was seen in New York City on Sundays on WABC-TV. It was a half-hour weekly talk show presenting topics of special interest to black women. Plaintiff claimed that when the series went into its second year, he served as executive producer of the first twenty-two shows before he was dismissed, but that he received no screen credit for his work prior to dismissal. Instead, the name of another employee was substituted under the confusingly similar credit executive in charge of production.”³⁹⁷

He further states that “On the basis of these facts, plaintiff commenced suit, alleging that his failure to obtain an appropriate screen credit for his executive producer services, coupled with the unjustified attribution of a confusingly similar credit to another, constituted a violation of his trademark rights under section 43(a) of the Lanham Act. Section 43(a) holds actionable the false designation of goods or services in interstate trade.”³⁹⁸ The Court decided in favour of the plaintiff and “Plaintiff obtained an immediate monetary settlement and, in addition, received billing as executive producer on programs broadcast in major television markets, including New York, Los Angeles, Chicago, Philadelphia and San Francisco. Plaintiff also received the right, after deductions, to half the net proceeds of two thirty-second commercial spots.”³⁹⁹

In *Waits v. Frito-Lay*⁴⁰⁰ the professional singer Tom Waits challenged “Frito-Lay” for utilizing his sound-alike in its advertisements. The court decided in his favour and observed that the main determination of the Lanham Act is to defend consumers as well as the commercial parties against unfair competition.

Thus, it is clear that many celebrities have gotten relief under *the Lanham Act*, but it still has miscarried to protect the rights of celebrities in a number of cases. In “*Carson v. Here’s Johnny Portable Toilets Inc.*”⁴⁰¹ In that case, “the famous

³⁹⁷ *Supra* note 396.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ 978 F.2d 1093, 1108 (9th Cir. 1992).

⁴⁰¹ 698 F.2d 831 (6th Cir. 1982).

television personality Johnny Carson, alleged that the defendant violated section 43(a) of the Lanham Act by using the well-known phrase here's Johnny in the name of its products. The court ruled in favour of the defendant on *the Lanham Act* claim, reasoning that the plaintiff failed to show a likelihood of confusion among consumers as to the plaintiff's association with the product."⁴⁰²

6.2.5 Copyright:

In the USA publicity right has been given recognition by way of state legislation or under common law. It has yet to be made into Federal legislation. The Copyright Act 1976 of the USA under Section 102⁴⁰³ have described the work identified by the Act (it is similar to the work under the "Indian Copyright Act of 1957").⁴⁰⁴ The Copyright Act of the USA has a provision for pre-emption (Section 301⁴⁰⁵), by way of which if the claims made by the parties are in any

⁴⁰² *Supra* note 35.

⁴⁰³ "§102 · Subject matter of copyright: (USA, Copyright Act 1976).

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, the method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

⁴⁰⁴ The Copyright Act's Preemption of Right of Publicity Claims, *available at*: https://www.sheppardmullin.com/media/article/753_CL%2025-4%20July%202008%20Chadwick-Vatanparast.pdf (last visited on March 27, 2022).

⁴⁰⁵ "§301 · Preemption with respect to other laws:

"(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to— (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or (2) any cause of action arising from undertakings commenced before January 1, 1978; (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or (4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8). (c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The pre-emptive provisions of subsection (a) shall apply to any such rights and

way similar to the rights provided under the CR Act then such rights shall become a focused matter of the copyright. In a similar way if the substance matter of right of publicity is in consonance with the copyright provisions then the same shall be preempted within the copyright, but if the claimants are capable to prove their publicity right claims individual to that of the copyright then the same shall not be preempted by the copyright.

Like in the case of *Law v Sony Music Entertainment Inc.*⁴⁰⁶ in this case, the court was of the view that the right of publicity claims made by the performer which was founded on the sanctioned use of a portion of the song, the part of the song was used in another song. The performer by way of contract has transferred her copyright over the song to the record producer, who for the purpose of sampling has licensed the part of the song to another. Here the performer has appealed that her publicity right has been dishonoured by way of such an act. The Court held that "Although California law recognizes an assertable interest in the publicity associated with one's voice, we think it is clear that federal copyright law pre-empts a claim alleging misappropriation of one's voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium."⁴⁰⁷

remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067. (d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute. (e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder. (f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State. (2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to— (A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990; (B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or (C) activities violating legal or equitable rights which extend beyond the life of the author."

⁴⁰⁶ 448 F.3d at 1134."

⁴⁰⁷ *Supra* note 404.

In the case of *Downing v Abercrombie & Fitch*⁴⁰⁸ the Ninth circuit court alleged that the Publicity right claims made on the use of the image by the Abercrombie & Fitch which was produced in the catalogue distribution do not amount to pre-emption. Abercrombie has purchased several pictures of surfers from the photographer and has used the same to be published in the catalogue for the purpose of promoting a line of clothing based on the surfer's theme. The use of the picture and name was without the consent of the said persons. The court held that the photograph itself, as a pictorial work of authorship, is subject matter protected by the Copyright Act. See 17 U.S.C. § 101.

However, it is not the publication of the photograph itself, as a creative work of authorship, that is the basis for Appellants' claims, but rather, it is the use of the Appellants' likenesses and their names pictured in the published photograph." The court has made the *Downing* different in a way by noting that "Abercrombie went well beyond mere republication of the photograph. Without obtaining the plaintiffs' consent to use their names and images, it also offered t-shirts exactly like those worn by the plaintiffs in the photo. We noted that the photograph itself was within the subject matter protected by the Copyright Act. But Abercrombie had not merely published the photograph. Rather, it published the photo in connection with a broad surf-themed advertising campaign, identified the plaintiff's surfers by name, and offered for sale the same t-shirts worn by the plaintiffs in the photo. By doing so, it had suggested that the surfers had endorsed Abercrombie's t-shirts."⁴⁰⁹

The courts have many different views in regards to the publicity right being “preempted” by the copyright, but through many cases, a general trend can be recognized in regards to such matter:

- 1- The publicity right is not always “preempted” nor is it always allowed as an individual right, but such a matter has been mostly identified on a case to case bases.

⁴⁰⁸ 265 F.3d at 994.

⁴⁰⁹ *Supra* note 404.

- 2- If the publicity right is being sued by the parties on the bases of the duplicate or production, spreading of the copyrighted work (works not subject to an advertisement or unauthorized distribution of any work) has mostly been preempted by the courts.
- 3- If the claim of the publicity right is based on the individual right i.e. it involves the mane, image, likeness, etc. in an individual capacity from that of the copyrighted work, then in such cases, the probability of the right not being preempted is high.⁴¹⁰

The problem of the publicity right and the “preemption” right under the copyright has been addressed in the case of “*Facenda Jr. v N.F.L. Films, Inc*”.⁴¹¹ In this case, the Third Circuit John Facenda publicity right dues will not be “pre-empted” under the NFL copyright for its games broadcasts, where “John Facenda” has provided his epic oboe voice. The defence was on the bases of derived use, for which the court was not convinced. The court laid down two reasons why they were dissatisfied with the defence:

1. That the voice of John Facenda had a commercial value, and that commercial value-added an extra element which was different and goes beyond the burden of proof as laid down for the copyright infringement.
2. To understand the problem better the main object is to analyze the problem correctly, and here the problem was not that the recording was used incorrectly, but the voice of John Facenda, which contains a commercial value.⁴¹²

⁴¹⁰ *Supra* note 404.

⁴¹¹ 542 F.3d 1007.

⁴¹² The Evolution of Intellectual Property Theory and the Right of Publicity in the U.S. Contemporary Application in the Entertainment and Sports Industry, *available at*: <https://poseidon01.ssrn.com/delivery.php?ID=618009031125122087126105081103120123117011052016042090064105005010124065088000025092041039044052007031061095088026014124121009008053029080082117094003001117029103071079015067065109111025098025029127096086104100014123083083010029110098085089113085090&EXT=pdf> (last visited on March 28, 2021).

The third circuit in this case gave out the twofold answer to the problem of copyright preemption in regards to the publicity right, i.e. when the publicity right can be preempted by the copyright and when it cannot be:⁴¹³

1. When the main motive of the use is for commercial purposes then the state publicity right won't be "preempted".
2. Though the publicity right can be "preempted" if the claimant has by way of a contract has given consent to the copyright holder over the use of the likeness, etc., which can be further incorporated in any kind of expressive work by the copyright holder.⁴¹⁴

In the present case, John Facenda had not entered into a contract with the NFL.⁴¹⁵ If the above arguments are understood then the right of publicity claim can stand on an individual footing if they are able to prove that it has an extra element which is different from the copyright infringement, otherwise, in the USA the publicity right shall be "preempted" by the copyright.

6.2.6 "*Post-mortem Publicity Right*":

After the death of a person who was famous, and who had a commercial value attached to their persona, does that commercial value come to an end after the death? Mostly the answer to that question is no. Even after death, the famous personalities retain commercial value over their persona. A very good example of this would be the use of "Elvis Presley, Albert Einstein, Marilyn Monroe, Michael Jackson," etc. even after death, some part of their persona is still being used for commercial purposes, for attracting the customers. So basically we can establish that the publicity right does not finish with the demise of the person, sometimes it happens that a person gains fame due to their death, it may be the way they died was unique, or there can be any other reason for it.

⁴¹³ *Supra* note 412.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

“Deleb” is a word which is used by the showbiz industry for those celebrities who even after death are able to reproduce revenue.⁴¹⁶ The major development in the incorporation of the “post-mortem” publicity right in the statute was due to the case of *Shaw Family Archives Ltd v CMG Worldwide, Inc*,⁴¹⁷ Sam Shaw was a famous photojournalist, who had engaged many remarkable pics of “Marilyn Monroe” including the one where she is erect overhead the subway grill with her miniskirt flying upwards. The family members of the late Sam Shaw contended that they had the right to use the image as and when they like for commercial purposes without paying any licensing fee for the same.

In this case the US DC for the Southern Area of “New York” held that as “Marilyn Monroe” expired before the passing of the “California Celebrity Rights Act 1985” and also that the New York does not identify the postmortem publicity right hence “Marilyn Monroe” persona was in the public domain, and since the Marilyn Monroe did not own any property right over her persona hence her heirs could not have inherited any property rights over the same. The court reasoned that “any publicity rights she enjoyed during her lifetime were extinguished at her death by operation of law.”

The court also stated that even with the later enactment of the postmortem publicity right in any state, the publicity right will not devolve over the heirs as the right was not there in the first place. So basically the conclusion is that Monroe's persona is now in the public domain in all individual states where the postmortem publicity right has not been accepted at the time of her death in 1962.⁴¹⁸

In response to this case, California has incorporated the postmortem publicity right within the “California Celebrity Rights Act 1985, (Cal Civ Code Sec.

⁴¹⁶ “Delebs” and Postmortem Right of Publicity, available at: https://www.americanbar.org/publications/landslide/2015-16/january-february/delebs_and_postmortem_right_publicity.html (last visited on March 28, 2022).

⁴¹⁷ 486 F Supp 2d 309 (SDNY 2007).

⁴¹⁸ Maybe you can take it with you: post-mortem rights of publicity in the United States, available at: <http://www.worldtrademarkreview.com/Magazine/Issue/39/Country-correspondents/United-States-Edwards-Wildman-Palmer-LLP> (Visited on March 28, 2018).

3344.1”⁴¹⁹) the right is available till 70 years after the demise of the celebrity. But to an identification of the postmortem right of publicity has been made subject to domicile (in the *Shaw* case itself). How much protection is to be provided and if it has to be provided or not will depend upon the level of protection that has been recognized in the particular state, as in the USA, not all countries have familiar with the concept of postmortem publicity right.⁴²⁰

This is the list of the states who have recognized and not accepted the postmortem publicity right along with the duration in each state. Some states have documented the postmortem publicity right by way of law form whereas some have recognized it through common law. The following figure is able to explain the duration.

*Fig. 6.1: Table presenting the duration of postmortem rights recognized by some states*⁴²¹

⁴¹⁹ The [California civil code section 3344.1](#) discusses post-mortem rights to identity:

(a)(1) Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use, and the person who violated the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorney’s fees and costs.

(2) For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

⁴²⁰ *Supra* note 418.

⁴²¹ *Supra* note 416.

States Where Postmortem Right of Publicity Is Recognized

State	Authority Granting Postmortem Right	Duration	Effective Date/ Applicable Date	Miscellaneous Requirements
Arizona	"[A] right of publicity exists under Arizona law and that it may be enforced by one's estate after death." ¹	Uncertain	N/A	N/A
California	Cal. Civ. Code § 3344.1	70 years after death	Applies to individuals who died on or after January 1, 1915	Name and likeness must have commercial value at death A descendent cannot recover damages before registration
Connecticut	Right of publicity is descendible. ²	Uncertain	N/A	N/A
Florida	Fla. Stat. § 540.08	40 years after death	Effective 1967	N/A
Georgia	"we hold that the right of publicity survives the death of its owner and is inheritable and devisable." ³	Uncertain	N/A	N/A
Hawaii	Haw. Rev. Stat. § 482P-4	70 years after death	Effective July 15, 2009	N/A
Illinois	765 Ill. Comp. Stat. § 1075	50 years after death	Does not apply to those who died before January 1, 1999	N/A
Indiana	Ind. Code § 32-36-1	100 years after death	Does not apply to individuals who died before 1994, the enactment date. ⁴	Applies as long as the infringing acts, including the dissemination of advertisements, occur in Indiana, regardless of domicile at death. However, courts do not always follow the statutory language. ⁵
Kentucky	Ky. Rev. Stat. Ann. § 391.170	50 years after death	Effective July 13, 1984	N/A
Michigan	"We believe that the weight of authority indicates that the right of publicity is more properly analyzed as a property right and, therefore, is descendible [under Michigan law]." ⁶	Uncertain	N/A	N/A
Nebraska	Neb. Rev. Stat. §§ 20-202, 20-208	Uncertain	Effective 1989	N/A
Nevada	Nev. Stat. §§ 597.770 - 597.810	50 years after death	Applies to those who died before enactment in 1989 ⁷	Applies to any commercial use in Nevada regardless of domicile at death Requires registration within 6 months of actual or constructive notice of an unauthorized use in the state, otherwise the claim is waived. ⁸

New Jersey	"we hold that Elvis Presley's right of publicity survived his death and became part of Presley's estate."⁹ A right of publicity cause of action, "under New Jersey law survives the death of the person."¹⁰	A California federal court concludes that the New Jersey Supreme Court would likely find a postmortem right to endure for no more than 50 years after death. ¹¹	N/A	N/A
Ohio	Ohio Rev. Code Ann. §§ 2741.01 - 2741.09	60 years after death	Only applies to individuals who died on or after January 1, 1998	Domicile or residence at death must be in Ohio
Oklahoma	Okla. Stat. tit. 12 § 21-1448	100 years after death	Applies to individuals who died on or after January 1, 1936	N/A A descendent cannot recover damages before registration
Pennsylvania	42 Pa. Cons. Stat. § 8316	30 years after death	Applies to individuals who died within a 30-year window before 2003, the effective date ¹²	Must be domiciled in Pennsylvania at death
South Carolina	"the right to control the use of one's identity is a property right that is transferable, assignable, and survives the death of the named individual." ¹³	Uncertain	N/A	N/A
South Dakota	S.D. Codified Laws § 21-64-2	70 years after death	Applies retroactively to deceased individuals who died prior to July 1, 2015, the effective date, but no right of recovery for infringement that took place before December 31, 2014	Requires a living next-of-kin if the deceased has not assigned his or her rights Descendent must register the claim of right before recovering any damages or receiving equitable relief
Tennessee	Tenn. Code Ann. §§ 47-25-1101 - 47-25-1108	10 years after death. After the 10 th year, the right continues if commercial use continues, but there is no right after proof of non-use for two years after the initial 10-year period	N/A	N/A

		year period		
Texas	Tex. Prop. Code Ann. § 26.001	50 years after death	Applies to individuals who died on or after January 1, 1937	If exercising the right within the first year of death, the right must have been registered. If exercising the right after the first year, no registration is required. However, it is unclear if suing for infringement constitutes an "exercise" of the right¹⁴ Name or likeness etc. must have commercial value at death or comes to have commercial value after death
Utah	"the Utah Supreme Court . . . would follow what appears to be the majority and modern rule that the common law right of publicity survives the death of the subject person in cases where he or she transferred or otherwise exploited such rights while alive." ¹⁵	Uncertain	N/A	Lifetime exploitation is required
Virginia	Va. Code Ann. § 8.01-40	20 years after death	N/A	N/A
Washington	Wash. Rev. Code Ann. § 63.60.010 - 63.60.080	For the name and likeness without commercial value at death, the right survives 10 years after death. For those with commercial value at death, the right survives 75 years after death	For the name and likeness without commercial value at death, it applies to those who died on or after January 1, 1988. For those with commercial value at death, it applies to those who died on or after January 1, 1948	Statutory language disregards domicile at death, but it was found unconstitutional. ¹⁶

6.2.7 Limitations on Publicity Right:

Steven J. Hoffman observes that "while the right of publicity responds to the needs of the celebrities it protects, and in doing so serves valid social goals, countervailing interests-those of other individuals and of society-mandate cautious enforcement of the right, lest it impacts too adversely on free expression, free enterprise, and federal supremacy in the area of copyright. One man's right is another man's restraint, and to set levels of protection in the intellectual property and unfair competition fields only in response to the needs of one group (such as celebrities) distorts the function of these laws, whose ultimate goals are to encourage creative endeavours and to promote competition."⁴²²

He further stresses that "Because the right of publicity encompasses a wide range of activities, its impact on commercial practices is potentially as broad as that of the laws of copyright, trademark, and unfair competition. These laws grant limited monopolies not only to benefit the protected parties but ultimately to benefit the public at large. They impose an orderly and generally fair regime on the uses of intellectual property."⁴²³

He cites *Lugosi v. Universal Pictures*⁴²⁴ and observes that "a celebrity's right of publicity conflicts with the economic interests, and sometimes with the proprietary rights, of other individuals-namely, defendants (or potential defendants) in right of publicity cases. His right of publicity also may conflict with the general weal, that is, with the interest of society as a whole in free enterprise and free expression."⁴²⁵ Another important case is "*Memphis Development Foundation v. Factors, Inc.*"⁴²⁶ the court recognized that overzealous enforcement of the right of publicity can unacceptably encumber free enterprise and competition. The Memphis court observed that expansive publicity rights might adversely affect the efficiency, productivity, and fairness

⁴²² *Supra* note 346 at 112.

⁴²³ *Id* at 115.

⁴²⁴ 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 332 (1979).

⁴²⁵ *Supra* note 346 at 122.

⁴²⁶ 616 F.2d 956 (6th Cir. 1980).

of our economic system. Not only might the right of publicity impair the stock or quality of goods and services, including those of a creative, informative, or entertaining nature, it might also detract from equal distribution of economic opportunity.”⁴²⁷

He argues that “Termination of the right upon death of the celebrity and application of a fair use doctrine would allow the right to be enforced consistently with the countervailing rights of other individuals and policy considerations affecting society as a whole.”⁴²⁸

Ross D. Petty and Denver D'Rozario observe that “courts and statutes also recognize that there should be some limits to the scope of the right of publicity. Right of publicity statutes, for example, often specifically allow non-commercial use of a celebrity's persona such as in news reporting and biographical reports.”⁴²⁹

They cite the case of “*Hoffman v. Capital Cities/ABC, Inc.*”⁴³⁰ whereby the Ninth Circuit “did not allow Dustin Hoffman to recover for the use of his image from the movie *Tootsie* altered to show a new evening gown published by a magazine next to an article about fashion”⁴³¹ As stated by the “so-called transformative uses also may be allowed. For example, an artist's painting commemorating Tiger Woods' victory at the Master's Tournament in 1997 that included three images of Mr. Woods as well as images of other famous golfers was permitted by the Sixth Circuit. The court held that the use of the image did not suggest source or approval and balanced Mr. Woods' right of publicity against the rights of the artist and the right of the public to enjoy the art (*ETW Corp. v. Jireh Publishing*⁴³²).”⁴³³

⁴²⁷ *Supra* note 346 at 123.

⁴²⁸ *Id* at 145.

⁴²⁹ *Supra* note 351 at 38.

⁴³⁰ *Hoffman v. Capital Cities, ABC, Inc.* (2001), 255 F.3d 1180 (9th Cir.).

⁴³¹ *Supra* note 351 at 38.

⁴³² *ETW Corp. V. Jireh Publishing* (2003), 332 F.3d 915 (6th Cir.).

⁴³³ *Supra* note 351 at 38.

They suggest that an amendment shall be made “to section 43(a) (15 U.S.C. 1125(a)) of *the Lanham Act* to the effect that for deceased persons, there would be a presumption that use of their names, likenesses or other indicia of their personae is legal and will not likely cause deception as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”⁴³⁴

6.3 Publicity Rights- Legal Framework in the UK:

The England law has "strongly resisted the concept of publicity rights. As the freedom of speech and expression is given utmost importance in common law countries, these rights are considered the antithesis of that. Publicity rights and other rights concerning celebrities lead to benefits only for a segment of citizens with little tangible benefits for the public in general."⁴³⁵ It is to be noted that "the law in the UK has not interfered to prevent the exploitation of the image (or other attributes) of an individual, whether that individual is a dead icon (Marilyn Monroe), a live celebrity (Posh Spice), or a living individual largely unrecognised by the wider community."⁴³⁶

Hayley Stallard states that “unlike in the United States, the law of the United Kingdom (U.K.) does not recognize a right of publicity or even a distinct right to protect a person's image or likeness from unauthorized use. Despite the common practice of merchandising and endorsement within the United Kingdom, there is no easy or straightforward way under U.K. law to protect a personality from unauthorized commercial exploitation. As in many other countries, however, a person can find a limited amount of protection from other bodies of U.K. law, including various intellectual property laws and personal and business tort.”⁴³⁷

⁴³⁴ *Supra* note 351 at 38.

⁴³⁵ *Supra* note 81.

⁴³⁶ Charlotte Waelde, “Marilyn Monroe, Posh Spice and Me Personality, Property and Privacy”, available at: <https://era.ed.ac.uk/handle/1842/2293> (last visited on February 18, 2022)

⁴³⁷ Hayley Stallard, “The Right of Publicity in the United Kingdom,” 18(3) *Loyola of Los Angeles Entertainment Law Journal* 565-588 at 565 (1998).

According to her “Since at least 1869, U.K. copyright law has offered no protection to a person's name. In that year, the Privy Council stated in *Du Boulay v. Du Boulay*⁴³⁸ that we do not recognize the absolute right of a person to a particular name ... whatever cause of annoyance it may be”⁴³⁹ She discusses that “Due to the absence of a personality right in the United Kingdom, public figures must rely on other protective rights. The primary methods of protection are based on intellectual property law, including copyright and trademark law, and the closely related tort of passing off. Other methods of protection include claims based on defamation, violation of advertising codes, and breach of confidence arising under contract law.”⁴⁴⁰

“Passing-off, misuse of private information and confidentiality are common law rights and arise out of the English courts' case law. In relation to the tort of misuse of private information, the Human Rights Act 1998 (HRA 1998) (implementing the European Convention on Human Rights) is also relevant for interpreting and balancing the articles 8 and 10 rights.”⁴⁴¹ In England celebrities can protect their rights under the “*Copyright, Designs and Patents Act, 1988, Trade Marks Act, 1994 and the Registered Designs Act, 1949*”. The legal position in the UK with regard to the protection of publicity rights is discussed as under:

6.3.1 Copyright:

In the UK, “under the *Copyright, Designs and Patents Act, 1988 (CDPA)*,⁴⁴² the copyright owner of an original art photograph, drawing, or caricature of an individual may prevent third parties from substantially reproducing or exploiting the work.”⁴⁴³ Further, “it is possible for an individual to assert copyright in a photograph or film taken of themselves. This is only possible where a celebrity, for example, has obtained the copyright in such a work from

⁴³⁸ 2 L.R.-P.C. 430 (1869).

⁴³⁹ *Supra* note 437 at 566.

⁴⁴⁰ *Id* at 567.

⁴⁴¹ *Supra* note 37.

⁴⁴² *Ibid*.

⁴⁴³ *Supra* note 437 at 567.

the author. Further, where a photograph or film has been commissioned for private and domestic purposes, that person has the right to prevent copies of the work being issued or communicated to the public.”⁴⁴⁴ It is to be noted that “a public figure who has acquired a copyright in photographs of him or herself may have the right to prevent them from being reproduced.”⁴⁴⁵

In “*Bauman v. Fussell*”⁴⁴⁶ “the court held that the copyright in a photograph was not infringed upon by a painting of that photograph because the artist only used it as a reference and introduced his original style into the painting. On the other hand, where the defendant has recreated the feeling and artistic character of the plaintiff’s work, a court may find an infringement if the defendant used “a substantial portion of the plaintiff’s work.”⁴⁴⁷

Jonathon Schlegelmilch concludes that “based on the current U.K. approach to publicity rights under the CDPA, the only protection for celebrities’ identities will come in the scenario where they authorize a photograph or recording, own the copyright, and have it copied completely or in substantial part. Unfortunately, this means that a very small fraction of cases involving publicity rights will be actionable. Therefore, celebrities must look elsewhere for protection.”⁴⁴⁸

6.3.2 Trademark:

Trademark is considered to be “the best practical way to protect a celebrity’s right to exploit his or her image for commercial gain or prevent unauthorised use. It is possible to register a trademark for a person’s name, signature, nickname, slogan, voice or likeness. In practice, the name is the most common registration.”⁴⁴⁹ As stated by Tabrez Ahmed and Satya Ranjan Swain “Trademark registration has a two-fold significance as far as rights of celebrities

⁴⁴⁴ *Supra* note 37.

⁴⁴⁵ *Supra* note 437 at 568.

⁴⁴⁶ 1978 R.P.D & T.M. 485 (C.A.) (Eng.).

⁴⁴⁷ *Supra* note 437 at 568.

⁴⁴⁸ *Supra* note 35.

⁴⁴⁹ *Supra* note 37.

are concerned. Firstly, trademark registration of any aspect of a celebrity's personality is indicative of the fact that the celebrity is open to the authorized assignment or licensing of his or her personality for merchandising purposes in the class of goods and services for which registration has been sought. Secondly, the celebrity obtains a means of defending those aspects of their personality against unauthorized use."⁴⁵⁰ It is to be noted that "David Beckham has registered his name for a range of goods including perfume, hair care and cosmetics, and Alan Shearer has registered his image in relation to goods such as clothing, bags and sports articles."⁴⁵¹

As stated by Hayley Stallard "The enactment of the Trade Marks Act of 1994"⁴⁵² relaxed U.K. trademark law. After the passage of the Act, numerous personality-related trademark applications have been filed. This law also recognized merchandising as an accepted practice. However, the Elvis case, which denied protection in the U.K. to the names Elvis and Elvis Presley on the basis that they lacked distinctiveness, challenges the validity of some of these recent applications."⁴⁵³ It is to be noted that "Since only registered trademarks are protected under the Act, the celebrities become helpless if their names are not registered as trademarks."⁴⁵⁴ The court In "*Re: Elvis Presley Trademarks, Inc, the court*" refused "to register the name Elvis Presley because it was so commonly known that it possessed no distinctive quality to identify goods."⁴⁵⁵ However, in the case of trademarks, "there are, however, some restrictions on registrability. Particular difficulties arise in relation to the proposed mark's lack of indication of trade origin and distinctiveness, and its application to certain goods such as merchandise and posters or photographs. Where the celebrity's reputation does not flow from a trade in the applied-for goods and services, the average consumer may think that the goods and services are about the celebrity as opposed to supplied by them."⁴⁵⁶

⁴⁵⁰ *Supra* note 81 at 10.

⁴⁵¹ *Supra* note 37.

⁴⁵² See chapter 26.

⁴⁵³ *Supra* note 437 at 569.

⁴⁵⁴ Harshada Wadkar, "India: Publicity Rights and its Scope in Intellectual Property Laws", available at: <https://www.mondaq.com/india/trademark/905188/publicity-rights-and-its-scope-in-intellectual-property-laws> (last visited on February 28, 2022).

⁴⁵⁵ [1997]. R.P.D.T.M.C. 543 (Ch.) (Eng.).

⁴⁵⁶ *Supra* note 37.

Jonathon Schlegelmilch opines that "celebrities looking to protect their images and likenesses in the U.K. through trademark law will probably be disappointed because it does not cover many more scenarios than the CDPA covers. Though U.K. trademark law seems to give celebrities hope at first, in reality, it does little for them."⁴⁵⁷

6.3.3 *Passing-Off*:

The action of passing off is relevant in "cases of personality merchandising where a person's name, likeness or performance characteristics are misused."⁴⁵⁸ In general, a passing-off action is a remedy against the injury to the goodwill or reputation of a person caused by misrepresentation by another person trying to pass off his goods or business as the goods of another".⁴⁵⁹ In the UK, "this common-law tort may be used by a celebrity to prevent a false representation that he or she has endorsed a particular product, service or brand. To bring such a claim, the celebrity must have a sufficient amount of trading goodwill, which is usually shown by evidence that he or she has previously used his or her name, image or likeness for endorsement activity."⁴⁶⁰

In *Irvine v Talksport*⁴⁶¹, it was held that "a celebrity must-have significant reputation or goodwill (at the time of the acts), and the use of his or her image without permission must constitute a misrepresentation to a significant section of the relevant market that the individual has endorsed the product. Examples of successful claims are limited and are usually very fact-specific. This is well demonstrated by Rihanna's successful claim against Topshop, which sold T-shirts with her image on them without her permission. The Court of Appeal confirmed that there is no image right per se and that Rihanna's claim only succeeded because the extent and nature of her previous endorsement activity

⁴⁵⁷ *Supra* note 35.

⁴⁵⁸ *Supra* note 81 at 10.

⁴⁵⁹ *Id* at 12.

⁴⁶⁰ *Supra* note 37.

⁴⁶¹ [2002] 2 ALL ER 414.

meant that a significant proportion of Topshop's customers would be misled by the use of her image."⁴⁶²

In "*Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.*,"⁴⁶³ it was held that "Where a personality is sufficiently well-known, the non-consensual use of his or her name, image, or voice may give rise to a misrepresentation that the personality endorses, or is connected with, the products or services in question. A plaintiff may bring an action for passing off if this misrepresentation is likely to cause confusion amongst consumers and a loss of income to the plaintiff."⁴⁶⁴

In "*Mirage Studios v. Counter-feat Clothing Co.*"⁴⁶⁵ "The so-called Teenage Mutant Ninja Turtles case, gave apparent authority to the proposition that third party character merchandising constituted a misrepresentation that the owner had licensed the use of the characters."⁴⁶⁶ In the words of Jonathon Schlegelmilch "when compared to the protection available through U.K. copyright and trademark law, the common law tort of passing off offers celebrities a fair amount of protection."⁴⁶⁷ He observes that "U.K. courts have traditionally been hesitant to apply the protection available through passing off claims to individuals' likenesses, but have shown more willingness to do so recently."⁴⁶⁸

He cites *Lyngstad v. Anabas Pros. Ltd.*⁴⁶⁹ "several decades ago, in 1976, the group ABBA was turned down in its attempt to enjoin Anabas Products from putting the group's picture on t-shirts and pillowcases. The court did not believe that the consuming public would really be confused that ABBA was selling the products when they were not in the business of selling t-shirts and pillowcases. Acknowledging that Anabas may be profiting off of the reputation that the group

⁴⁶² *Supra* note 37.

⁴⁶³ 2 All E.R. 927 (H.L. 1979) (Eng.).

⁴⁶⁴ *Supra* note 437 at 570.

⁴⁶⁵ 1991 F.S.R. 145 (Ch.) (Eng.).

⁴⁶⁶ *Supra* note 437 at 571.

⁴⁶⁷ *Supra* note 35 at 113.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ [1977] F.S.R. 62, 70 (Eng.).

had earned, the court was still unwilling to give protection to the group in its image and likeness when no consumer confusion was likely.”

6.3.4 Defamation and Malicious Falsehood:

A plaintiff may introduce a case for defamation or malicious falsehood if the perpetrator has instigated harm to the plaintiff's trade.⁴⁷⁰ Hayley argues that “an unauthorized endorsement could be defamatory if it is contrary to the known attributes of the individual, derogatory to his or her image, or harmful to his or her reputation. In *Tolley v. J.S. Fry & Sons, Ltd.*⁴⁷¹, for example, a well-known amateur golfer brought a defamation suit against the manufacturers of a chocolate bar that bore his image. He successfully argued that the advertisement implied that he had prostituted his amateur status by accepting money for the endorsement.”⁴⁷²

6.3.5 Misuse of private information:

Misuse of information is another form of tort that “can be used to protect an individual from unauthorised publishing of images or other information about them. The information must be private and the individual must have a reasonable expectation of privacy in relation to the information. This right flows from article 8 of the Convention on Human Rights, which provides for the right to private and family life, but this must be balanced with article 10 which gives the right to freedom of expression. The courts have interpreted this as allowing the publishing of private information where it is in the public interest (but not simply where the public is interested in the information).”⁴⁷³

⁴⁷⁰ *Supra* note 437 at 572.

⁴⁷¹ 1931 All E.R. 131.

⁴⁷² *Supra* note 437 at 572.

⁴⁷³ *Supra* note 37.

6.3.6 Contract and Confidence:

Hayley elucidates that “When a personality has entered into a specific promotional contract with a product manufacturer for the right to use the person's name or image in connection with the promotion or sale of particular merchandise for a set term, and the contract contains a promise not to exploit the right after the term has expired, the manufacturer would be in breach if it uses the name or image after the end of the term.”⁴⁷⁴

She cites another case “*Creation Records Ltd. v. News Group Newspapers Ltd.*”⁴⁷⁵ Wherein “the pop group Oasis applied for an injunction to prevent photographs taken at a photo shoot for an upcoming album from being published in The Sun newspaper. Because the photographer knew that the photographs were for a specific purpose, it was arguable that he acted surreptitiously in taking them to the newspaper. The court thus held there was a sufficient case for breach of confidence. Although the photographer was lawfully at the scene, his lawful presence did not give him the right to have the photos published in a newspaper.”⁴⁷⁶

In “*Douglas v Hello! Ltd.*”⁴⁷⁷, “photographs of the wedding of Michael Douglas and Catherine Zeta-Jones were published by Hello! without authorisation when the Douglasses had instead entered into an agreement with OK! magazine. To succeed in this claim, the individual must show that the information has the necessary quality of confidentiality and was disclosed in circumstances that give rise to a duty of confidentiality. Where the information is already in the public domain it can no longer be protected. As with misuse of private information, information may be published where it is in the public interest.”⁴⁷⁸

⁴⁷⁴ *Supra* note 437 at 574.

⁴⁷⁵ 1997 LEXIS (Ch. Apr. 25, 1997) (Eng.).

⁴⁷⁶ *Supra* note 437 at 565.

⁴⁷⁷ 1(2001) 2 WLR 992.

⁴⁷⁸ *Supra* note 37.

6.3.7 Limitations on Publicity Right in UK:

Hayley expounds that the following limitations are applicable to the celebrities with regard to their intellectual property:

1. "In the context of publicity rights, the primary defence against a claim of a copyright violation is fair dealing, which is not specifically defined in the CDPA. Hayley gives four categories of fair dealing- use for research and private study, criticism or review of a work, reporting current events and artistic work, sound recording, film, broadcast or cable program that incidentally includes a copyrighted work."⁴⁷⁹ In other words, copyright belonging to any person shall be used fairly. Fair dealing "is a legal term used to establish whether a use of copyright material is lawful or whether it infringes copyright. There is no statutory definition of fair dealing - it will always be a matter of fact, degree and impression in each case."⁴⁸⁰

2. "A trademark is not violated mark in case of provides that a registered trademark is not infringed upon by: (a) the use by a person of his own name or address; (b) the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services; or (c) the use of the trademark where it is necessary to indicate the intended purpose of a product or service (in particular, as accessories or spare parts), provided the use is in accordance with honest practices in industrial or commercial matters."⁴⁸¹

6.4 Conclusion:

The aforesaid discussion makes it clear that USA and UK have quite different laws in the context of protection of the publicity rights of celebrities. In the USA

⁴⁷⁹ *Supra* note 437 at 578-579.

⁴⁸⁰ Exceptions to copyright- Guidance for Consumers, *available at*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448273/Exceptions_to_copyright_-_Guidance_for_consumers.pdf (last visited on March 1, 2022)

⁴⁸¹ 03 Section 11(2) of the 1994 Act cited in Hayley 579.

these laws are quite expanded and developed. There is no denying the fact that the USA, in fact, has significantly contributed to the development of laws relating to the protection of publicity rights. At the federal level, there is *the Lanham Act* and at the state level, various states have their own laws in this regard. Besides the legislative framework, the US courts have delivered a number of landmark decisions which have further helped in the evolution and development of publicity rights. On the other hand, in the UK, there are no significant laws protecting publicity rights. In fact, these rights are not even duly recognised in the UK. As such, there is no direct legislation, in the UK, under which a celebrity can claim protection for the publicity rights. However, limited protection is available under the law relating to the protection of intellectual property of a celebrity like copyright, trademark and designs. Some protection is available in the law of torts relating to passing off. However, still, a large change is required in the laws of the UK so that the publicity rights of celebrities are duly protected in case of unauthorised commercial exploitation of the same. It is time that the UK and India shall also follow the USA in protecting the publicity rights of celebrities and frame the necessary comprehensive legal framework for the same.

CHAPTER 7
EMPIRICAL STUDY

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EMPIRICAL STUDY

The researcher has collected the data from 300 respondents across India, through the use of the snowball sampling method. The respondents selected were well educated and varied from 17 to 70 age group. The aim behind choosing accomplished and millennial, Gen X, Boomer generation respondents is that they are more vigilant towards their rights. They are more technologically savvy and know how to function an android phone, email, etc. In this chapter, the researcher shall discuss the results collected through the questionnaire.

The questionnaire was constructed to collect data from the general public. Through this data, the researcher aims at understanding, how publicity rights are perceived by the general public. According to them what should be the level of protection awarded to the publicity right. The researcher also aims at finding according to the general public what constitutes a violation of publicity right, if any such incident has ever taken place with them or their known persons. Further what steps were taken by them to prevent such misshaping?

7.1 Results and discussions:

There were a total of 18 questions in the questionnaire, given to the general public. Each question along with the answers shall be discussed in this section. The questionnaire was divided into 4 sections. Section I deals with demographic details. Section II deals with the questions specifically on the topic of Publicity Right. Section III is in relation to the questions gazing at the concept of Publicity Right from the view of the general public. Section IV is general, giving information on the concept of Publicity right.

a. **Section I: Demographic Details:**

Q1. Name:

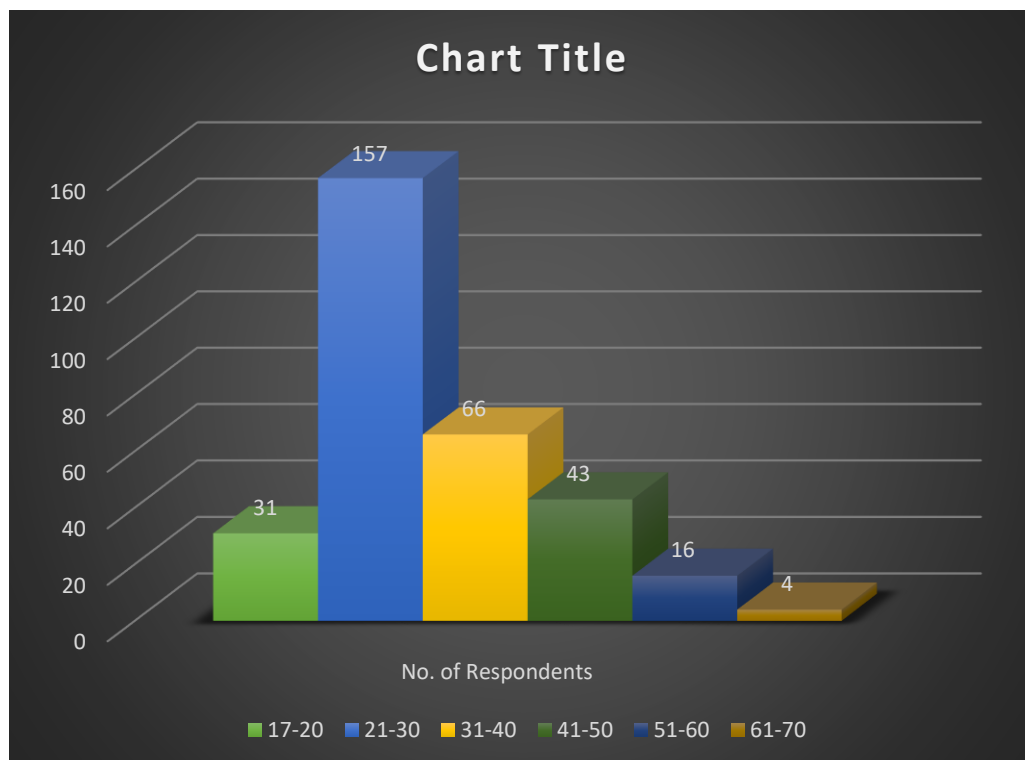
There were 300 respondents. They had to mention their names in this section. The names of the respondents shall not be disclosed for anonymity purposes.

Q2. Age:

Table 7.1: Collection of data from various age groups.

Age Group	No. of Respondents
17-20	31
21-30	157
31-40	66
41-50	43
51-60	16
61-70	4

Graph 7.1: Representation of data collected through various age groups.



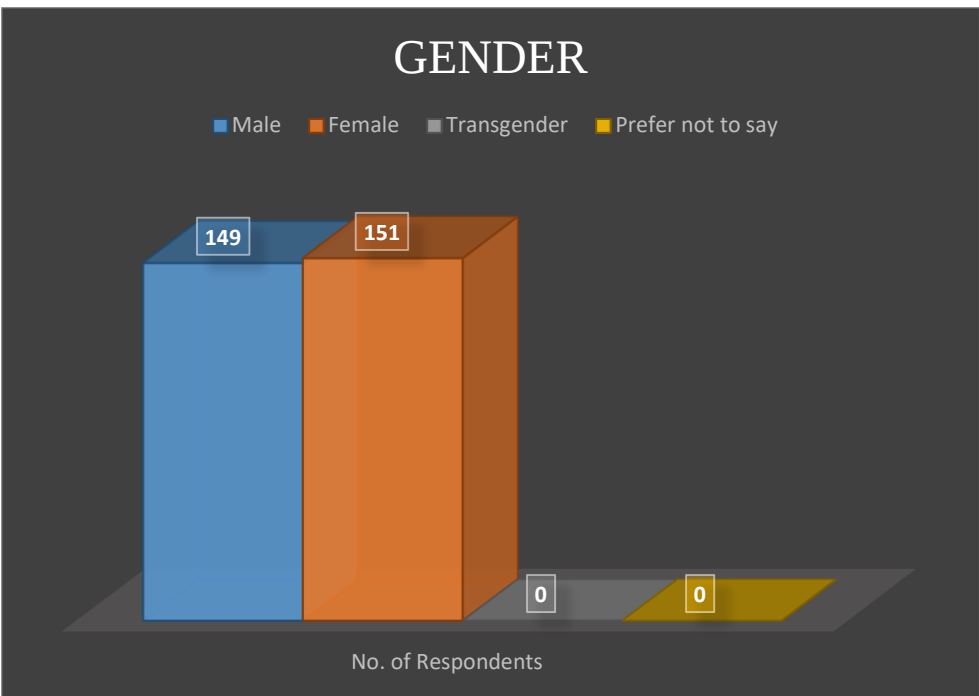
There are 300 respondents of varying ages. The collection of data from the varying ages was done to keep in mind that the concept of publicity right does

not affect the younger generation, it also affects the older generation of today's time, especially those who are technically savvy.

Q3. Gender:

Table 7.2: Table representing data collected from different genders.

Gender	No. of Respondents
Male	149
Female	151
Transgender	0
Prefer not to say	0



Graph 7.2: graphical representation of data collected through the different genders.

There were 50-50 responses from both genders. Non were from the transgender section, nor was there anyone who did not disclose their gender.

Q4. Educational Background:

The respondents are from varying fields of education. Some have graduated, some are pursuing post-graduate, some have completed post-graduation, some have completed their post-graduation, some are pursuing Ph.D. some are from MBA, CA, CS, MBBS, MCA, masters of education, Bachelor of Hotel Management, BA, BBA, engineers from different fields, law pursuing or graduates from different fields, B.Com, Masters in commerce, M.Sc, B.Sc, M.Tech, B.Tech, etc.

b. Section II: Publicity Right:

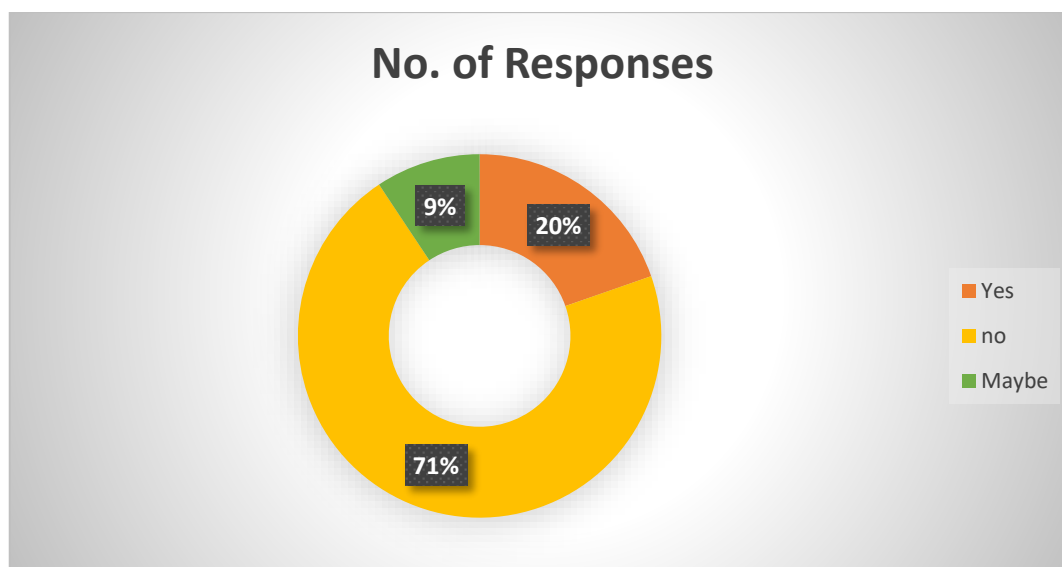
In this section, the basic knowledge and concept of publicity right questions have been asked. This will help the researcher in understanding the basic extent of knowledge and awareness that the general public has on publicity right.

Q 5. Recent case involving Rajat Sharma vs. Zee Tv. The Zee Tv news channel had advertised that: - here onwards the requirement for Rajat Sharma shall not be there, as they will be promoting an anchorless channel. Were you familiar with this?

Table 7.3: Tabular representation of responses for Q5.

Options	No. of Responses
Yes	59
No	213
Maybe	28

Doughnut Pie Chart 7.3: Graphical representation of data for Q5.



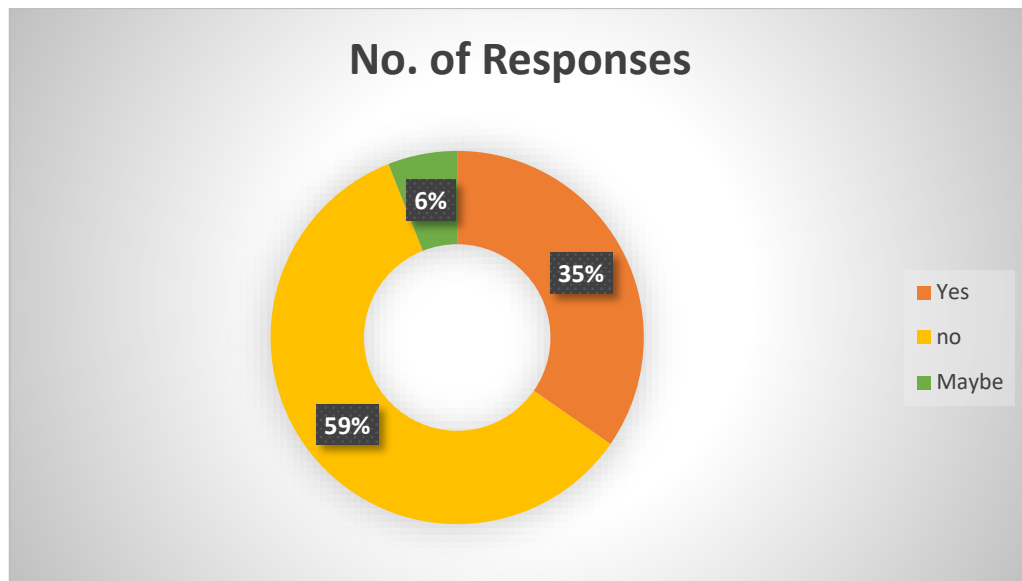
Only 9% of the respondents knew about the case, whereas 20% of respondents were not aware of the case and responded negative and 71% responded was maybe i.e. they might have known about the case or might have heard it or read about it somewhere, but were not so sure regarding it.

Q6. Salman Khan's hit and the run case had recently been incorporated into a game, which was released on various platforms. The game included a likeness to Salman Khan's name and personality, which violated Salman Khan's publicity right. Were you familiar with this?

Table 7.4: Tabular representation of responses for Q6.

Options	No. of Responses
Yes	104
No	178
Maybe	18

Doughnut Pie Chart 7.4: Representation of data for Q6.



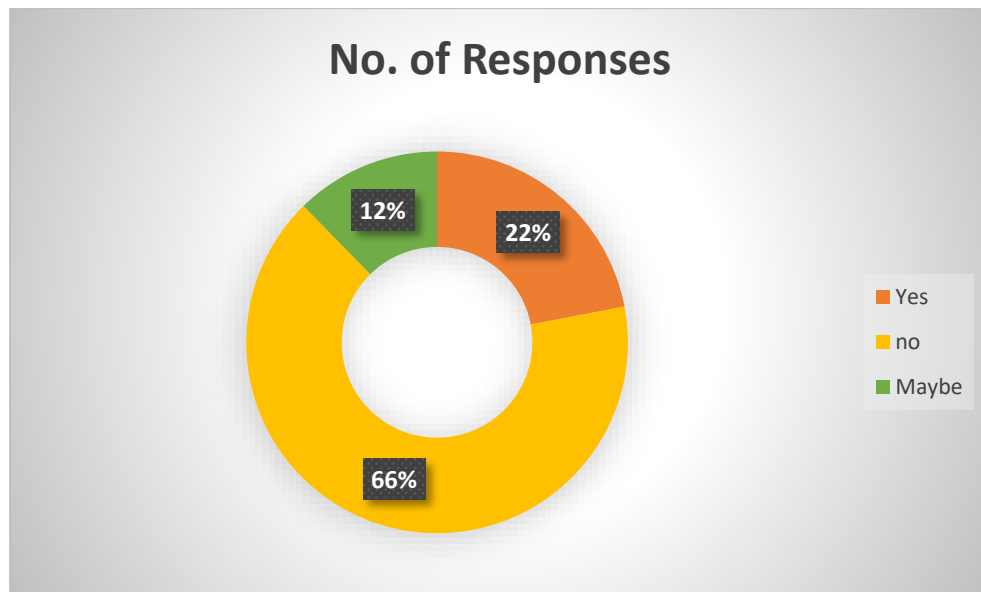
Only 35% of the respondents knew about the case, whereas 59% of respondents were not aware of the case and responded negative and 6% responded was maybe i.e. they might have known the case or might have heard it or read about it somewhere, but were not so sure regarding it.

Q7. The "Main Hoon Rajnikanth" movie was under release. The movie incorporated the unique style of dialogue delivery and likeness of Rajnikanth. Rajnikanth's Publicity Right got violated. Where you familiar with this?

Table 7.5: Tabular representation of responses for Q7.

Options	No. of Responses
Yes	66
no	197
Maybe	37

Doughnut Pie Chart 7.5: Graphical representation of responses for Q7.



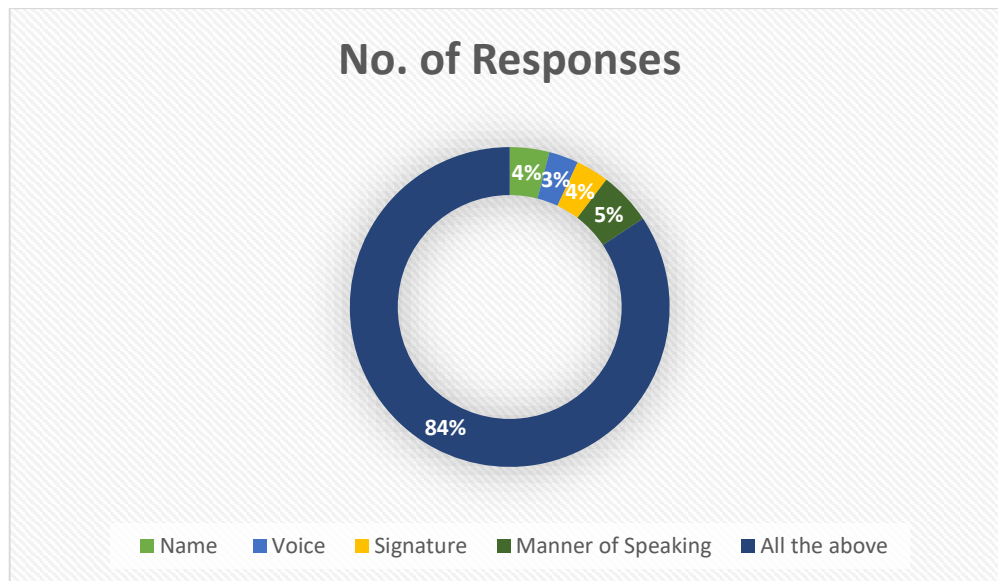
Only 22% of the respondents knew about the case, whereas 66% of respondents were not aware of the case and responded negative and 12% responded was maybe i.e. they might have known the case or might have heard it or read about it somewhere, but were not so sure regarding it.

Q8. What forms the essence of publicity right?

Options	No. of Responses
Name	12
Voice	9
Signature	10
Manner of Speaking	16
All the above	253

Table 7.6: Tabular representation of responses for Q8.

Doughnut Pie Chart 7.6: Graphical representation of responses for Q8.



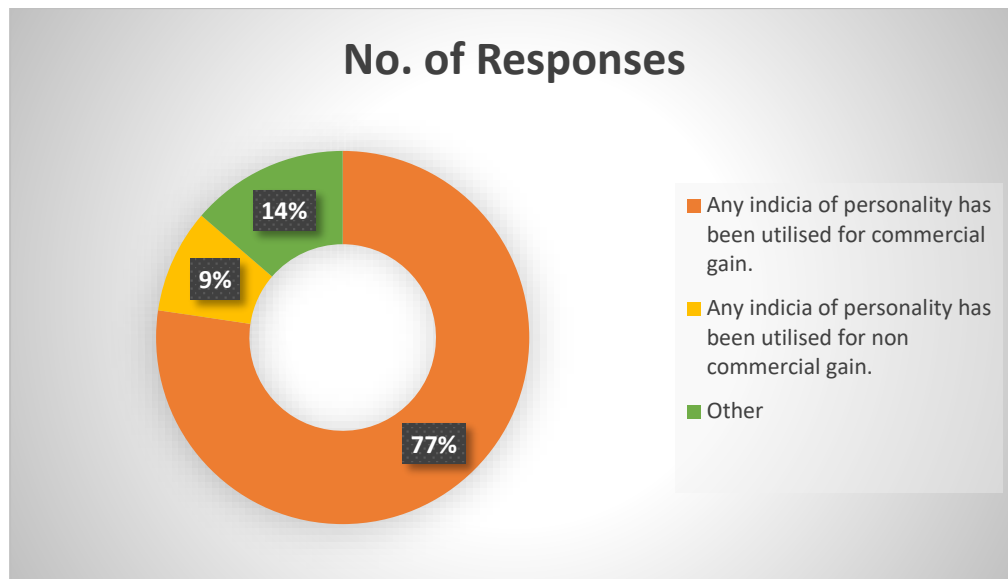
For 4% of the respondents, the name formed the essence of Publicity Right. For 3% it was only voice, for 4% it encompassed only signature and for 5% only the manner of speaking formed the essence of Publicity Right. Whereas 84% of the respondents believed that not just anyone's feature forms the essence of Publicity Right, but all the features combined together formed the essence of Publicity right.

Q9. When can the Publicity Right be violated?

Options	No. of Responses
Any indicia of personality has been utilised for commercial gain.	232
Any indicia of personality has been utilised for non-commercial gain.	27
Other	41

Table 7.7: Tabular representation of responses for Q9.

Doughnut Pie Chart 7.7: Graphical representation of responses for Q9.



77% of respondents had the correct understanding of what constitutes a violation of Publicity right, i.e. when any indicia of the personality of a person has been used for commercial gains. 9% believed that it was violated when the personality was even for non-commercial gains. 14% were under the understanding that it can also amount to some other features amounting to the violation of Publicity Right.

c. Section III Basic:

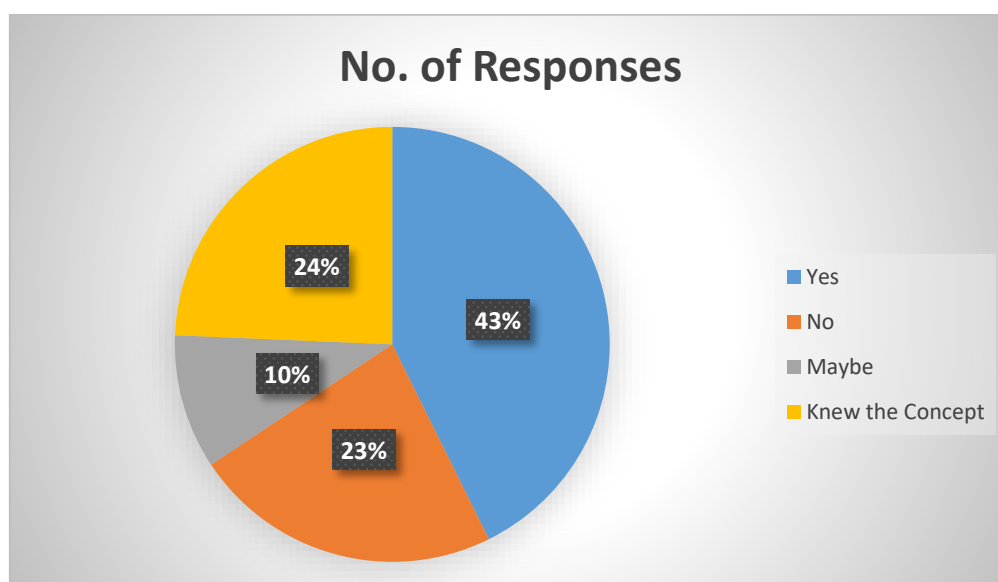
This section covers the question in regards to any such situation happening with the individuals, where their or their known person's personality right have been infringed. This will help the research to understand the grasp that the general public owns on the concept of publicity right. What according to them constitutes the violation of publicity right and further according to them, what should be the remedy or what steps were taken by them to prevent the infringement of their publicity right.

Q10. Were you aware of the right "publicity right"?

Table 7.8: Tabular representation of responses for Q10.

Options	No. of Responses
Yes	128
No	69
Maybe	30
Knew the Concept	73

Pie Chart 7.8: Graphical representation of responses for Q10.



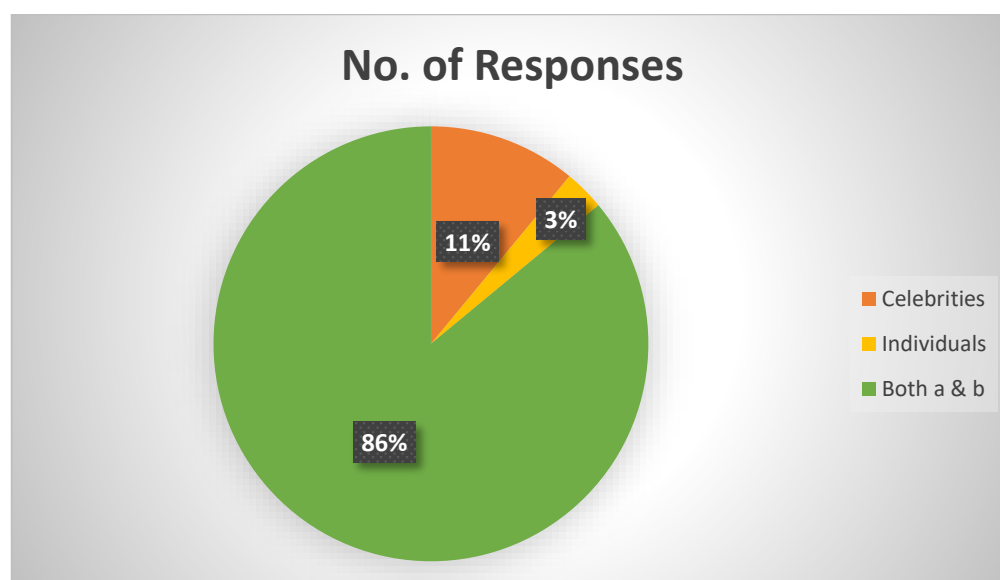
43% of respondents were aware of the concept of Publicity rights. 23% were not aware in regards to Publicity Right. 10% were not sure and 24% Knew the Concept but were not completely aware regards to Publicity Right.

Q11. According to your understanding, the Publicity right is relevant for?

Table 7.9: Tabular representation of responses for Q11.

Options	No. of Responses
Celebrities	33
Individuals	9
Both a & b	258

Pie Chart 7.9: Graphical representation of responses for Q11.



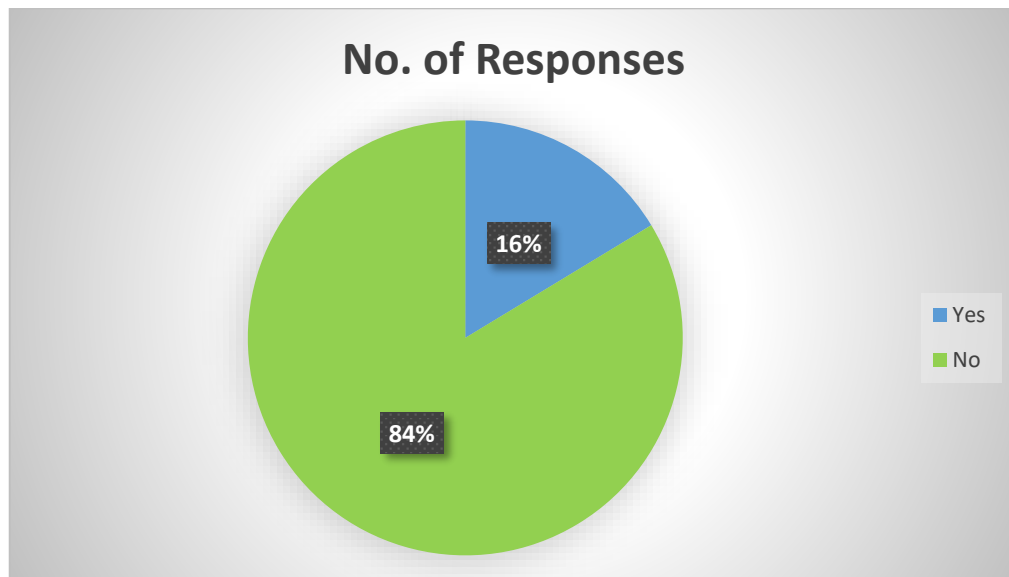
11% of respondents believed that publicity right applies only to celebrities, whereas only 3% thought it was only applicable to individuals. 86% had the right notion, that the right is relevant for both the celebrities as well as the individuals.

Q12 Whether any such incident has occurred to you, where your personality has been used without your consent?

Table 7.10: Tabular representation of responses for Q12.

Options	No. of Responses
Yes	49
No	251

Pie Chart 7.10: Graphical representation of responses for Q12.



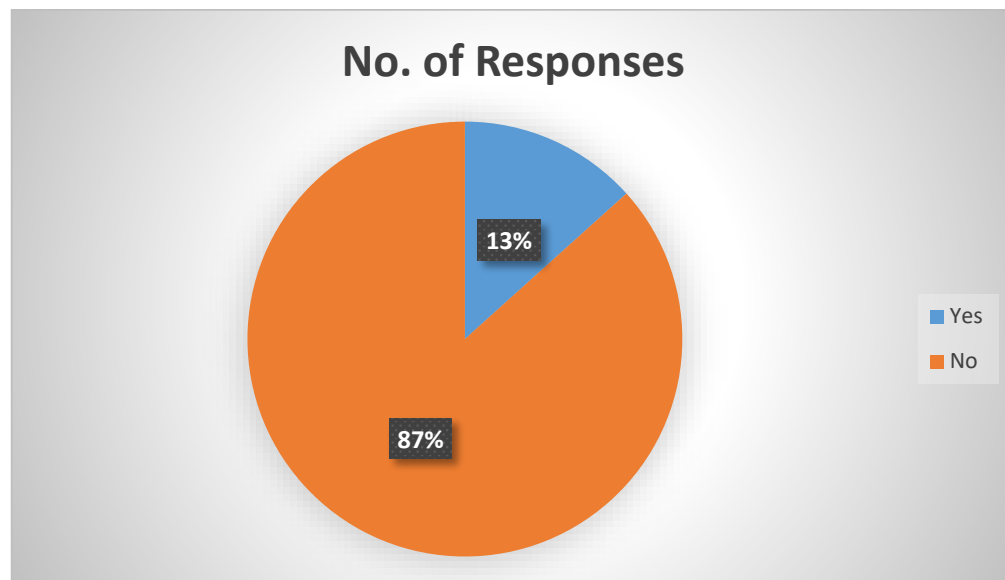
Only 16% of the respondents such an incident has taken place, where their personality has been used without their consent. With the rest 84% of the respondents, no such incident has ever taken place.

Q13 Whether any such incident has occurred with your known ones, where their personality has been used without their consent?

Table 7.11: Tabular representation of responses for Q13.

Options	No. of Responses
Yes	40
No	260

Pie Chart 7.11: Graphical representation of responses for Q13.



Only 13% of the respondents such an incident has taken place, where their known people's personality has been used without their consent. For the rest 87% of the respondents no such incident has ever taken place with any of their known people.

Q14. If yes? Can you elaborate on the incident?

The question was open-ended. Only 24 people out of 300 respondents i.e. 8% responded to the question in the affirmative. Out of those 24 people, many did not want to share the incident, responding in a manner as "too personal, do not

want to share, only answered yes but did not share the form of violation that took place with them or their known persons, etc."

13 respondents, responded by saying that their profile was misused on Instagram or Facebook. While doing so, the people had asked for financial benefits from their known persons, or relatives. Someone's Signature was copied for gaining cash benefits. Use the identity of the person for their own personal gain, or gain from the in-laws.

6 respondents, responded with some form of genuine issues, in relation to the misuse of the personality of either their own or their known persons. In a case, one person had cleared UPSC exams, and their image was used without the consent of various coaching instituted for their personal gain. Someone's image had been used in advertisements, without their consent. In a situation, the image had been used to gain some form of commercial benefit.

Q15 What steps were taken by you to prevent such misuse?

The question was open-ended. 36 respondents out of 300 i.e. 12% of the respondents responded to the question with some form of steps that were taken by them or through their known persons. The most common response was:

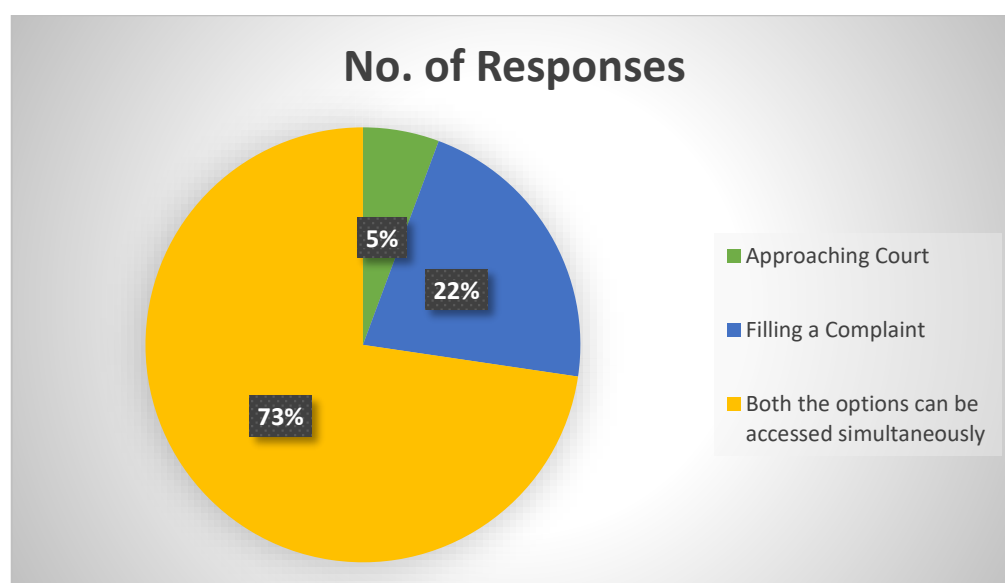
- i. Either to compromise or to ignore that person who had done such a violation.
- ii. To give such a person a warning, to send legal notice to the person.
- iii. Most went for filing a complaint on the online cyber complaint.
- iv. Some filed an FIR against such an incident.
- v. Some stopped sharing their photos on online forums.
- vi. To make sure use setting of the private profile, for some extent of protection.
- vii. Choose wisely whom to befriend on online forums.

Q16. In case of an accident like this, what is the appropriate remedy available for the victim?

Table 7.12: Tabular representation of responses for Q16.

Options	No. of Responses
Approaching Court	17
Filling a Complaint	65
Both the options can be accessed simultaneously	218

Pie Chart 7.12: Graphical representation of responses for Q16.



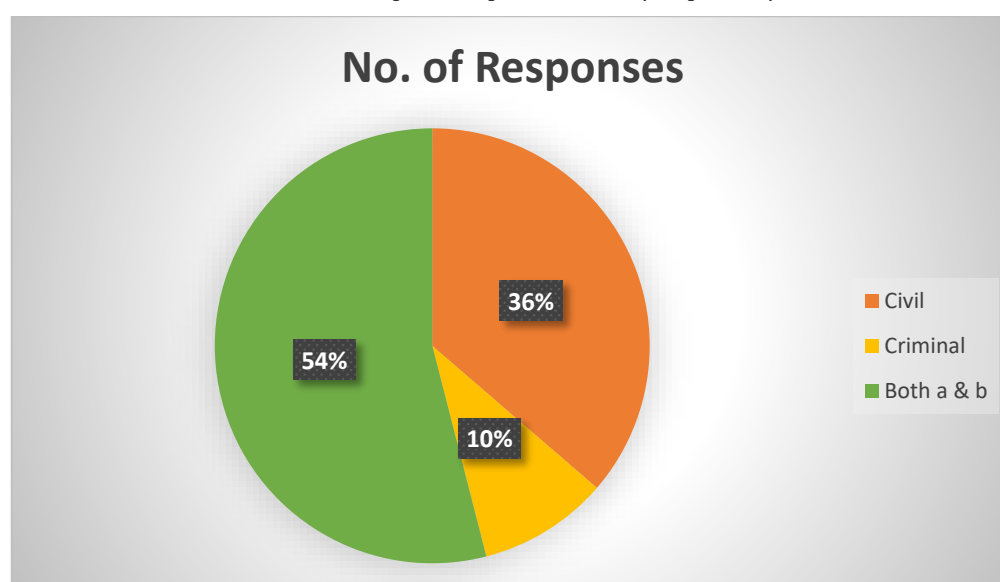
5% believed that approaching the court will provide some form of remedy, and 22% were of the opinion that filing a complaint would be good as well. 73% were of the opinion that both the options can be accessed simultaneously, as it might provide a better remedy.

Q17. What are the remedies accessible to the persons whose publicity right has been violated?

Table 7.13: Tabular representation of responses for Q17.

Options	No. of Responses
Civil	109
Criminal	29
Both a & b	162

Pie Chart 7.13: Graphical representation of responses for Q17.



36% opinion that the nature of remedy can be civil. 10% opinion that the remedy provided for the violation of publicity right can be criminal in nature. 54% opinion that the remedy for the violation of publicity right can be both Civil and Criminal in nature.

Q18 Any suggestions, in the light of Publicity Right.

It was an open-ended question. 132 out of 300 responded i.e. 44% responded. Throughout the responses, some common themes emerged. Those were:

1. Almost 20 responses were in the favour of developing strong legislation, making the publicity right enforceable, and to provide with harsh punishment to the ones who have violated one's publicity right.
2. Apart from that, the next most recurring response was to make the law more public, so that there is more awareness in regards to this particular law. As this is still in its starting phase, not many people are aware in regards to their rights. So steps should be taken to spread more awareness in this field.
3. Whenever going for the use of one's personality, or any indicia of personality, always consent should first be taken from the person.
4. It is considered to be a branch of Intellectual Property Right and Defamation, therefore such rights should be amended in such a manner to provide sufficient protection to the publicity right.
5. The publicity right can be protected through Constitution, especially through Article 21 of the Constitution of India.
6. Courts play an important role here in the positive interpretation of the publicity right. The courts can step in and help for the time it takes the legislative to reach a point where they can form proper legislation on publicity right.
7. Media plays an important role in today's world. Just to increase their TRP they are willing to violate a person's personal life and use it for their advantage. This should be stopped, as it brings adverse effects on the person involved in the news.
8. The publicity right is different from the right to privacy, hence it should be treated as an independent right and not considered as a part of the right to privacy.

9. Other jurisdictions can also be analysed and studied to understand how they are protecting the publicity right.
10. The right should be equal for the celebrities as well as the normal citizens.
11. Through the questionnaire, many came to know their respective rights in the light of publicity right.

Result:

After the analysis of the data collected from 300 respondents, it can be concluded that the general public is not that aware in regards to the publicity right. Some have a vague idea of the concept. Some were aware of the cases in the field. Many believed that the right should not be limited to celebrities only, it should be applicable to all. There were few people whose publicity rights have been violated, and they have taken steps such as filing a complaint, giving warnings and blocking the account, among other methods. It can be said that the violation of publicity right is not only for celebrities but also for the general public. It was suggested by maximum people, to make legislation on this right and that there should be more aware of the right, the courts can take a more active role in the situation of publicity right, like make rules for the regulation of publicity right, till the administrative are able to make separate legislation on the topic. The liability of publicity right should be both civil and criminal. If there is a more heinous crime, then the option of punishment should be available.

Chapter 8

Conclusion and Suggestions

Chapter 8

Conclusion and Suggestions

The progression of the world and the transformation of technology for the betterment of that world go hand in hand. These technologies are introduced through man's intellect. The main purpose for doing so is to make the life of any individual easier. Though the scope of advancement of technology is not limited to this only. With the advancement to make life easier, comes the lacunas, where such technologies can be misused. Whenever such misuse happens then the legislative i.e. the administrative and the judicial comes into play. They impose restrictions on such use and employ punishments on the persons who have misused them for either their gain or for misguiding the public at large.

With such advancement in time, the introduction of new rules and regulations keeps on taking place. Either it was for the basic protection i.e. crime against a person's property or if it was for the protection of a person's intellect. Another such situation has arisen in today's time in the name of publicity right. The main purpose of such a right is to give authority, to an individual, to be able to have control over the utilization of one's personality for commercial purposes. If anyone wishes to use any feature of an individual then they have to get the permission of that person before such use.

The reason behind the recognition of such a right has become immensely important in today's time, because nowadays, where ever you take a look, one is bombarded with some the other forms of advertisements. The use of one's personality is not limited to just advertisements, the concept of memes, and reels, have taken root so fast, that it is impossible to miss such things. You visit any web page, or not just surfing on the internet, even if you are walking outside on road, you can see billboards, and even small vendors have put up attractive flyers to attract consumers. Such flyers can make use, of any feature of a single person, or even a group of persons. When such a situation arises, the persons whose features are so used, without their permission, not only their economic rights but as well moral rights, are violated. For such a thing to stop from

happening so often, there becomes a need to identify the concept of publicity right. Though a step has been taken forward with the help of the courts the administration is lacking behind.

Even before the administration takes an action, the research through this work has tried to establish the need and has laid down the basic understanding of the concept of publicity rights. The right was firstly associated with celebrities only. The concept of celebrities is an old concept, ranging back from the Roman Empire, where the introduction of sports and battles for punishment took place. The winner was worldwide recognized, and the use of their image or their personal marks took place for selling the products. Such use was there even back then. As time advanced, the introduction of TVs, Internet helped in the growth. First came the radio, the voice of people got famous then came TV, and the looks of people took precedent. Then came the internet, and every feature of the individual came into play. With the introduction of the internet, the right was not limited to celebrities only, but it started to be applicable to the general public as well. Violation of publicity right increased, not just worldwide but also in India.

The question of recognizing the right came. The right did get its recognition through various court judgments. Now if the publicity right has to be recognized by the administration, then the first step is to identify whether the right aligns with the COI⁴⁸²? This question was answered in the J. S. Puttaswamys case, the famous right to privacy case. In this case, the right to privacy was recognized as a part of Art. 21 "right to life and personal liberty". A nine-judge bench preceded the case and six out of the nine judges responded in favour of the right to privacy. Out of those six judges, one judge, Justice Sanjay believed that the publicity right is to be recognized as a part of the right to privacy. So publicity right has found its way into the COI, but since the judgment came through one judge, and does not form the maximum judgment, therefore this right can be taken as only persuasive and not authoritative grounds. Therefore, the COI fails to provide justified protection for the publicity right.

⁴⁸² COI stands for Constitution of India.

Publicity right can be justified with the help of Art. 19 (1) (a) and (g), the "freedom of speech and expression" and the "right to practice any profession" respectively. The concept of commercial speech, which the celebrities very prominently make, justifies the point of publicity right with the "freedom of speech and expression" and every person has a right to choose their profession and to practice it free without any hindrance wither to their life or personal liberty is justified through "right to practice any profession". Therefore it can be concluded that the publicity right agrees with the COI.

It has been proven that the publicity right does not violate the provisions of COI, but at the same time it is not being sufficiently protected through it as well. Then where can the publicity right find its protection? For that, the existing laws have been examined. There are some laws which can protect the publicity right, they are:

1. Intellectual Property Right: Publicity right has similarities with the concept of IPR.⁴⁸³ The justification lies in the Labour theory, where if a person has put in the work, then they are entitled to the fruits of that work as well. IPR thrives to protect the work of an individual's intellect. Publicity right protects one's features. To develop those features, an individual puts in lots of hard work. Everyone works to make themselves apart from others and to do so, they work hard on the development of their personality. This justifies that the publicity right is a part of IPR.

Where in IPR can publicity right find the protection, because there is no specific law for its protection? The protection can be sought in the form of Copyright and Trademark. In copyright, a person's image and through performance right the protection was sought, but the image rights lie with the author not with the person whose image has been captured, so this proved to be insignificant. Through the Performer's right, the performance of the person can be protected, but only first, if they fit in the definition of the performer and secondly if the work violated fits with the degree of violation

⁴⁸³ IPR stands for Intellectual Property Rights.

laid down through the CR Act. Both the things prove to be insignificant in lots of cases, leaving many loopholes to be taken advantage of. Therefore CR fails to protect the right properly.

Then comes the Trademark law. The name and likeness to an extent can be protected, but only if they are graphically represented and that they form a part of goods and services and further if they can be registered in the mentioned 45 classes. The lacuna here is that not always a person's name is associated with any goods and services, and also the names cannot be distinctive in nature all the time. If a name does not have any distinctive quality, then it cannot get registered, until and unless they have gained some secondary meaning, but for that to happen, it takes a lot of time, which everyone does not have. This becomes the major lacuna here. Further, anyone cannot possibly get registered in all the 45 classes simultaneously, this forms another lacuna. Even if by some miracle a person can register in all the 45 classes, if they do not utilize their trademark in those classes, within 5 years then that trademark ceases to exist or is automatically removed from the trademark registry. Hence the IPR becomes insufficient in providing sufficient protection to publicity right.

2. Passing off: passing off comes into the action of first, there is a violation to the goodwill, second, if there is misrepresentation and lastly and most importantly the violation is in the form of some goods and services. With publicity right, there is a violation of goodwill established, there is a misrepresentation without the permission. So the two main elements of passing off get fulfilled here, but the last element that it should be in regards to goods and services or trade-in short possess a question. It is because the violation of publicity right is not always in the lines of trade and commerce. So the situations where there is a violation through trade can be solved through passing off, but in the situations where there is no trade and commerce involved, the passing off is not able to protect the right justifiable.
3. Defamation: Defamation is general protection, anyone can try to find protection through defamation. The defamation can be basic or cyber i.e.

online defamation. There are as studied in the above chapters, but what happens in the situation where the elements of defamation are not provided. Not only this, the question, even if defamation is able to provide justified protection, does that exempt the administrative to do their work and not make a law on the subject matter. If such was the case, then why was there a need felt to make separate laws on the subject matter of property. The basic property was able to provide protection justifiable at that, but still, a need was felt to make another section in the form of IPR and to further construct a separate statute on that as well. The need was felt to make separate sexual harassment legislation dealing with children, even when there were justifiable provisions within the IPC. There are many such examples, not just these.

4. Cyber Law (Information technology Act): The provision of online defamation and wrong use of an image whether independently or through memes, if they are represented wrongly, then such violations can be protected through the cyber law. These can be protected in online mode only, even then if the violations are justified within the information technology act only then can the protection can be sought.
5. The Emblems and Names (Prevention of Improper Use) Act 1950: The Act renders protection to national significance dignitaries and institutions, from the unauthorized use of their names, without governmental permission, for commercial purposes. This law is limited to significant dignitaries and institutions only. This does not extend to the general citizens.

These are some of the Acts through which publicity right can seek protection, but the protection provided through these Acts are full of lacunas. To remove such lacunas, there is a need to understand what the other countries are doing to deal with the matter of publicity right. The most prominent countries are USA and UK. The USA has construed state legislation for the protection of publicity right. These states according to their understanding have made legislations for publicity right. There are almost 29 states which have construed laws on the subject matter, but there is no federal law. So if the matter has to be taken at the

federal level, then they take the help of Trademark or Copyright, Unfair trade practices help. The USA has made steps for the construction of federal legislation on the subject matter of publicity right to bring uniformity in the laws as well as to recognize the right at the federal level.

In the UK like in India, there is no legislation for the protection of the publicity right. They protect the right through the existing laws like India. They take the help of trademark, copyright, contractual breach, unfair trade practices, and defamation, to protect their right within their country. They are not satisfied with the level of protection. The publicity right protection in the UK like in India is not justified. Hence the need to construe a law for the protection of the right is necessary. Without a proper law in place, the protection cannot be justified.

To construe a law, the applicability has to be examined. The application of the law should not be limited to celebrities only, it should be extended to the general citizens. To justify this point, the research has undertaken empirical research. The researcher has constructed a questionnaire for this purpose. Data has been collect from 300 respondents across India, through the use of snowball sampling. The respondents selected were well educated and varied from 17 to 70 age group. The aim behind choosing accomplished and millennial, Gen X, Boomer generation respondents is that they are more vigilant towards their rights. They are more technologically savvy and know how to function an android phone, email, etc. The respondent through the questionnaire aims at identifying the level of awareness the general public has in regards to publicity right. Also to understand if any such incident of infringement has even taken place either with them or among their known persons. What were the steps taken by them in case of infringement? The findings are:

Quantitative data:

1. The 300 respondents comprised of both genders.
2. They were from accomplished backgrounds. Some had completed their intermediate, some were graduate, post-graduate, MBA, MMBS, CA, CS, MCA, Engineers from different fields, Masters of education, Bachelor of

Hotel Management, BA, BBA, M.Sc, B.Sc, M.Tech, B.Tech, B.Com, Law, etc.

3. 35% were looped with the recent cases dealing with publicity rights.
4. 84% of respondents every independent feature of a personality combined forms the basic element of publicity right.
5. 77% understood that if any indicia of personality has been utilized for commercial purposes, with the consent of the individual, then it amounts to the infringement of publicity right.
6. 43% were aware of the publicity right and 23% knew the concept of publicity rights.
7. 86% believed that the publicity right is applicable to celebrities as well as the general public.
8. 54% of respondents pinioned that there should be both criminal and civil liability imposed for the violation of publicity right.

Qualitative data:

1. 16% of respondents have experienced some form of infringement of their or their known person's publicity right.
2. Out of the 16%, 8% were ready to disclose the form of infringement experienced by them.
 - a. The other 8% responded that the incident was to person and therefore, did not wish to disclose the information, or they just did not want to share the occurrence.
 - b. The 8% who did disclose their experiences, retorted:
 - i. Someone had cleared the UPSC exam, and their image was used by various coaching centres, without proper authorization.
 - ii. Someone's image was utilized in an advertisement.
 - iii. Someone's image was used for gaining some form of commercial benefit.
 - iv. Few people's signatures had been copied for accessing financial gains.
 - v. A person's relative was a police officer, his personality had been utilized for commercial benefits.

- vi. Few people's Facebook, Twitter, and Instagram accounts were hacked, and the accounts were further used for gaining financial benefits.

3. When inquired about the preventive measures taken by them, 12% responded positively, and disclosed some of the steps engaged by them:

- i. Either to compromise or to ignore that person who had done such a violation.
- ii. To give such a person a warning, to send legal notice to the person.
- iii. Most went for filing a complaint on the online cyber complaint.
- iv. Some filed an FIR against such an incident.
- v. Some stopped sharing their photos on online forums.
- vi. To make sure use setting of the private profile, for some extent of protection.
- vii. Choose wisely whom to befriend on online forums.

4. Lastly some suggestions were taken from the respondents, 44% replied that:

- i. Almost 20 responses were in the favour of developing strong legislation, making the publicity right enforceable, and to provide with harsh punishment to the ones who have violated one's publicity right.
- ii. Apart from that, the next most recurring response was to make the law more public, so that there is more awareness in regards to this particular law. As this is still in its starting phase, not many people are aware in regards to their rights. So steps should be taken to spread more awareness in this field.
- iii. Whenever going for the use of one's personality, or any indicia of personality, always consent should first be taken from the person.
- iv. It is considered to be a branch of Intellectual Property Right and Defamation, therefore such rights should be amended in such a manner to provide sufficient protection to the publicity right.
- v. The publicity right can be protected through Constitution, especially through Article 21 of the Constitution of India.
- vi. Courts play an important role here in the positive interpretation of the publicity right. The courts can step in and help for the time it takes the

legislative to reach a point where they can form proper legislation on publicity right.

- vii. Media plays an important role in today's world. Just to increase their TRP they are willing to violate a person's personal life and use it for their advantage. This should be stopped, as it brings adverse effects on the person involved in the news.
- viii. The publicity right is different from the right to privacy, hence it should be treated as an independent right and not considered as a part of the right to privacy.
- ix. Other jurisdictions can also be analysed and studied to understand how they are protecting the publicity right.
- x. The right should be equal for the celebrities as well as the normal citizens.
- xi. Through the questionnaire, many came to know their respective rights in the light of publicity rights.

From the data collected and analysed from the questionnaire, it can be concluded that:

1. The Publicity right is applicable to the general public as well as the celebrities, hence rejecting the first hypotheses, which stated that: "Publicity right is applicable to the celebrities only, the protection of the right does not extent towards the general public."
2. The general public is not that well aware with respect to the publicity right, hence rejecting the second hypothesis as well, which is "General Public is well aware of the Publicity Right."

➤ **Suggestions:**

The following are some suggestions based on the conclusion:

➤ **Social Action:**

1. More awareness should be spread on the subject matter, with the help of media, seminars, conferences.

2. Awareness campaign can start at the local level as well. It is not compulsory to start the awareness at the international level itself.
3. The information can also be spread in the form of pamphlets. Specific pamphlets can be made on the subject matter and then can be pasted and distributed on various platforms. The World has a global reach, the same should be utilized.
4. Radio shows should introduce a topic discussing various laws relating to people. One of the topic can be on publicity right.
5. Questionnaire like the one introduced by the researcher has helped in spreading information. More steps in this form should be taken for spreading information on the concept of publicity right.

➤ **Legal Action:**

❖ **Constitution of India:**

6. Publicity Right and Art. 19 (1) (a) "freedom of speech and expression", overlap each other in more than one way. When there is a right of one, then it becomes the duty of another and vice-a-versa. To overcome such overlapping between these two prominent rights, the Indian judiciary can play an active role and develop some doctrines, so that both the rights can coexist peacefully in India. The examples can be taken from the USA judiciary. They have developed some doctrines such as the Rogers test, Brightline test, etc.
7. A step forward was taken toward the recognition of privacy rights. Under that jurisdiction, the publicity right was recognized as a part and parcel of the privacy rights, though only done by one of the judges. A step further can be taken, where the publicity right is also recognized as an independent right. It can also be directed under Art. 21 of the COI. The reason is that both the rights are different from each other. Where the privacy right aims at protecting the emotional right of others, the publicity right aims at protecting the economic rights of individuals. Hence, they are very separate rights.
8. There have been attempts made the protection the publicity right through the existing laws. There are many loopholes in such laws. To overcome such loopholes, the laws can be amended to accommodate the publicity right.

❖ Copyright Act:

9. The Copyright Act can be amended:
 - a. Sec. 38 protecting the performer's right (one of the related rights) can be amended. In another section, 38C can be introduced, and the concept of publicity right can be incorporated in that section, with the proper definition. Further Section 38A and 38B can be modified to include the infringement of publicity right, within their ambit.
 - b. The Copyright Act, the section covering the concept of the author can be modified, to include shared ownership over the photographs and drawings. This will remove the loophole of transferring the copyright to the person, whose photo has been captured.

❖ Trademark Act:

10. The Trademark Act, need to be amended:
 - a. The trademark governs the registration of names and signatures, the registration procedure can be loosened, where the requirement of distinctiveness can be removed from the registration of names. This will help people to get their names registered easily.
 - b. Another class should be introduced, under the 45 existing classes for the registration of goods and services, to accommodate the registration of the publicity right.
 - c. For the registration of the trademark, the requirement of graphical representation can be relaxed, this will help in the registration of one's likeness, dialogue delivery and distinctive body movements, and voice registration. This way trademark will be able to protect more elements of the publicity right.

❖ Information Technology Act:

11. The Information Technology Act should be amended to incorporate the violation of publicity right on the online medium. The punishment and governance should be made strict, in case of violation of publicity right. The

sections should be introduced for the protection of the use of images on the online forum without one's permission.

❖ Defamation and other Act:

12. Defamation and passing off provisions will always be in addition, as is the case with other existing laws, for the protection of publicity right in India.

➤ **United Nation Organization Action:**

13. A convention or agreement should be introduced at the international forums, like the United Nations of Organizations. This will help in regulating the publicity right all over the world. All the countries should make laws under the convention or agreement. This will also help in getting a combined registration for publicity rights as is the case with patents and trademarks.
14. A proper definition of publicity right should be introduced, it will help in regulating the protection of publicity right in the countries.
15. A provision should be made mandatory: if and when a person can prove that they have some commercial value attached to their personality, only then they should be able to get themselves registered for the protection of publicity right.
16. Registration offices can be introduced in addition to the trademark, copyright, and patents. Even the provision for registration of publicity right should be made available online mode. They should keep books and provide a certificate for the registration of the publicity right.
17. There should be a proper registration procedure defined for the registration of publicity right as is the case with trademarks and patents. The process can be application-publication-objection-registration-certification.
18. Proper punishment and fine should be imposed for the infringement of publicity right, in the existing laws.

In the opinion of the researcher, apart from making so many amendments to the existing laws, separate legislation can be introduced for the protection of publicity right. Legislation has been proposed by the researcher in appendix I.

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42. *Midler v. Ford Motor Co.* ”, 849 F.2d 460 (9th Cir. 1989).
43. *Mirage Studios v. Counter-feat Clothing Co.*” 1991 F.S.R. 145 (Ch.) (Eng.).
44. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974).
45. *Montana v. San Jose Mercury News Inc.* 34 CalApp4th 790, 35 USPQ2d 1783.
46. *Mr. Arun Jaitley vs. Network Solutions Private Limited and Ors.*,CS(OS) 1745/2009.
47. *National Medical Ltd. v Jooste*, 273 (1996).
48. *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 693-94 (9th Cir. 1998).
49. *Palmer v. Schonhorn*, 96 N.J. Super. 72, 232 A.2d 458 (Super. Ct. 1967).
50. *Pavesich v. New England Life Insurance Co.*”, 122 Ga 190; 50 SE 68 (1905).
51. *Pepsi Co. Inc. vs Hindustan Coca Cola Ltd.* 2003 (27) PTC 305 Del.
52. *Pesina v. Midway Mfg. Co.* ”, 948 F Supp 40 (ND III 1996).
53. *Phoolan Devi vs. Shekhar Kapoor & Others*,” 57 (1995) DLT 154.
54. *Rajat Sharma & Anr v Ashok Venkatramani & Anr*, CS (COMM) 15/2019.
55. *Re: Elvis Presley Trademarks, Inc, the court*, [1997]. R.P.D.T.M.C. 543 (Ch.) (Eng.).
56. *Reckitt & Colman of India Ltd. vs. M.P. Ramchandran*, 1999 P.T.C.

57. *Ritu Primalani v State of Karnataka*”, Karnataka High Court, 16th October 2015.
58. *Robertson v Rochestor Folding Box*”, (1902) 171 N.Y 538; 64 N.E 442; N.Y. LEXIS 881.
59. *R Rajagopal v State of Tamil Nadu*”, 1995 AIR 264, 1994 SCC (6) 632.
60. *Shaw Family Archives Ltd v CMG Worldwide, Inc*”, 486 F Supp 2d 309 (SDNY 2007).
61. *Shivaji Rao Gaikwad v Varsha Productions*”, 2015 (62) PTC 351 (Madras).
62. *Sourav Ganguly v. Tata Tea Ltd.*”, Calcutta High Court CS No. 361 of 1997.
63. *Tata Sons Limited & Anr v Aniket Singh*”, CS (OS) 2662, Delhi High Court, decided 26 April 2012.
64. *Tata Press vs. M.T.N.L.*, (1995) 5 SCC 139.
65. *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d. 753, 755.
66. *Titan Industries Limited v. M/s Ramkumar Jewellers*”, 2012 (50) PTC 486 (Del).
67. *Tin Pan Apple, Inc. Vs. Miller Brewing Co.*, 737 F. Supp. 826, 837 (S.D.N.Y. 1990).
68. *Tolley v. J.S. Fry & Sons Ltd.*, AC 333 (1931).
69. *Vanna White vs. Samsung Electronics America*, et al., 971 F.2d 1395 (9th Cir. 1992).
70. *Waits v. Fritolay, Inc.*, 978 F.2d 1093, 1098-1101 (9th Cir. 1992).
71. *Weston Electronics Ltd. vs. M/s Rajesh and Co.*, AIR 1995, DEL 13 at 15, 16, 17.

APPENDIX I- PROPOSED LEGISLATION

Title of the legislation: Publicity Right Act.

1. **International level:** The right of publicity is not protected at international level within any of the treaties, conventions, protocols, etc. The right of publicity can be introduced within the Rome Convention which is for the protection of the performer's rights, phonograms producers and broadcasting rights, (called as the related rights or the neighbouring rights), and the introduction can also be done in the TRIPS Article 14 copyright and related rights. The International protection will ensure a parity in the protection of publicity rights across the globe. The international protection so advocated either in the Rome Convention or TRIPS agreement will provide a common framework for the protection and safeguard of the interest of public figures.
2. **Definition:** An inclusive definition of the right of publicity in consonance with the copyright and trademark law to be introduced. It should include the use of one's name, signature, voice, image, likeness, mannerism, gestures or distinctive appearance as facets and characters an element of the right of publicity. The inclusion of style and other features of persona can be incorporated into this definition. The Court should be given the discretion to determine whether a particular feature can be attributed to the right of publicity. This discretion is needed owing to changing technological advancement. The legislatures can take into consideration the definition of the right of publicity from some of the states of USA enacted Acts particularly Indiana right of publicity Act, California Celebrities Right Act, Hawaii, etc. Indian being a developing country need to make people aware about the publicity rights. This awareness will add new dynamics into the concept of publicity rights. Though reference can be made to US state — legislation for determining the essentials of the right of publicity, but same cannot be borrowed as it is. It needs to be taken into note that copyright and trademark laws of the USA are centuries old and they have vast jurisprudence and doctrine's to protect the right of publicity of an individual.

3. **To whom publicity right can be attributed:** the right to publicity is closely nexused with the law of copyright and trademark law, therefore the determination of real claimant of this right is crucial to be determined. It is suggested that the claimant need to meet with the essential qualification for the right of publicity. Hence, celebrity or an individual, ordinary person, not being a firm, corporation, i.e. a natural person is entitled to claim this right. The persons who have gained popularity due to a criminal activity shall not be entitled to avail this the protection.
4. **Qualification for the right of publicity:** If the persons are able to prove that they have any commercial value attached to their persona, only then shall they be entitled to this right (In USA some states have not made commercial value to be an entitled for this right). It is suggested that Indian government need to adhere the commercial value factor owing to cultural diversity and traditional enrichment of the country.
5. **Test to determine claim of publicity right:** The proposed legislation should restrict the qualification of the right of publicity with the following factor namely: i. They have a persona, ii. Such persona has commercial value, iii. There is a need to protect that persona, iv. The right cannot be protected either under the trademark law and copyright law, and v. There was an injury to the individual due to such unauthorized use.
6. **Registration:** The legislature should make registration of the right of publicity mandatory. The non-registration will create deception, confusion and dilute the interest of real right holder. Only those who have registered right of publicity can claim damages, and be eligible to file suit for infringement.
7. **Registration office:** The registrar of trademark and patent can be made the registrar for the registration for the purpose of the right of publicity. It is desirable to have a commonly assessable repository of right of publicity where all claimants are registered with full description of the subject matter which they have sought to be protected under the right of publicity. This

repository needs to be linked with trademark and copyright search portfolios so an individual can determine the real status of protection, either as a trademark or copyright or right to publicity or all or any of them.

- 8. Nature of the right:** The right of publicity shall be an exclusive right, i.e. the person who has got themselves registered shall have complete control over the exploitation of such right. Therefore, they have economic as well as moral rights relating to their right of publicity.
- 9. Registration process:** The registration can be the same as that of the trademark, copyright or design. A necessary infrastructure preferably online need to be created. Moreover, the international protection for the right of publicity should be framed in the line of the Madrid agreement, Patent Corporation Treaty, Hague agreement, etc.
- 10. Books of register:** The registrar shall be responsible to maintain a book of records, where the description of all nature pertaining to the registered right of publicity holders shall be recorded. This register will be a public document which can be inspected by anyone by making necessary payments. The electronic copy of the register is also required to be maintained.
- 11. Publication in the official gazette:** If the registration is approved then the same shall be made known to the public by way of publication in the official gazetted.
- 12. Objection:** Any person interested will have a right to raise objection over the registration of any personality once published in the official gazette within a reasonable period of 6 months from the date of publication.
- 13. Certificate of registration:** After the completion of the process of registration, then the registrar will record the name in the register of publicity rights and provide the individual with a certification of registration.

- 14. The term of protection:** Right to publicity is a persona based right which is attributed to an individual having commercial value. Therefore, the minimum protection shall be for the lifetime of the proprietor.
- 15. Society of publicity right holders:** The society can play a very important role in the collective management of publicity rights which serves the interest of not only of the publicity right holder but also the user of works and public at large. The adequate general provisions for the registration and management of such society in the interest of right holder should be incorporated in the legislation. This society will facilitate the interest of publicity right holder as well as interested parties in that right who may not conveniently be able to obtain a licence from the individual right of publicity holders. This form of society, therefore, will help in enforcing copyright with the benefits both of the right holder and general public.
- 16. Postmortem right:** The postmortem right means the right over one's right of publicity even after death. This is feasible, as even after death, the commercial value of an individual does not end, e.g. Elvis Presley, Marlin Moaner, Michael Jackson, etc. Indian legislature can take reference of protection of the right of publicity in Texas. The postmortem right in Texas for the right of publicity is for 10 years after the death and extended until there is a commercial value attached with the personality.
- 17. Postmortem succession of right of publicity:** The right of publicity can devolve upon the legal heirs of the individual, it can be the sons, daughters, granddaughters, grandsons, brother, sisters, parents, legal representative, or the person who is entitled to this right by the individual before the death, by way of assignment or transferability or by testamentary. If there is no claimant after the death of an individual for the right of publicity, then the publicity right shall stand terminated.
- 18. Transferability and Assignability:** The right of publicity can be transferred and assigned.

- 19. Process of Transferability and Assignability:** The transferability and assignment can be done only through a proper contract or agreement. Such transfer and assignment has to be communicated to the registrar, the registrar has to give a certificate for the same and make a record of it.
- 20. Dispute:** If any dispute in relation to the use of the right of publicity of a registered person arises, then the same shall first be brought before the registrar of the right of publicity (the same way when the disputes in patent, trademark, etc. are dealt with).
- 21. Appeal:** The appeal against the order of the registrar shall be brought before the IPAB established under the Trademark Act of 1999. The further appeal shall lie against the order of APAB before High Court and Supreme Court. The Procedure shall be followed as laid down in the Civil Procedure Code, 1908.
- 22. Infringement:** The infringement of the right of publicity shall arise when there is an unauthorized use of the elements of persona by anyone, whether it be for commercial use or not (only the use of any of the feature of persona without proper consent or remuneration shall be liable to bring the suit against the right of publicity).
- 23. Remedies:** The remedies available to the registered person shall be civil remedies and criminal remedies. Under the civil remedies, claim for compensation, an account of profit, damages, costs, an injunction can be claimed. The Criminal remedies won't be available for each and every case, the criminal remedy shall be applicable only in case the injury is greater, which shall be decided by the courts from case to case bases.
- 24. Test for determining the right of publicity:** If an individual is able to prove before the court that they i. They have a persona, ii. Such persona has commercial value, iii. There is a use of that persona without the consent, iv. There was no proper compensation for the use and v. There was an injury to

the individual due to such unauthorized use. On fulfilment of the above-said conditions, the court can conclude the existence of the right of publicity.

25. Harmonization of the Acts: There has to be a balance with the right of publicity enactment and other laws, such as the copyright and trademark, freedom of speech and expression, so that these rights won't overlap with each other in future and cause confusion. The relation between the copyright Act and right of publicity is formed with the help of performer's rights protected under section 38 of the Act of 1957. The rights have to be harmonized in such a manner to avoid any kind of overlapping between the two rights.

APPENDIX II- QUESTIONNAIRE

Section I: Demographic Details

Q1. Name:_____

Q2. Age: _____

Q3. Gender:

- a. Male b. Female c. Transgender d. Prefer not to say

Q4. Educational Background:_____

Section II: Publicity Right

Q5. Recent case involving Rajat Sharma vs. Zee Tv. The Zee Tv news channel had advertised that:- here onwards the requirement for Rajat Sharma shall not be there, as they will be promoting an anchorless channel. Were you familiar with this?

- a. Yes b. No c. Maybe

Q6. Salman Khan's hit and run case had recently been incorporated into a game, which was released on various platforms. The game included a likeness to Salman Khan's name and personality, which violated Salman Khan's publicity right. Were you familiar with this?

- a. Yes b. No c. Maybe

Q7. “Main Hoon Rajnikanth” movie was under release. The movie had incorporated the unique style of dialogue delivery and likeness of Rajnikanth. Rajnikanth’s Publicity Right got violated. Where you familiar with this?

- a. Yes b. No c. Maybe

Q 8. What forms the essence of publicity right?

- a. Name b. signature c. Voice d. Manner of speaking e. All the above

Q9. When can the Publicity Right be violated?

- a. Any indicia of personality has been utilised for commercial gain.
- b. Any indicia of personality has been utilised for non-commercial gain.
- c. Other

Section III: Basic

Q 10. Were you aware of the right "publicity right"?

- a. Yes
- b. No
- c. Maybe
- d. Knew the concept

Q 11. According to your understanding, the Publicity right is relevant for?

- a. Celebrities'
- b. Individuals
- c. Both a & b

Q 12. Whether any such incident has occurred to you, where your personality has been used without your consent?

- a. Yes
- b. No

Q 13. Whether any such incident has occurred with your known ones, where their personality has been used without their consent?

- a. Yes
- b. No

Q 14. If yes? Can you elaborate the incident?

Q 15. What steps were taken by you to prevent such misuse?

Q16. In case of an accident like this, what is the appropriate remedy available for the victim?

- a. Filing a complaint
- b. Approaching Court
- c. Both the options can be accessed simultaneously

a. Civil b. Criminal c. Both a & b

List of Conferences:

1. Organized by Amity University, Amity law school, Noida on “International Conference on Comparative Law”. Paper presented on the topic “Publicity Right: Comparative study between USA and India” held on February, 19th & 20th 2021.
2. Organized by Legge Rhythms Media & Publications on “Theme 2 – Cyber Law & Security & Intellectual Property Rights international Virtual Conference”. Paper Presented on the topic “Publicity right Relationship with copyright – A comparative study” held on 22nd and 23rd August 2020.

List of Publication:

1. Paper publication on the topic “Publicity Right and Right to Privacy an Indian Perspective”, in Journal Of Hunan University Natural Sciences, (Multidisciplinary).