

Personality Rights

**By Poorvi Chothani, Esq. and Vidhi Agarwal*

Introduction

A personality right is a bourgeois or colloquial term used in reference to a "Right of Publicity." The Right of Publicity can be defined simply as the right of an individual to command and control the use of his or her name, image, likeness or other unequivocal aspects of his or her distinctiveness. It is generally acknowledged as a property right and not as a personal right. This article examines the Right of Publicity (or analogous rights by a contradistinctive name). Personality rights generally consist of two types of rights: the right to publicity, or to keep one's representation and likeness from being commercially exploited without permission or contractual compensation, which is similar to the use of a trademark; and the right to privacy, or the right to be left alone and not have one's charisma epitomized *carte blanche*.

Country Specific Information

Australia

The Henderson case [1969] RPC 218 was a conclusion of the High Court of New South Wales. The plaintiffs were ballroom dancers and they sued the accused with a "passing off" action alleging that the accused wrongfully published their photograph on the cover of a gramophone record entitled *"Strictly for Dancing: Vol. 1"*. A decree was granted on the ground that the use suggested the plaintiffs' recommended or approved of the appellant's goods, or had some connection with the goods.

In the Koala Dundee case (1988) 12 IPR 508, the Federal Court of Australia addressed the issue of personality rights. In this case brought to court by a script writer and actor whose fame came from the film "Crocodile Dundee" the respondents ran two small shops which sold clothing and other items of an Australian nature. The appellant sought to restrain the shop owner from using the name "Dundee" in association with a composite counterpart "the koala image". The appellant advanced a case of "passing off" alleging such use was calculated to induce the community to believe the goods sold were associated with the film or the individuality portrayed in the film by the appellant. The court granted the relief holding that the inventor of a legendary fictional appearance having certain visual or other traits may prevent other using his aspect to sell goods and may assign the rights to use that attribute. This "extended action of passing off" upheld by the Australian court prevents the wrongful appropriation of an eminence, or wrongful association of goods with an appearance belonging to a claimant.

In the Pacific Dunlop case (1989) 14 IPR 398, the Federal Court of Australia affirmed an accommodation which upheld an action in passing off. The prosecutor sued the litigants for a television general notice of sale which was easily recognizable as being a parody of

a scene from the plaintiff's film "Crocodile Dundee". The Federal Court asserted the test was whether a cogent section would be misled into believing that a bartering arrangement had been concluded between the offender and the accuser under which the complainant agreed to the advertising.

Canada

Canadian common law identifies the right to personality on a limited basis. It was first acknowledged in the 1971 in the Ontario accord of *Krouse v. Chrysler Canada Ltd.* (1971), 5 C.P.R. (2d) 30. The Court held that where a person has marketable value in their likeness and it has been used in a manner that suggests a support of a product then there are grounds for an activity in appropriation of magnetism. This right was later expanded upon in *Athans v. Canadian Adventure Camps Ltd. et al.* (1977), 17 O.R. (2d) 425 (Ont. H.C.J.) where the Court held that the personality right contained both the carbon copy and name.

England and Wales

England and Wales have followed the Australian development of the law. In the *Mirage Studios* case [1991] FSR 145, Browne-Wilkinson, V.C., after referring to the Australian cases of *Children's Television Workshop v. Woolworths (NSW) Ltd.* [1981] RPC 187 and *Fido Dido Inc. v. Venture Stores (Retailers)* 16 IPR 365, conjectured the law as developed in Australia is sound. There is no reason why a remedy in passing off should not cover a case where the public is misled in a relevant way as to a feature or quality of the goods sold when agility is brought by the people with whom the public associate that feature or quality. An interim injunction was granted.

The first litigant was the owner of the copyright in the drawings of fictitious humanoid badges known as "Teenage Mutant Ninja Turtles" and part of their business was to license the reproduction of these likeness on goods sold by others. The first defendant made drawings of humanoid turtle's characters similar in appearance to the first plaintiff's, utilizing the concept of turtles rather than the indubitable drawings of Turtles.

France

In France personality rights are bulwarked under article 9 of the French civil code. While overboard known facts and effigies of public figures are not generally insulated, use of someone's image or personal history has been held prosecutable under French law.

The legion notable of the many cases in recent history is perhaps the publication of the book on the French President François Mitterrand called *Le Grand Secret* in which Mitterrand's doctor published a book that not only disclosed intimate facts about Mr. Mitterrand's life, but also uncovered medical confidences harbored by doctor-patient privilege.

United States

The right of publicity evolved out of the right of privacy in the United States, and is still sometimes contrived (erroneously) a "subset" of privacy rights. Some might ruminate it the right to charge for (or bar entirely) the commissary exploitation of name, likeness, voice or "personality." Typically, but by no means exclusively, the Right of Publicity is manifest in advertising or merchandise. The Right of Publicity is a state-based right, as debated to Federal, and to date, eighteen states have enacted Right of Publicity legislation. In abundant other reigns without a specific Right of Publicity statute, the Right of Publicity may still be a determinate via common law. The Right of Publicity is a rapidly-evolving principle with a history of reported cases in the United States and worldwide. By the broadest definition, the right of publicity is the right of every individual to ascendancy any pecuniary use of his or her name, image, likeness, or some other identifying aspect of identity, limited (under U.S. law) by the First Amendment.

The right of publicity can be referred to as publicity rights or even personality rights. The term "right of publicity" was coined by Judge Jerome Frank in the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.). The extent of discernment of this right in the U.S. is largely driven by statute or case law. Because the Right of Publicity is governed by state (as against Federal) law, the degree of identification of the Right of Publicity varies sententiously from one state to the next. To date, twenty-eight states are on record as recognizing the Right of Publicity. Indiana is believed to have the copious far-reaching Right of Publicity statutes in the world, providing acknowledgement of the right for 100 years after death, and shielding not only the usual "name, image and likeness," but also signature, photograph, gestures, distinctive appearances, and mannerisms.

There are other notable characteristics of the Indiana law, though myriad of the major movement in Right of Publicity emanates from New York and California, with a compelling body of case law which suggest two potentially contradictory positions with respect to apperception of the Right of Publicity. In the United States, rights of publicity are enforced through state law. Some states diagnose the right through statute and some others through common law. California has both statutory and common-law strains of authority fending slightly different forms of the right. The right of publicity is a property right, rather than a tort, and so the right may be descendible to the person's beneficiaries after their death.

The Celebrities Rights Act, which was passed in California in 1985, grants personality rights to a celebrity for 70 years after his or her death. Previously, the 1979 case of *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979), adjudicated by the California Supreme Court held that Bela Lugosi's personality rights could not pass to his successors.

In the case of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the U.S. Supreme Court held that the First Amendment did not grant immunity

to television station from liability for broadcasting Hugo Zacchini's human cannonball act without his consent. This was the first, and so far the only, U.S. Supreme Court ruling on rights of publicity.

In September 2002, Tom Cruise and Nicole Kidman sued luxury goods company Sephora for allegedly using a picture of them without permission in a brochure promoting perfumes.

A recent example is John Dillinger's rights of publicity, as seen in *Ken Phillips, Mark Phillips and Dillinger's, Inc. v. Jeffrey G Scalf*, No. 55A01-0207-CV-261, a 2003 Indiana Court of Appeals case. The operators of Dillinger's restaurant allegedly violated the right of publicity of Jeffrey G. Scalf, the grand-nephew of the 1930s gangster and bank robber John Dillinger, by using without approval Dillinger's name, image, and likeness in connection with the restaurant.

However, in the July 2003 case of Tiger Woods, *ETW Corporation v. Jireh Publishing Inc.*, 2003 U.S. App. LEXIS 12488 (6th Cir. June 20, 2003), a painting of the acclaimed golfer Tiger Woods and others is protected by the US Constitution's First Amendment and treads neither on the golfer's trademarks nor publicity rights.

The 6 May 2005 *Toney v. L'Oreal and Wella*, 406 F3d 905, opinion clarified the distinction between the purviews of copyright versus the nature of publicity rights.

The 2006 New York County Supreme Court case *Nussenzweig v. DiCorcia*, 2006 NY Slip Op 50171(U) determined that personality rights do not trump legitimate First Amendment rights of artistic free expression. This case is currently under appeal in the New York courts.

In 2008, a federal judge in California ruled that Marilyn Monroe's rights of publicity were not protected in California. The court reasoned that since Monroe was domiciled in New York at the time of her death, and New York does not foster a celebrity's deceased rights of publicity, her rights of publicity ended upon her death.

India

In India, as of date, neither has there been any judicial precedent recognizing or rejecting 'personality rights' nor is there any legislation expressly granting such a right. As the Indian craze for cricket grows we are consumed by our obsession with cricket related celebrity status. This is in addition to our continued obsession with film personalities, growing stature of sports persons in tennis, shooting, badminton, car racing to name a few. Businesses recognize this and are eager to have personalities endorse their products resulting in a huge business and enormous profits around "image or personality rights".

Protecting Persona rights - Katrina Kaif

Reportedly, Katrina Kaif, the august Bollywood and extremely well known movie star in India has, recently, filed a suit against a personal hygiene products manufacturer (the Company) claiming an transgression of her publicity rights. An individual can be assessed as to his or her celebrity status by virtue of the number of authority contracts and the repayment for such contracts. At an early stage an aspiring film actor is likely to take every opportunity that comes along and is not fastidious about what is put into the written contract if there is one. Also, the burgeoning actor does everything possible to gain publicity.

However, the tables turn once the solitary, gains celebrity status. The celerity is now eager to encash the monetary and non-monetary benefits that accrue from the newly gained public status. Therefore an unauthorized use of the celebrity's persona, mien, image or information is challenged as a violation of his or her "publicity rights." The laws in India do not provide for this type of intellectual property and jurisprudence shows that the judges grapple with such claims and often turn to international cases to gain some guidance. Kaif had early in her career endorsed one of the Company's products for a relatively small amount. She recently endorsed another personal beauty product (similar to the product she endorsed for the Company antiquated) ostensibly for a large amount.

The Company reintroduced the antediluvian announcements on television to run parallel with the new advocacy broadcasts. Kaif's contract with the Company provided for remuneration for an initial period and a recurring annual reimbursement if the commercials were used for supplementary periods. Even this was an infinitesimal amount. Several years had lapsed between the initial affirmation contract and the recent promulgations during which time Kaif had gone from being an unknown pretty face to an applauded movie star perceived across the globe. Kaif sought an order from the Bombay High Court against the Company detaining it from using the antecedent promotions. The court will have to eventually deliberate persona rights and/or publicity rights when dealing with the nuances of the case.

Protecting Persona rights – Rajnikanth

In recent times, thespian Rajnikanth issued a legal notice just before the release of his latest film, "Baba", interdicting anyone from emulating his screen persona or using the character of "Baba" for exchange gain, including by way of advertisements, broadcasts, promulgations and replication by mimics on television. Published in a number of leading Tamil and English dailies the legal notice also enunciated that no attempt should be made to use Rajnikanth's physiognomy or habiliment in the film, such as head-scarves, pendants, etc, for the purpose of endorsing products.

Given Rajnikanth's iconic cachet in South India, even his idiosyncrasies, mannerisms, dialogues, shenanigans and antics have been duplicated multitudinous times. By issuing a legal notice to prevent illegitimate duplication of his 'persona', is Rajnikanth in anywise

attempting to asseverate his "personality right" – heretofore unheard of in Indian legal colloquialism. Are stars and celebrities in India finally waking up to smell the coffee?

Conclusion

The exorbitant endorsement deals received by film stars and cricketers connote that there is great commercial appraisal attached to endorsement by such celebrities. If such commercial value is appropriated by persons without acceptable compensation to the celebrity, should the celebrity have the right to sue for such embezzlement? Is it therefore propitious and legitimate to determinate a 'personality right' in India? With jurisdictions such as the USA and the UK (and several others) providing exculpate identification of the 'personality rights' of celebrities, maybe it is time for India to provide judicial and legislative recognizance to this modernistic classification of 'intellectual property'.

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