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The Legal and Judicial Framework of Publicity Rights and IPR

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As the name suggests “Intellectual Property rights, are the rights that cover the ownership over the intellectual part or simply the mental capability of creating something new having different utility. The introduction of IPR came with the aspect of protection and safeguarding such rights. It is a vast growing concept with the evolution of unique ideas or technologies. Though this concept highlighted main laws including Copyright, Trademark, and Patent over time, they got legal entitlement. Lately, other concepts like geographical indication, industrial designs, integrated circuits, etc. They gained legality from the constitutional validity of Article 246 which allows the parliament to implement international laws in the Indian context. In this article, the emergence of publicity rights is explored from the viewpoint of Constitutional validity, Statutes of Intellectual Property rights along with judicial interpretations. Nowadays, the creation of content on various social media platforms has become part of our lives, so their intellectual rights are subject to be considered as publicity rights or not. The efforts to entertain the public may be taken up as a performer who is acting on digital platforms. Therefore, this article links IPR rights with Publicity rights and their legal aspects shortly.

Keywords: *publicity rights, intellectual property, constitutional relevance, legal aspect, privacy, violation.*

BACKGROUND/ORIGIN

In India, the term “Publicity rights” was first taken up by the **High Court of Madras** in the controversial Case *Mr Shivaji Rao Gaikwad v M/S. Varsha Productions, 2015*¹ of well-known **film actor Rajnikant**. The movie named “Main Hoon Rajnikanth” was on the subject of interim injunction on the claim that it may distort the reputation of the actor and will be considered as an undue use of his name by putting a random title of the movie without any authorization for extracting and using his image, name, way of delivering dialogues. The honourable court has issued an injunction order concerning the release of that movie. Publicity rights have been defined under this case, which is also considered a part of celebrity rights. The court further explained the term “Celebrity” which can be defined as a well-known or famous individual. When people want to know about and talk about a particular individual, he or she gets recognition and will be called a Celebrity. Here, Celebrity Rights were defined as “the rights of certain individuals to restrict other persons from using their related particulars including but not limited to their photograph or image, name, physical similarity for commercial purposes without obtaining prior approval.” Thus, the meaning of publicity rights is considered any right which is attained by the name after being recognized by the public. Though these rights are not special but incomplete without privacy and personality rights.

THE EMERGENCE OF PUBLICITY RIGHTS FROM IP

Intellectual rights provided under the **Trademark Act, 1999**² cover the part of Publicity rights in association with the definition of “Marks”. Under **Section 2(1)(i)(V)(m)** of the Act, the term “mark” includes brand, label, signature, name, letters, word, or any combination of the same. Generally, Celebrities opt to take advantage of pre-emptive rights concerning their name, so that any misuse of their name can be avoided in the future. Further, signatures are also considered by a few of the celebrities to get protected under a secured trademark.³

¹ *Mr. Shivaji Rao Gaikwad v M/S. Varsha Productions* (2015) (62) PTC 351 (Mad)

² TradeMarks Act 1999, s 2(1)(i)(V)(m)

³ Harshada Wadkar, ‘Publicity Rights And Its Scope In Intellectual Property Laws’ (*Mondaq*, 19 March 2020)

<<https://www.mondaq.com/india/trademark/905188/publicity-rights-and-its-scope-in-intellectual-property-laws>> accessed 16 November 2022

Two rights can be attained by them, in case of getting a registered trademark for their name and signature. Primarily, the assignment or licensing rights have been authorized for the merchandising and promotion purpose of goods and services on behalf of the celebrity figure. Secondly, the obtained rights can be protected from the prospect of unauthorized access or use. The significance of the registration brought the aspect of the prior approval to any use whether of registered name or signature. In case of the procedure of registration requires an application to the registrar with the consent form from the person having individual rights or its legal representative. Therefore, this act simply concludes that the part of IPR focuses on the prevention part of the trademark.

Similarly, the **Copyright Act, of 1957** plays a significant role in protecting the publicity rights of any performer. As per provision of **Section 2(qq)**⁴ of the Act, “Performer” includes a singer, actor, dancer, musician, or any other person who is involved in a similar kind of delivering a lecture or making a performance. Though **Section 38**⁵ of the act states the rights provided to the performer including utilizing, broadcasting, converting, or assignment rights for a particular period which is 50 years, beginning from the following year of the year of performance. Thus, it simply the use of the same performance requires their prior consent, if it is for the commercial purpose, though general use which will not eventually harm or distort the same in any way. Thus, it can be enjoyed by an audience or used for recreation purposes.

On the other side, **Section 57**⁶ of the Act states the special rights for the work done by the author that covers the aspect to claim the authorship even after partial or whole as assigned for the publication or further presentation in audio or visual ways. The author can claim damages or a restraint order in case of any distortion or mutilation of the assigned work, in case of fulfilment of the infringement criteria. But it cannot be provided on the ground that the presentation doesn't provide satisfaction to the author.

⁴ Copyright Act 1957, s 2(qq)

⁵ Copyright Act 1957, s 38

⁶ Copyright Act 1957, s 2(qq)

In simple words, it is the situation when a performer or author got fame, their identities become subject to put an impact on the public, considered as a holder of publicity rights, subject to the provisions of the law, related thereto. For marketing purposes, some organizations choose a cheaper way to use the name of a well-known artist or performer, without consent to enhance their sales. Therefore, this act works as a bridge that allows certain rights including assignment and restriction in respect of utilization criteria of their name, photo, signature, or any related way of identifying them.

Hence, the Relevancy role of the major acts namely Copyright and Trademark are directly or indirectly associated with the publicity rights of the celebrities. The separate clause for such rights is not taken up as a separate kind of law under a specific act yet. But in this era of technology where a major part of the young generation is working to gain a unique identity for themselves or themselves over the various social media platform, will require more such protection.

CONSTITUTIONAL VALIDITY

As India does not have any particular statute relating to the right of publicity, therefore, the legal sources for the right of publicity are linked to the right to privacy which is an inherent right guaranteed under **Article 21** of the Constitution of India.⁷The right may be enforced via a writ issued by the court to oppose the incursion of government in an individual citizen's life. But the right to privacy can be enforced mainly against the government or state and is difficult to enforce against an individual.

Landmark Case: *R. Rajagopal v State of Tamil Nadu*⁸

It was the first instance where the Supreme Court of India explained the concept of the "Right to privacy" as a part of the "Right to Life & Liberty" guaranteed to all the citizens by Article 21 of the Indian Constitution. It even comprises the "Right to be let alone" as well. It was further added that every citizen shall have a bundle of rights under this article to protect his privacy

⁷ Constitution of India 1950, art. 21

⁸ *R. Rajagopal v State of T.N* (1994) SCC (6) 632

along with his or her family and other matters concerning motherhood, procreation, marriage, education, childbearing et cetera. Any information whether truthful or not, whether having a positive or negative impact shall be subject to prior approval of the concerned person before finalizing or publishing the same. In case any publisher or any other person who used such private information without consent would be taken as a violation of the right and the damages will be imposed on such person. Though the only case where a celebrity or any other related person has voluntarily tried to raise or create a fuss about his or her privacy rights will be considered a different situation.

The Madras High Court had described the tort of publicity by using the above passage of the Supreme Court. It exclusively stated that the right to publicity has been evolving out of the Right to Privacy. If we rely on the above paragraph, it depicts that a celebrity may find greater difficulty in taking action for damages by referring to the tortious right engraved in privacy. If the right to publicity is conferred only to celebrities even though it is engraved in privacy, then as per our jurisprudence, the celebrity does not have a right based on a privacy right because the tort has become ineffectual. The Indian Courts should have read the right to publicity with the right to property instead of the right to privacy so that they don't face above stated difficulty.

Under our constitution scheme, Article 19(1)(a)⁹ of the Constitution of India, 1950 which guaranteed the freedom of speech and expression has the foremost significance, as emphasized by the apex court of India. The Supreme Court has always underlined that permitting the decision of a public figure is of great significance, particularly when the public figure is linked to the political class. Supreme Court has many times stressed that public figures need to have thick skin for public criticism because it is important for the working of democratic institutions. In this view, it has become more important that the defence of the right to publicity must be confined, if the right has been left unrestricted, then it could create a hindrance to every free speech which is the right of the citizen.

⁹ Constitution of India 1950, art. 19(1)(a)

Contrary to the above, the tort of publicity cannot be superior to the right to freedom of speech guaranteed by Article 19(1)(a)¹⁰ of the Indian Constitution. If a celebrity tries to take action under the publicity right to prohibit a biography being written or movie being directed or a play being enacted that is based on material on a public figure which is publicly available, would be opposed by the right to freedom of speech guaranteed by the Article 19(1)(a) of the Indian Constitution. Thus, Article 19(1)(a) of the Indian Constitution is the new benchmark in developing a strong defence point to the action taken under the tort of publicity. Thus, it can be stated that the “Right to Privacy” has not merely been a right but got further recognition through various amendments & judgments.

JUDICIAL RELEVANCE OF PUBLICITY RIGHTS

As the Indian context of laws revolves around two major things, the former is the statute part of the law that consists of Acts and related rules and the latter is judicial precedents. Similarly, in this case, the IPR-related acts cover the basic structure of enforcement while the judicial system has the responsibility to interpret the crux of the legal part. Several judicial interpretations have been grounded regarding publicity rights in various cases.

Case: *Titan Industries Ltd. v Messers Ramkumar Jewellers*¹¹

It is a landmark case, where the High Court of Delhi has provided general guidelines while considering cases related to publicity rights. In this case, the famous Actor namely Amitabh Bachchan, and his wife, Jaya Bachchan were being targeted by the marketers. Their photographs have been taken up to publication without their prior approval. The High Court of Delhi observed the situation and stated that the locus of the case should not only be revolved around the fact of the unauthorized access or use of the name of a well-known celebrity to earn monetary benefits but it should be focused on the solutions to control the situation primarily. Hence, the right to entertain the monetary from their personality or their image should be limited to themselves only. The right to publicity is nothing but the right to control the commercialized

¹⁰ *Ibid*

¹¹ *Titan Industries Ltd. v M/S Ramkumar Jewellers* (2012) (50) PTC 486 (Del)

use of the identity of the celebrity. Thus, the right to control the commercial use of human identity is the right to publicity.

Though in this case, the court has taken an observation from the Case of *Haelan Laboratories v Topps Chewing Gum*¹². The court stated that the right of publicity is the right, which gives access to an individual to value or publish his picture, it should be termed as an exclusive privilege. Such privilege must only be granted by the person, who has earned it and should not be available for just business purposes or any other commercial purpose, without his consent. The court has tried to point out the feelings of such prominent individuals or celebrities who get popularity through their excellence in a particular field like sports, acting, singing et cetera. Their feelings have been neglected by using their pictures over buses, walls of subways, magazines, newspapers, trains, and other displays, without their consent, with the mere purpose to advertise, sell and monetize their products. Without giving due consideration to the celebrity, he or she would feel deprived of the monetary benefit, that they can have. This right of publicity would continue to restrain them from monetary benefit till it is not made to subject an exclusive grant which would prohibit any other advertiser from using their picture.

Thus, Affixing or putting a celebrity image on any product without their consent would create an assumption in the public mind that there is a direct association of the celebrity with the production company and the celebrity is willingly promoting the product, which may result in a negative impact on their public image. Some basic elements suggested whether the violation of the right to publicity arises or not, based on which the liability can be determined. Therefore, these elements have been enlisted by the court in this case.

Validity: This element ensures the aspect of right enforceability by the plaintiff or not by considering its identity or persona. Simply it requires a valid reason to consider the nature of use.

Identifiability: The direct connection or pattern can be easily identified that the defendant is using the image of the celebrity in any way to get benefitted out of that. Though the violation of

¹² *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc* 202 f.2d 866 (2d Cir. 1953)

such right is not always recognized or pointed out on the facts of deceptive nature, vagueness, or false information, in the case where the celebrity can be easily identifiable. The conventional way to limit false or misleading advertising laws can be a move forward with the right to publicity.

Case: *Mr. Gautam Gambhir v D.A.P & Co. & Another*

It is one of the most recent cases in which the court provides clarity of publicity rights that can have a restraint. The court stated that the question on conflict was not related to the approval or disapproval of the name or image of the celebrity/figure being the plaintiff, but in this case, the defendant has also the same name i.e., the famous cricketer, Gautam Gambhir. In the present case, the defendant is engaged in the restaurant business which has been named in “his” own name though he is entitled to do so. The legal provisions say that “No one is entitled to operate any business in such a way that represents the business of the other person or linked or connected in any way with another business.

The court dismissed the suit by concluding that a person carried any business bonafide or without any malafide intention in his name, whether it creates confusion with the celebrity’s name i.e., Gautam Gambhir. The cricketer Gautam Gambhir registered the logo of “HAWALAT Lounge & Bar” in the year 2016 in respect of Restaurant Services and there was no objection by the Trademark Registry. Both businesses have separate images even if it confuses them due to the name of the celebrity with the defendant’s name. Hence, the situation will remain the same alike before the suit or continuity of both businesses has been validated by this suit.

CONCLUSION

Even till the present scenario, publicity rights have not gained any significant position in India. As the work of an artist and performer protected by the copyright law or the innovative technique protected by the provisions of patent supports the part of the provided rights only. The regulation still needs a separate law so that the infringement of such rights can be prevented or penalized in case of undue violation. Also, the right to privacy has always remained in the question of facts even after the addition of vast concepts under Article 19 of the Indian

Constitution. It was a kind of individual right that provided incentive as well as security to the celebrity and restricted others to utilize them negatively. That's why publicity rights came into the picture with an extended version of rights.

The image created in public by their achievement whether good like film stars or bad like Vijay Mallay requires segregation as the former ones have achieved a certain name in the public by their hard work. The same image name should be subject to benefit whether in terms of commercial value. Therefore, defamation in any way of audio, visual, or written way should be disallowed and stringently penalized. Hence, it can be concluded that Publicity rights are nothing but works like a two-sided sword that deals with the rights of the individual seeking protection, and the other side deals with the restriction for the other from whom the protection is required in the present scenario.