Privacy and publicity: the two facets of personality rights

In this age of endorsements and tabloid gossip, famous people need to protect their rights and reputations. With a growing number of reported personality rights cases, India must move to develop its legal framework governing the commercial exploitation of celebrity

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Introduction

Intellectual property in India is no longer a niche field of law. Stories detailing trademark infringement and discussing the grant of geographical indications routinely make their way into the daily news headlines. From conventional categories of protection such as patents, trademarks, designs and copyright, IP laws have been developed, often by judicial innovation, to encompass new roles and areas of protection. One such role forms the premise of this article – the unique realm of "personality rights".

Personality rights are rights that individuals have over their name, image, reputation, likeness or other unequivocal aspects of their identity, as well as information connected with them. In the event that an unauthorised third party seeks to benefit commercially from such reputation or information, a case may be made for rights violation.

The relevance of personality rights is evident from the multitude of newspaper and magazine articles that are published about the lives of celebrities. The public appetite for gossip and scandal is limitless, and even a small incident involving a famous person can become the subject of hyperbole. In this context, personality rights encompass the "right of privacy", which prohibits undue interference in a person's private life.

In addition to coverage in the media, images of celebrities adorn anything from t-shirts, watches and bags to coffee mugs. This is because once a person becomes famous, the goods and services that he or she chooses to endorse are perceived to reflect his or her own personal values. A loyal fan base is a captive market for such goods, thereby allowing celebrities to cash in on their efforts in building up a popular persona.

Unfortunately, a large fan base is also seen by unscrupulous people as an opportunity to bring out products or services that imply endorsement by an individual, when in fact there is no such association. In such cases the individual's "right of publicity" is called into play. The right of publicity extends to every individual, not just those who are famous, but as a practical matter its application usually involves celebrities, since it is their names and images that help to hype and sell products.

In addition, celebrities are often made the subject of parody and ridicule – most of which is in good humour, but some of which can involve malicious intent. In such latter cases the celebrity would be entitled to bring an action for defamation, which may be categorised under the "moral aspect" of personality rights.

Trajectory of growth

Recognising individuality and protecting it from intrusion is not a recent phenomenon – it dates back to ancient European history. Long before the term was even coined, an artist's works were considered an expression of his or her individual

personality. This idea is also embodied in the law of intellectual property, which recognises a deep bond between a creator and his or her artistic or literary works.

The earliest development of privacy law took place in the United Kingdom with the establishment of protection against the physical interference with life and property. Thereafter, privacy rights expanded to include a "recognition of man's spiritual nature, of his feelings and his intellect". Eventually, the scope broadened further to include a basic "right to be left alone". By the late 19th century, interest in the right to privacy grew rapidly in response to the growth of print media, especially newspapers.

Across the Atlantic, in 1890 an article appeared in the *Harvard Law Review* by Samuel Warren and Louis Brandeis. They called on courts to recognise the right of individuals "to be left alone". Such a privacy right would redress the harms that private individuals suffered from invasions of their privacy and also put an end to the downward spiral in the content and quality of US journalism in the wake of recent technological developments, including those in photography. Warren and Brandeis declared that information which was previously hidden and private could now be "shouted from the rooftops".

The other aspect — publicity rights — grew concurrently. Curiously enough, before the late 19th century, individuals had little recourse against the unauthorised use of their names or images, with the exception of cases involving libel or trademark infringement. The right to publicity originated as a subset of the right to privacy when the latter expanded to include the right against false endorsements, which was made available to celebrities and non-celebrities alike. It was only decades later that the courts moved from protecting the integrity of an individual's identity to safeguarding the economic value of celebrity as an alienable economic right.

The term "right of publicity" comes from the seminal judgment in *Haelan Laboratories Inc v Topps Chewing Gum Inc*. This 1953 case involved competing chewing gum manufacturers that used baseball trading cards to help to sell their gum. While Haelan had obtained exclusive licences from a number of players authorising the use of their images on its baseball cards, Topps sold its own gum with photographs of these same players. Understandably, Haelan sued for violation of its "exclusive rights" to the players' images. The court held that the plaintiff could not recover damages under New York's statutory privacy law, but ruled in favour of the plaintiff based on a new common law right that it dubbed the "right of publicity". With *Haelan*, a fully alienable economic right which allowed damages to be claimed in addition to injunctive relief came to the fore.

Explicit recognition of such rights came much later in the United Kingdom with the case of *Irvine v Talksport* [2003]. Eddie Irvine, a successful Formula 1 driver, objected to the unauthorised use of his image in an advertisement for a radio station. The court held that he had a property right in the goodwill attached to his image and was entitled to compensation on the basis of a reasonable endorsement fee.

Different experiences on both sides of the Atlantic

Recent decisions in the United States on the right of publicity have often involved impersonations. Film star Bette Midler declined to lend her distinctive voice to an advertising jingle. Undeterred, the advertisers simply found a sound-alike performer who could duplicate her vocal timbre and styling. However, Midler prevailed on right of publicity claims and was awarded high monetary damages. In another case involving mere evocation, an advertising campaign which involved a robot dressed and presented so as to evoke the plaintiff — a popular game show presenter — was held actionable. Clearly, the old saying that "imitation is the best form of flattery" needs to be taken with a pinch of salt.

Meanwhile, in the United Kingdom, the *Hello!* case caused a stir with regard to the right of privacy. The claimants, film stars Catherine Zeta-Jones and Michael Douglas, had chosen to commercialise images of their wedding by contractually granting exclusive rights to *OK!* to take and publish photos of the event. To their dismay, *Hello!* managed to obtain some photographs from a guest. The couple sued *Hello!* for damages for breach of privacy. By some arguments, they had already exhausted their right of privacy by entering into a contract with *OK!*; however, the appeal court judge disagreed and said that under the contract, they had insisted on a veto over what photos were to be used so as to maintain their professional and personal image. By retaining that editorial control, the use of any pictures other than those personally chosen by them invaded their privacy.

However, the right of freedom of speech

and expression often prevents celebrities from being able to control what information about them reaches the public. The test applied to protect free speech is usually whether the information to be released regarding the celebrity is newsworthy (ie, whether there is any public interest in the receipt of the information). Public interest is judged using the standard of a reasonable man; however, given that celebrities often willingly court the media, in their case the line is usually drawn only when such interest can be categorised as morbid prying.

Even so, standards differ across jurisdictions. French law grants broad legal protection to a person's portrait and name against unauthorised use based on provisions in the Civil Code. When the Duchess of York sought advice on blocking the publication of topless pictures in the UK tabloids, she was firmly told that there was no law of privacy that could help her. By contrast, in France, a magazine that published the pictures not only had to pay the duchess damages for infringing her privacy, but was also fined in the criminal courts.

This discussion would be incomplete without mentioning that personality rights now transcend the life of the celebrity. For example, the US state of Tennessee recognises the right for another 10 years after the individual's death, while California does so for another 70 years. In Germany, a decision pertaining to actress Marlene Dietrich put a 10-year limit on personality rights after the death of a celebrity.

The Indian experience

India does not formally recognise the right of personality. Nonetheless, the twin concepts of privacy and publicity are slowly taking shape in the courts.

In *R Rajagopal v State of Tamil Nadu* [1994] the Supreme Court held that the right to privacy is implicit in the fundamental right to life – it is a right "to be left alone". The court held that the Tamil magazine *Nakkheeran* did not require consent to publish the life story of the serial killer Auto Shankar, insofar as it was based on public records. However, if it went beyond such records, it might be "invading his right to privacy". Fundamental rights can be enforced only against the state; however, the court recognised that in the private sphere, an action would lie in tort for breach of privacy as a common law right.

In terms of publicity rights, as in the case of misappropriation of trademarks, a "passing off" action is available against any third party that causes injury to the business, goodwill or reputation of a celebrity by trying to pass off its goods or business as those of the celebrity. However, for such action to be successful, all three classic elements of a passing off action must be proven: damage to reputation, misrepresentation and the resultant irreparable damage.

Furthermore, the Indian courts have recognised the name of a celebrity as having trademark significance, and have restrained third parties from misappropriating such names for use as domain names. Copyright law also allows for protection of a specific image in the form of, for example, a photograph or painting. However, seeking recourse to IP laws has limitations – for example, copyright law may protect a specific image in the form of a photograph; however, protection would not extend to the likeness of the celebrity's name or image.

The code of the Advertising Standards Council of India, a self-regulatory body, provides that advertisements must not contain references to any individual without due authorisation. The Standards of Practice for Radio Advertising and the Code for Commercial Advertising on Television contain similar provisions.

In the event that the reputation of a celebrity is intentionally maligned by any person, a defamation suit can be filed. In India, defamation is both a civil wrong and a criminal offence. However, truth published in the public interest is a valid defence and the threshold of permissible intrusion into the lives of famous personalities is generally considered to be higher than that applicable to an ordinary individual.

Publicity rights were also discussed by the Delhi High Court in *ICC International v Arvee Enterprises* [2003]. The court noted that the right of publicity had evolved from the right of privacy and could inhere in an individual or in any aspect of an individual's personality (eg, in his or her name, personality trait, signature or voice). Furthermore, an individual may acquire the right of publicity by virtue of his or her association with, for example, an event, sport or film. However, contrary to the plaintiff's claim, publicity rights vest only in a living person and not in an event or a corporation behind the organisation of an event.

Thus, in principle, the right of publicity is recognised in India. An example of the assertion of personality rights came in 2003 when the actor Rajnikanth issued legal notices in leading daily newspapers before the release of his film *Baba*. These notices prohibited the imitation of his screen

persona, as well as the use of the character Baba for commercial gain, including by way of advertisement and imitation. This is perhaps one of the first examples of a celebrity laying public claim to his or her persona.

Another instance involved Sourav Ganguly, a hugely popular cricketer and former Indian captain, who returned from a tour of England to find a well-known brand of tea cashing in on his success by offering consumers a chance to congratulate the cricketer. The offer implied that the cricketer had associated himself with the promotion, which was not the case. Ultimately, a compromise was reached and the promotion was withdrawn.

In another case the characters from a popular soap opera were depicted in an advertisement for a washing detergent. It was contended by the creators of the soap opera, which was a household name, that any use or representation of the characters would wrongly indicate a connection between the characters they had created and the goods being endorsed. The creators contended that they had been denied merchandising profits. Although these arguments were rejected, the case was significant on account of the court's comments that character merchandising could involve the exploitation of fictional characters who had acquired sufficient reputation to be called commodities in their own right.

In a different but pertinent case, in late 2009 Montblanc released luxury pens in India called "Mahatma Gandhi Limited Edition 241" and "Mahatma Gandhi Limited Edition 3000", which were engraved with Mahatma Gandhi's portrait on the nib. Tushar Gandhi (Gandhi's great-grandson) had given his prior approval; however, the launch was met with immediate opposition on account of the Protection under the Emblems and Names (Prevention of improper use) Act 1950. Under this act, unless the government permits it, names and images of nationally important personalities cannot be used for any trade, business or professional purpose. As a result, Montblanc was forced to withdraw its advertisements and the pens in question from the market.

While the aforesaid act was brought into force to ensure that people of Mahatma Gandhi's stature are not treated with disrespect, it allows for the inference that personality rights have long been recognised in India.

Conclusion

The law pertaining to personality rights is still at a nascent stage in India; however, if the recent increase in reported cases involving personality rights is anything to go by, awareness is quickly growing. Merchandise and advertising deals for products endorsed by celebrities generate billions of dollars, and magazine and tabloid sales further add to these revenues. In an age of globalised mass media, powerful economic factors drive the cult of stardom; therefore, the legal framework governing its commercial exploitation is also guaranteed to evolve. *iam*



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