지식재산연구 제14권 제2호(2019. 6) ©한국지식재산연구원 The Journal of Intellectual Property Vol.14 No.2 June 2019 https://doi.org/10.34122/jip.2019.06.14.2.87 투고일자: 2019년 1월 31일 심사일자: 2019년 2월 20일(심사위원 1), 2019년 2월 6일(심사위원 2), 2019년 2월 7일(심사위원 3)

게재확정일자: 2019년 5월 29일

PROTECTION OF CELEBRITY RIGHTS

—A COMPARATIVE ANALYSIS OF RELEVANT IPR LAWS IN US, UK AND INDIA—

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Abstract

This paper is a modest endeavour to explain a comparative analysis of laws and judicial trends for protection of celebrity rights from U.S., U.K. and India. This paper is based on the evaluation of multi jurisdictional regime of protection granted to celebrity rights, with the analysis of precautions undertaken for balancing the public and private interest while protecting celebrity's persona and identity. Further, the need for international recognition and universal application of celebrity rights protection forms to be an important aspect of the paper. The concluding remarks derived are firstly, in comparative analysis it can be found that India is at nascent stage of development for protecting publicity rights with no specific protection granted, U.K. does not recognize the concept of publicity rights on one hand and on the other U.S. has given due recognition to publicity rights protection and provided statutory mandate of protection in its twenty two states; Secondly, Publicity right requires a specific statutory protection as other laws fail to protect the right in complete sense. Lastly, there is need of international treaty for publicity rights protection to provide the right international standard and develop uniform mandates of protection in different jurisdictions.

Keyword

Publicity right, Personality, Trade Mark, Copyright, Intellectual Property, International Recognition, Comparative analysis.

I Introduction

Intellectual Property Law has developed with the development in art, technology, science *etc*: and thus from mere traditional approach of legal protection has reached to the creation and innovation. In contemporary times the domain of Intellectual Property Rights (IPR) has been expanded to afford protection to modern rights such as the 'right to publicity' a corollary of the right to privacy and the bundle of rights that emanate from 'celebrity rights'. However the adaptation of such rights of celebrity still does not have a well settled approach that can be universally recognized. The intangible nature of intellectual property, which allows it to flow relatively freely across the borders, presents a need for international enforcement of intellectual property rights.

As to the reasons behind protecting publicity rights the different rationale has been stated by the authors favouring the establishment of such rights. The most important of them is the Locks' labour theory. The personality attributes of an individual like name, photograph, likeness, image *etc*. are developed by an individual with great labour, skill and time involved. Their continuous efforts make them earn fame and recognition among the public and thus they are right holder of fruits of their labour. The commercial value of the personality among the public becomes their source of livelihood. The goodwill developed in the market through acceptance by public at large enhances their popularity and economic worth in the market. Holding goodwill and reputation they are approached by the market forces for various advertisement and related work schemes as the ulterior goal of the advertising industry is only to attract consumers to buy their goods or services.

Another important rationale for favouring publicity rights protection is to protect the consumer interest in the ever expanding commercialised market. The association of well known personalities or celebrities fetch great number of consumers in comparison to the goods or services advertised by lesser known faces in the market. Similar as the well known trade mark establishes its goodwill among the people by being associated and recognised by the people at large similarly celebrity or well known personality develop a trustworthy image in the minds of the people through their work. This creates an association of consumer with the celebrity and thus the brand endorsed by the celebrity. Considering this factor if unauthorised use of the persona of a personality is done by the market forces to promote their poor quality product utilising goodwill of personality then consumer will be cheated and will suffer from loss that can be monetary or physical both. Other than these personalities providing entertainment or services in the form of films, shows, sports, awareness programmes etc. should always have motivational force behind them to serve the interest of public at large. If the rights of personality are not protected they will lose self motivation and interest in the work. The personality's publicity rights protection in the form of Intellectual Property will generate economic incentive for the public as such intellectual property of personalities will be taxable as any other intellectual property to which protection is provided. With the increasing importance of celebrity in the society exploitation of their goodwill has also increased with the greater pace by media, manufactures, producers as well as vendors. Understanding such situation would pay the way for recognizing rights of celebrities the origin of which one may find in the doctrine of privacy.

Haelan Laboratories v. Topps Chewing Gum, Inc. 1) is the first case

which recognized that celebrity's name or likeness has a value beyond the right of privacy. This case held that people, especially prominent ones, in addition to and independent of their right of privacy, have a 'right in publicity value of their photographs'. "New York was the first state to enact a publicity law with the New York Civil Right Law in 1903. As of this writing, twenty-two states recognize the Right of publicity in some capacity via statute."2) As compared to the U.S., India and U.K. has been lagging behind in recognising and protecting the publicity and image rights of celebrity. Publicity right in India is at nascent stage of development. It also holds its origin in privacy right. Publicity right has been determined as part of privacy right in the case of Justice K. S. Puttuswamy (Retd.) v. Union of India, AIR 2017 SC 4161. The Indian trade mark laws and copyright protection both have failed to protect the rights of celebrity. Though the name is protected but has fail to authorise the methods and criteria of protection under trade marks and under copyright performers right.

U.S. recognises the rights of celebrity and some of its state even have statutory provisions dedicated for the protection of rights but, on the other hand, countries like U.K there is no recognition of such rights and further, in India, though through a few judicial pronouncements rights of celebrity has been recognised but it is at developing stage with no statutory recognition. Researcher's goal through comparison of celebrity rights protection in three different jurisdictions i.e. U.S., India and U.K. is to strengthen the Indian recognition and protection of celebrity rights as in India when compared to U.S. there is absence of specific legislation

^{1) 202} F 2d 866 (2nd Cir.), 1953.

²⁾ Faber, Jonathan, "A Brief History of the Right of Publicity", Right of Publicity, available at: http://rightofpublicity.com/brief-history-of-rop, last visited on Jan. 18, 2019.

regulating the concept of protection of celebrity rights. The trade mark and copyright law provide limited protection for celebrity right with no clarity of concept- 'celebrity' which makes it more difficult to enforce the relevant provisions in said law by courts. So the objective lies to suggest measures for evolving a legal mechanism for effective dealing of the cases of abuse of celebrities' goodwill by a comparative analysis of laws in order to bring to light the ambiguity and lack of comprehensive laws in India. For the comparative study researcher has undertaken U.K. though it does not recognise the right of celebrity but has been taken for consideration to study the grounds on which the country is reluctant to recognise specific rights of celebrity. With the study of the country's perspective for celebrity rights protection in U.K., India will get an insight for adopting the precautions in form of limitations over the rights of celebrity when drafted.

II. International Dimension of Celebrity Rights Protection

The strength and recognition of the celebrity is transcending the traditional social and cultural boundaries through continuous growth of entertainment market across the world. The celebrities' cross cultural influence has spurred the growth of other industries as well. Thus, the role of celebrity to be recognised in international arena has become important aspect. There is lack of universal standard of protection for celebrity rights. The right of publicity to protect celebrity's persona is not mentioned as such in any international treaty by WTO such as agreement on TRIPS, the Berne Convention for Protection of Literary and Artistic

Works and WPPT. Agreement on TRIPS and Berne Convention that can be closely related to protection of intangible rights of celebrity has given no importance to the present aspect. For tracing out the scope of protection of celebrity rights in the international dimension following international conventions and treaties are explained below:

1. International Protection for Publicity Rights under the Agreement on TRIPS

Marks for entertainment services are included by registries created by international convention.³⁾ Registration of "entertainment" and "sporting and cultural activities" as services is allowed by the Nice Classification, *i.e.*, the International Classification of Goods and Services, which includes many celebrities exercising the right of publicity.⁴⁾ The agreement on TRIPS provides specific protection to service marks as its protectable subject matter under article 15.1 which states that "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those or other undertakings, shall be capable of constituting a trade mark. Such signs, in particular including personal names ··· shall be eligible for registration as trade marks."

The right of publicity in trade mark law is provided due protection under the TRIPS structure against misappropriation of marks even in non competing goods or services.⁵⁾ Misappropriation of celebrity marks are

³⁾ Nice Agreement Concerning the International Classification for Goods and Services for the Purposes of the Registration of Marks, June 15, 1997, 23 U.S.T. 1336, 550 U.N.T.S. 45 [hereinafter "Nice Agreement"]. In the United States, the Code of Federal Regulations provides for registrability of "entertainment and sporting and cultural Activities" as marks, 37 C.F.R. § 6,1(41).

⁴⁾ Ibid

often in relation to consumer goods and services, rather than entertainment industry which is the origin of marks. So, the "agreement on TRIPS structure against misappropriation of non competing goods or services becomes an important and powerful instrument for celebrities to use trade marks for their advantage."

The problem with the parallel approach of protection lies with constraint ambit of protection of celebrity rights as their claim for different rights has to fit into the ambit of service marks specification or is treated as a right of unfair competition. Further, both these rights of publicity and trade mark are not coextensive at many stages. The purpose behind the protection is very different in regard to the interest that requires protection. This difference lies in different aspects like policy goals as the key to the right of publicity is the commercial value of a human identity, the key to the law of trade marks is the use of a word or symbol in such a way that it identifies and distinguishes a commercial source"7); test of infringement the trade mark infringement is based on likelihood of confusion but the test of infringement for celebrity right is identifiability when the infringement takes place it is not only the personal name of the celebrity associated with goods or services but the different aspects of his personality is involved like image, likeness, perception etc.; Identification differences the difference lies in the aspect of identification by the trade mark and publicity right, "While a trade mark identifies a single commercial source, the right of publicity involves identification of the 'person' of a single human being"8); Transfer rules for

⁵⁾ Mostert, Frederick W., "Well-Known and Famous Marks: Is Harmony Possible in the Global Village", *Trademark Rep.*, 86(1996), pp.103, 122.

⁶⁾ Id. at 130.

⁷⁾ Mostert, Frederick W., "Well-Known and Famous Marks: Is Harmony Possible in the Global Village", *Trademark Rep.*, 86(1996), p.131.

both the protections publicity and trade mark transfer rules also differ as publicity rights of celebrity is accompanied by freedom of transferability they can assign or license their persona rights to anyone they deem fit. On the other hand transfer rules for trade marks are stringent in nature; *Prior exploitation* under publicity rights, the celebrity can satisfy his/her claim against misuse of his persona without requiring establishing the prior use or exploitation of their persona. This will help celebrity to control and claim their rights in such a manner which is totally different from protection provided under trade marks. The problem to keep trade mark and publicity right at same footing arises when claim of celebrities for misappropriation of their identity fails to relate to their current entertainment services.

2. International Protection for Publicity Rights under the Berne Convention

Moral rights have always been an important driving force behind the Berne Convention because of the international desire to "harmonize the protection of artistic, intellectual property throughout the world,"⁹⁾ and to acknowledge the "author's continuing interest in his or her work."¹⁰⁾ The Berne Convention is "animated by the desire to protect, in as effective and as possible, the rights of authors in their literary and artistic works"¹¹⁾

⁸⁾ McCarthy, J. Thomas, *Rights of Publicity and Privacy*, 2nd edn., Clark Boardman Callaghan, 1999, § 5:9.

⁹⁾ Antezana, Monica E., "The European Union Internet Copyright Directive as Even More than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory", *Boston College International and Comparative Law Review*, Vol.26 Iss.2 (2003), pp.415, 420.

¹⁰⁾ Id. at p.424.

¹¹⁾ Berne Convention for the Protection of Literary and Artistic Works, Article 6bis

which includes the moral rights of those creating the works. This is analogous to aspects of personal autonomy in publicity rights. Under Berne Convention, 1986, the problem with protection of celebrity attributes lies as it is not considered to be the subject matter of authored work under copyright as for example face or any body part cannot be authored original work. Fixation of work is another problem with publicity rights. Copyright protection granted to name protects only the words in name not the persona behind it. Framework is such that if publicity rights are protected through international copyright it is required to be proved that it's an extension of copyrightable work of authorship.

3. International Protection for Publicity Rights under WIPO Performances and Phonograms Treaty, 1996

Article 5 of the WPPT creates a safe haven for moral rights independent from the performer's economic rights by mandating that the performer shall have "the right to claim to be identified as the performer of his performances," known as a right to attribution, and "to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation," known as the right to integrity. ¹²⁾ While the treaty does not specify how the rights are to be exercised, the article does limit interpretations of expansive rights. ¹³⁾ One place where

Sept. 9, 1886, 828 U.N.T.S. 221 (last revised at Paris, July 24, 1971). While TRIPS is the dominant intellectual property treaty in force today, the Berne Convention is still the source for international protection of moral rights since, after "strenuous objection" by the United States, the moral rights provisions of Berne were not incorporated into the TRIPS Agreement. Paul Goldstein, "International Copyright: Principles, Law And Practice" 55 (2001).

¹²⁾ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, art. 5.1.

¹³⁾ Morgan, Owen, International Protection Of Performers' Rights, Oxford, 2002, p. 198.

the orbits of protection between copyright law and the right of publicity cross paths is in performances and performance values, but even then this protection is very different.¹⁴⁾ Under WPPT though the moral rights are recognised but it is only in case of performance which itself is not defined firstly and secondly, the performance protects only the rights in performance of the performer not the persona of the performer in the performance.

As there is lack of international laws for protection of publicity or personality rights of celebrity different jurisdictions have major differences in the recognition and level of protection granted to such rights as for example in U.S there are specific enactment or statutes governing publicity rights for celebrity and non celebrity as well in different states but in India the right is just recognised with no concrete protection further, in U.K. the rights are not at all recognised also. In U.S. twenty two states have codified laws for publicity or personality rights protection. 15) Japan extends the protection to even signatures. Post mortem rights are allowed and protection is extended to identity of non celebrities in Indiana, Washington etc. but in India there is not even a legal frame work to protect rights on persona of celebrity. This lack of standard protection results in failure of protection of rights at foreign jurisdictions where no such celebrity rights are recognised and solid protection is granted for the same. Plus the rights of the jurisdiction which do not protect publicity rights in their jurisdictions will not be protected by foreign jurisdiction as principle of reciprocity protection is generally followed. In this digitalised world popularity of an individual's

¹⁴⁾ Supra note 6, § 5:46.

¹⁵⁾ Faber, Jonathan, "A Brief History of the Right of Publicity", Right of Publicity, available at: http://rightofpublicity.com/brief-history-of-rop, last visited on Jan. 2, 2019.

persona is not limited to particular jurisdiction and so is the exploitation. Such absence of standard protection causes lack of harmonisation, and national treatment as it creates contradictory situations of protection with disparity and unfavourable conditions for people trying to protect their rights in other foreign jurisdictions. There is certainly a need for adding an amendment to existing intellectual property right treaty or a separate treaty for harmonising the international standards for publicity or personality rights protection.

4. Prospective Criticism and Challenges for proposal on publicity rights as separate treaty or amendment in existing IPR international treaties

The protection of publicity rights of celebrity can be questioned as a right that should not belong to intellectual property. This criticism finds its origin from the general criticism for intellectual property rights protection that is treated as growing "uncontrolled to point of recklessness"¹⁶⁾ It can also be presented weightage is being given to celebrities interest to control their image in comparison to freedom of speech. ¹⁷⁾ The argument made is that it "puts the power of the state behind private individuals who want to control whether and how information about important people ··· can be used by other people."¹⁸⁾ However, there is need to consider publicity

¹⁶⁾ Halpern, Sheldon W., "The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality", *Hastings Law Journal*, Vol. 46 No. 3 (1995), pp. 853, 864-869.

¹⁷⁾ McSherry, Corynne, "Publicity Rights Aren't Property Rights: Appellate Court Gets It Very Wrong in Hart v. Ea", Electronic Frontier Foundation(May 22, 2013), https://www.eff.org/deeplinks/2013/05/publicity-rights-arent-property-rights-court-wrong

¹⁸⁾ Zimmerman, Diane L., "Who Put the Right in the Right of Publicity?", *DePaul Journal of Art, Technology & Intellectual Property Law*, Vol. 9 Iss. 1(1998), p.53.

right as stand alone intellectual property right that is not in conflict with any other right. All the current rights identified as intellectual property are based on the same theory "that creators' or inventors' entitlement to their work is akin to an inherent natural right which the state is under an obligation to protect and enforce."¹⁹⁾

The overlapping of rights is another prospective criticism but nonetheless the overlap with other intellectual property rights is "an indication that the right of publicity belongs as a standalone right within the same family of rights."

The establishment of specific international treaty or agreement for protection of publicity rights would institute publicity right as important force in the global market. A new international treaty would set minimum standards to recognize the right of publicity in already WTO signatory countries to harmonize it. Under this scheme, the scope of protection would extend to celebrities resulting in a harmonized system of enforcement. The addition of provision under agreement on TRIPS or Berne Convention will not serve the purpose of dual approach protection for publicity rights. Publicity right is a concept which relates to commercial as well as moral rights protection of personalities. Though, agreement on TRIPS deals with trade related aspect for intellectual property but the moral rights is the area which is not covered under agreement on TRIPS but recognised under Berne Convention. The true protection can be reflected through combination of both the international laws.

¹⁹⁾ Oguamanam, Chidi, "Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy", *Wake Forest Intellectual Property Law Journal*, Vol.9 No.2 (2009), pp.104, 108.

III. Comparative approach for celebrity rights protection

Individuals' right to commercially control the use of his/her persona²⁰⁾ under publicity rights has been at stake and is been receiving great attention from around the world. Though, receiving recognition as an important issue, publicity rights of celebrity is in its nascent stage of development. The form and substance of publicity rights need to be greatly settled in various jurisdictions. Some of the state like California provides for even post-mortem rights to celebrity and countries like England does not even recognise the publicity rights. Further, in an attempt to codify the publicity rights some states have taken up inconsistent and variant standards to provide for scope and nature of the publicity right. ²¹⁾ Other jurisdictions somehow solely rely on common law for protection of publicity rights.²²⁾ The study of different jurisdiction for celebrity rights protection represents the trend followed to how the rights are recognised and given statutory mandate considering importance of protection of individual's persona. The extent of protection in some jurisdiction like Indiana granted is such that even the non celebrated individuals are given protection over their intangible property of persona.

²⁰⁾ McCarthy, J. Thomas, *The Rights of Publicity and Privacy*, Third edition, Clark Boardman Callaghan, 2004, p.16.

²¹⁾ Goodman, Eric J., "A National Identity Crisis: The Need for a Federal Right of Publicity Statute", *DePaul Journal of Art, Technology & Intellectual Property Law*, Vol.9 Iss.2(Spring 1999), p.227, 231, 235, (stating that "instead of waiting for the courts to fully develop this evolving area of law, many state legislatures have created their own statutory laws" concerning publicity rights and reporting that "the right of publicity is recognized as existing under the common law of sixteen states").

²²⁾ Supra note 5.

According to the analysis in different jurisdictions celebrity is defined as the personality which has commercial value in his/her persona. Though the level of protection differs like time period of protection, subject matter of protection and transfer of rights *etc*. but idea behind providing the protection is the same *i.e.* to protect individuals persona as considered to be his/her personal property.

1. Protection of celebrity rights in India

The jurisprudence of publicity and image rights is in its developing stage in India. When compared with the worldwide situation, India has been lingering behind in perceiving the privilege of publicity and image rights. Though Constitution of India under article 21 i.e. Right to life and liberty includes the protection of publicity rights of an individual being part of privacy rights. As right to privacy is enshrined under article 21 of the Indian Constitution through judicial interpretation in the landmark cases like; Kharak Singh v. State of U.P., 23) Rajagopal v. State of T.N 24) and Justice K. S. Puttuswamy (Retd.) v. Union of India²⁵⁾ etc. but such protection in regards to protection of celebrity personality traits has proved to be insufficient as enforcement of fundamental rights has its own requirements which could not be satisfied by celebrity rights claim for example doctrine of waiver, enforcement of rights majorly against the state only, extinguishment of rights on death of personality etc. The celebrity rights stands as personal and intangible property rights. It's a combination of dignitary as well as proprietary interest of celebrity and

²³⁾ AIR 1963 SC1295: (1964) 1 SCR 332.

^{24) (1994)} SCC 632.

²⁵⁾ Writ Petition (Civil) No 494 of 2012.

the constitutional right only protects the dignitary aspect of celebrity. Right to publicity is not absolute though it comes under the vibrant ambit of article 21 of the Constitution of India. For the protection of public interest reasonable restrictions can be placed on such right under article 19 of the Constitution. The right to acquire information and circulate the same has been held to be included under the article 19(1)(a) within the ambit of 'freedom of speech and expression'. ²⁶⁾

The limited protection to a celebrity's image is provided under the provisions of trade mark laws. Under the Trade marks Act, 1999 there is no specific provision to grant protection to image and publicity rights. Though, the Act under section 2(m) providing the definition of 'mark' does include names. Passing off is the common law remedy on which celebrities depend to protect their image and publicity rights. To avail the remedy from passing off action the proof of the persons' reputation, misrepresentation caused and thus irreparable damage to the individual is required in association to the goods or services.

The Indian Trade Mark Act, 1999 takes into consideration the protection of single trait of personality, *i.e.*, names under section 14 but even to this it does not state anything about the rules of assigning and authorizing such rights. The trade mark law furnishes restricted insurance with no clarity of idea that makes it harder to implement the said law by courts. Further, Copyright Act, 1957 though includes actors as performers to provide them with the performers' right but has failed to recognise acting in cinematographic films as the subject matter of performer's right protection as it only talks about the live performance made by the actors. Though performer's right protects the economic, moral and intangible

²⁶⁾ Jain, M. P., Indian Constitutional Law, Fifth edition, Wadhwa and Co., 2008, p.988.

rights of performers but the same is restricted in relation to the specific performance made by the performer and not beyond that so even if sports persons falls under the definition of performer their intangible right protection will be only limited in regard to distortion, mutilation or modification of their performance not beyond it.

2. Protection of celebrity rights in U.S.

The origin of right of celebrity in U.S. can be traced from the very existence of right to privacy. In the case of *Roberson* v. *Rochester Folding Box Co.*,²⁷⁾ for the first time right to be let alone was invoked by the plaintiff on the assertion that likeness of plaintiff as decoration on flour bags was used by the defendant. The issue involved was "whether the commercial appropriation of somebody's appearance required a licence."²⁸⁾ In the present case the issue had its existence based unauthorised use of image of plaintiff disregarding all her prospective commercial interest rather than usual case based on cause of action on the grounds of privacy rights violation. Though, the claim was rejected but dissenting J. Gray recognised plaintiff had "a property right to protection against the use of her image for commercial purposes."²⁹⁾

Holding the strong base of privacy rights, shift from only protecting the humanitarian concern of individuals to recognising the commercial value of personality's persona took place considering the need for protecting celebrity rights on the ground that "the celebrities suffer from exploitation

²⁷⁾ Roberson v. Rochester Folding Box Co., 1902, 171 NY 538.

²⁸⁾ Weber, Olaf, "Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights?", *SCRIPT-ed*, Vol.1 No.1 (2004), p.161.

²⁹⁾ Supra note 11.

of their image evidenced by the public at large, for which they have laboured hard and employed skills at greater extent rather than being only emotionally harmed by privacy exploitation."³⁰⁾

The court for the very first time dealt with the claim of publicity rights protection of celebrity in the case of Zacchini v. Scripps-Howard Broadcasting Co., 31) the claim of plaintiff for commercial exploitation of his performance without his consent was undertaken by the court recognising the value of performance of celebrated individual with the right to benefit from its execution. In U.S. the present trend for protection of publicity rights is through regulation by state laws as there is no standard federal law regarding the same. The application of the law depends on each state's interpretation of the right. 32) Twenty two of states of U.S. have codified the right of publicity (Alabama, Arizona, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin) and twenty eight states recognise the same right through application of common law in U.S. 33) It was noted by some commentators that such "non-uniform regulation requires a careful evaluation of various, often inconsistent, jurisdictional laws"34) in order to protect the individual's legitimate interests in his/her

³⁰⁾ Bartholomew, Mark, "A Right is Born: Celebrity, Property, and Postmodern Lawmaking", *Buffalo Legal Studies*, Vol. 44 No. 2(2010), p. 6.

^{31) (1977) 433} U.S.

³²⁾ Webner, W. Mack & Lindquist, Leigh Ann, "Transformation: The Bright Line between Commercial Publicity Rights and the First Amendment", *Akron Law Review*, Vol.37 No.2(2004), p.173.

^{33) &}quot;Statutes & Interactive Map", The Right of Publicity Statutes, available at: http://rig htofpublicity.com/statutes, last visited on Jan. 11, 2019.

³⁴⁾ Peles, Gil N., "Right of Publicity: A Practitioner's Enigma", *Journal of Intellectual Property Law*, Vol.17 No.2(2010), p.351.

personal characteristics. Additionally, the modern view of the scope of the right of publicity is expressed in Section 46 of the Restatement (Third) of Unfair Competition:³⁵⁾

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in Sections 48 and 49.

The Restatement provides the right to every individual to protect their personal identity and claim the commercial value that accrues from the use of their name, likeliness and other indica for the purpose of trade. The remedy suggested for the violation of the right of publicity includes injunctions and monetary relief. These Restatements are often quoted by the lawyers, academic community and the courts as well.

Due to the lack of federal protection for publicity rights of celebrity, uncertainties regarding the issues of when, how and what right of publicity will be applied and in the cases of protection of right of celebrity from state which recognises the right, in the state which does not provides for the right, what will be the status of relief that can be granted through publicity rights protection. The need for having standard uniform federal law has been often stressed by the American legal doctrine for protection of publicity rights.³⁶⁾

³⁵⁾ The American Law Institute, "Restatement (Third) of Unfair Competition 1995, s. 46-49", available at: http://rightofpublicity.com/statutes/restatement-third-of-unfair-competition-s46-49, last visited on Jan. 22, 2019.

³⁶⁾ Goodman, Eric J., "A National Identity Crisis: The Need for a Federal Right of Publicity Statute", *DePaul Journal of Art, Technology & Intellectual Property Law*, Vol. 9 Iss. 2(Spring, 1999), pp. 227-278.

The following chart presents the illustration of protection provided in different states of U.S. which differs from one state to another:

| Countries | New York | Washington | California | Indiana |
|-----------------------|---|--|--|--|
| Law | Civil law Rights Section 50 and 51(Right to privacy) | Section 63,60,010 to Section 63,60,080, Wash, Rev. Code title 63 of the code deals with 'Personal Property' The title 63 provides for a specific chapter 63,60 specifically dealing with the personality rights. | Section 3344 and sec 3344.1 California Civil Code | Indiana code Section 32-36-1-0,2 et seq. Chapter containing 20 Sections specifically dealing with the publicity rights protection. |
| Infringement | Name, portrait, picture or voice Commercial or non commercial purpose for trade, advertising purpose. | name, voice, signature, likeness or photograph Commercial or non commercial purpose for trade or advertising purpose. | name, voice, signature, photograph, or likeness Commercial or non commercial purpose for trade or advertising purpose, fundraising | name; voice, signature, photograph, image, likeness; distinctive appearance, gesture; or mannerisms, Only for commercial purpose in relation to trade or advertisement and fundraising |
| Term of Protection | Lifetime (any person) | Individual(life time plus 10 years), personality(life time plus 75 years) | Life time plus 70 years(personality) | Lifetime plus 100 years |
| Remedies | Civil remedy from the court. | grant injunctions greater of one thousand five hundred dollars or the actual damages sustained as a result of the infringement, and any profits that are attributable to the infringement and | amount equal to the greater of seven hundred fifty dollars(\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the | Damages in the amount of (A) one thousand dollars(\$1,000); or (B) actual damages, including profits derived from the unauthorized use whichever is greater |

| | | not taken into account when calculating actual damages, order the impounding and destruction of material. | unauthorized use that are attributable to the use and are not taken into account in computing the actual damages, Punitive damages may also be awarded | Treble or punitive damages, |
|--------------|----|---|--|--------------------------------|
| Registration | No | o requirement of regi | stration automatic pr | otection |

3. Protection of celebrity rights in U.K.

In U.K. there is no recognition of right of publicity. The judiciary and politicians both have supported the right of publicity to come into existence but the same has been continuously opposed by the public.³⁷⁾ There is great concern that "recognizing a right of publicity would limit the ability of newspapers to bring stories to the public. The public is suspicious that such a right would restrict the media's freedom of expression, and open the press to a flood of litigation."³⁸⁾

Intellectual property rights provides relief to celebrity through three specific mechanisms of the Copyright, Designs and Patents Act of 1988 ("CDPA"),³⁹⁾ the Trade Marks Act,⁴⁰⁾ and the common law cause of action for passing off. The CDPA does not provide relief to celebrities who have not secured or are unable to secure copyright protection for their artistic talents. A plaintiff must establish British citizenship and ownership of the

³⁷⁾ Basil and Markesinis *et al.*, "Concerns and Ideas About the Developing English Law of Privacy", *American Journal of Comparative Law*, Vol. 52, No. 1 (Winter, 2004), pp. 133-208.

³⁸⁾ Supra note 37.

³⁹⁾ Copyright, Designs and Patents Act, 1988, s.48.

⁴⁰⁾ Trade Marks Act, 1994, s.26.

work that was "allegedly reproduced, published, or infringed upon in the United Kingdom in order to pursue a copyright infringement claim."41) Celebrities are not protected where their "artistic talents do not fit within the confines of the definition of a copyrightable work."42) Further, the Trade Mark Act is also unlikely to grant any protection to celebrities in U.K. as it provides "protection of names, letters, designs, or symbols that distinguish the trade mark owner's goods from the goods of a competitor."43) Celebrities have attempted to trademark names or symbols associated with their names, 44) but courts have been reluctant to afford protection where there is no likelihood of confusion as to the source of the goods promoted. ⁴⁵⁾ Passing off action has been recently recognised in U.K. for getting relief by celebrities when their reputation or image is exploited in relation to goods or services, they never personally endorsed. In Irving v. Talksport Ltd., 46) the passing off relief was granted to plaintiff on the ground of unauthorised appropriation of his goodwill or reputation. The court appropriately recognized "celebrities seek to exploit their personality and image commercially."47) Therefore, celebrities are entitled to recover when another attempts to falsely portray their endorsement of goods or services. While passing off action holds great potential for providing relief to celebrities but such relief is nominal in nature in

⁴¹⁾ Id., s. 154.

⁴²⁾ Id., s.1.

⁴³⁾ Supra note 39 at s.1 (1).

⁴⁴⁾ Lyngstad v. Anabas Prods. Ltd., (1977) F.S.R. 62 (Ch.); In re Elvis Presley Trade Marks, (1997) 13 R.P.C. 543 (Ch.): (1999) 16 R.P.C. 567 A.C.

⁴⁵⁾ In re Elvis Presley Trade Marks, (1997) 13 R.P.C. 543 (Ch.): (1999) 16 R.P.C. 567 A.C. (holding that a company's use of the name "Elvis" in the United Kingdom did not preclude registration of "Elvis Presley" by Elvis Presley Enterprise, Inc., as such was unlikely to cause public confusion).

⁴⁶⁾ Supra note 29.

⁴⁷⁾ Id. at 2378-79.

comparison to the damages suffered.

The Human Rights Act of 1998⁴⁸⁾ ("HRA") fails to provide protection against the commercial appropriation of celebrities' attributes. Article eight of the HRA holds that "individuals have a right of privacy, which may not be infringed upon by public authority, unless for purposes of national security and public safety."⁴⁹⁾ Many celebrities have managed to indirectly claim commercial misappropriation through right to privacy claim. One of such example is the case of *Douglas* v. *Hello! Ltd.*,⁵⁰⁾ The court balanced the celebrity's privacy interests, as established in HRA article eight, against the freedom of expression granted to the press in HRA article ten. The court held that when "elements that would otherwise have been merely private became commercial, the Hello! defendants had acted unconscionably and that by reason of breach of confidence were liable to all three claimants to the extent of the detriment."⁵¹⁾

4. The comparative analysis

The comparative analysis of U.S. (states like Indiana, New York, Washington and California) with India and U.K. represents the sad status of celebrity rights development in both these nations. On the one hand where such states have specific enactments for protection of publicity rights India on the other hand is struggling to give proper recognition to rights of celebrity. Indiana provides for statutory protection which extends to protecting personality attributes like appearance, gestures and mannerism

⁴⁸⁾ Human Rights Act, 1998.

⁴⁹⁾ Supra note 48, part 1, art. 8.

⁵⁰⁾ Ibid.

⁵¹⁾ Id. at 86.

etc. It recognises the rights of celebrity and even non celebrity with extension of post mortem rights to both for 100 years after death whereas New York does not protects the post mortem rights, Washington code protects post mortem rights personality and other individuals but term of such protection varies to 75 years for celebrity and 10 years for non celebrity and in California for any natural person post mortem rights are available till 70 years after death. New York and California provides for civil and criminal remedies for violation of such publicity rights but Indiana and Washington provides only civil remedies. Use that is prohibited in all the states is based on commercial exploitation of persona and the rights vested are freely transferable. Each of the states of U.S. undertaken for comparison provides for set defences that can be raised for the exploitation of publicity or personality rights by the third party.

Defences provided includes dissemination of information for public interest, news worthy items, promotional material for news reporting, original work of fine arts *etc*. Each of the state provides combination of defences to limit the rights of publicity of celebrity and even a non celebrity for balancing the public and private interests. The best suitable defences as studied in these jurisdictions can be adopted by India to serve public and private both the interests.

In U.K. though judiciary has given minimal recognition to the celebrity rights protection but such right has been largely opposed by the general public as violating the public interest to free dissemination and access to information as by limiting the rights of media. It is only through the stringent right of privacy under Human Rights Act of 1988 somehow celebrity rights are protected though, it falls to be inadequate. Passing off action is also recognised by celebrities as viable cause of action against violation of their rights. The celebrity can seek relief under passing off

only when their reputation is attached to goods or services which they never consented to be part of but such action provides for very nominal remedies, which in comparison to profits to the other party and dilution of goodwill of celebrity is not justified. The Human Rights Act 1988 gives broader protection of privacy rights and presents that it can only be compromised by public authorities when purpose of national security and public health is involved. Celebrities in U.K. generally try to protect their commercial rights through this clause of privacy. India lacks in providing such strong privacy rights protection to individuals when role of press and media comes into play but in recognition of celebrity rights, India stands at better footing in comparison to U.K. In India the concern to balance the right of publicity for celebrity and freedom of press and media is required to be undertaken as in U.K. for non recognition of celebrity rights major reason is fear of excess limitation over rights of press and media.

The below chart represents a comparative analysis of celebrity rights protection in different jurisdictions which forms to be the result of study of different aspects of protection directly or indirectly granted to celebrities in their respective jurisdictions. The chart is been divided into ten heads and these heads are selectively undertaken by the researcher as being important points to easily understand the difference in recognition and level of protection granted to celebrity rights with the limitations imposed on such protection so as to balance the interest of public with the individuals.

| Point of Compari- son | India | New York | Washington | California | Indiana | U.K. |
|-----------------------------|----------|-----------|----------------------|------------|--------------|-------------|
| Statutor-y | No | Civil law | Section 63.60.010 to | Section | Indiana code | No specific |
| Protection | specific | Rights | | 3344 | Section | statute |

| | statute | Sections 50 and 51 | Section 63.60. 080. Wash, Rev. Code | California Civil Code | 32-36-1-0,2 et seq. | limited protection through Human Rights Act controlling press and media against celebrity |
|---------------------------|--|---|---|---|--|--|
| Recogni- tion of Right | Forms to be part of Right of Privacy Puttuswa- my (Retd.) v. Union of India | Statutory recogni- tion | Statutory recognition | Statutory recognition | Recognised as Invasion of privacy that includes the tort of appropriation of name or likeness with statutory protection granted. | No specific recognition of right |
| Who is protected | Not defined | Any natural person | Any natural person | Any natural person but post-mortem statute requires that the person has a "commercial value" | Person with commercial value in identity (Celebrity) Ind. Code § 32-36-1-0,2 et seq. | Celebrity |
| Remedy | Civil Actions | Civil (N, Y. Civ. Rights Law § 51. Action for Injunction and For Damages) and Criminal (N, Y. Civ. Rights | Civil | Civil (Cal. Civ. Code § 3344) and Criminal (Cal. Penal Code § 115,1) both | Statutory or actual damages awarded, Ind, Code § 32-36-1-0,2 et seq. | Civil Actions |

| | | Law § 50. Right of Privacy) both | | | | |
|--|--|---|---|---|--|---|
| Protects use of | Not defined | Name, portrait, picture or voice | Name, voice, signature, likeness or photograph Section 63.60.010 Wash, Rev. Code | Name, voice, signature, photo- graph, or likeness (§ 3344.1(a) | Name; voice, signature, photograph, image, likeness; distinctive appearance, gesture; or mannerisms. | Not defined |
| Purpose for use that is prohibited | Privacy violation and misleading consumers | For any trade purpose (commercial use) | Advertising, fundraising, or solicitation of donations Disseminating or publishing any advertisements without consent (commercial or non commercial purposes) | Appropriation of the plaintiffs' identity to the defendant's advantage Defendant undue advantage, advertising or solicitation of purchases Commercial use | Commercial purpose it expressly includes uses in the context of "fundraising." Ind. Code § 32-36-1-0,2 et seq. | Misappro- priation of ones privacy. |
| Kind of protec- tion | Constitu- tion of India general- ised insuffi- cient protection | Statutory | Statutory | Common law and Statutory both | Statutory | Indirect protection through Privacy right under Human Rights acts by controlling media and press. |
| Assign- ment of right | Status not clear | Non assign- able | free transfer- ability, assignablity | freely transferable and | Easily transferable Indiana code | Not defined |

| | | | and licensing of the rights by individual or personality. | descendi- ble | IN ST 32-36-1-6 Section 16 | |
|-------------------------|---|--|--|--|---|--------------------|
| Post mortem right | Not defined | Not protected | The post- mortem period is ten (10) years for individuals and seventy-five (75) years for personal- ities, Wash, Rev. Code §63,60,040 (2) | Cal. Civ. Code § 3344.1, post- mortem rights are available for seventy (70) years after death. | Ind. Code § 32-36-1-0,2 et seq., postmortem rights are available for seventy (100) years after death. | Not defined |
| Statutory defences | Article 19(a) Constitu- tion of India | N.Y. Civ. Rights Law § 51. Action for Injunction and For Damages | Wash, Rev. Code § 63,60,070 (2) (2012). | Cal. Civ. Code § 3344) | Ind. Code § 32-36-1-1 | Public Interest |

The study of these different jurisdictions can certainly help Indian legislature to enact laws for protection of celebrity rights with different exceptions required to be framed for balancing the interest of celebrity with the society. The framework for limiting the rights of media in regard to celebrity image exploitation as provided in U.K. can be taken into consideration to limit the rights of press as provided under Indian Constitution, being the status that media forms to be the foremost exploiter of the celebrity persona. The combination of best of the suitable laws from these different jurisdictions can help India to have a sustainable legislative framework for celebrity rights protection.

IV. Interface between Celebrity Rights and IPR

The celebrity rights stands as personal and intangible property rights. The protection of personality traits of famous person and the goodwill attached to is intangible in nature. The goodwill or reputation among the public is established by continuous hard labour, creativity, skill and time. Persona of an individual once developed by his or her intellect and recognised by the society becomes his personal property to protect and flaunt. This intellectually developed property suits the best protection under IPR regime. For the best understanding of the suitability to protect celebrity rights under IPR the concepts of trade mark and copyright needs attention.

1 Trade Marks

The law of trade mark and publicity rights of celebrity have great deal in common like ensuring that owner of the right should continue to control the role and meaning of their identity. Trade mark law attempts to control such use of trade mark which results in the confusion or ambiguity as regards to the affiliation or source of the good. The right to celebrity provides similar protection in such it tries to prevent the cases where a celebrity may be falsely or mistakenly associated with the product that they have given no consent to endorse. These rights are significant as they not only protect the celebrity's interest but also help in creating awareness among the general public. Though, all these similarities are present but trade mark as a sole protection for celebrity rights is not justified due to major differences in idea and concept of protection

between trade mark and celebrity right. The purpose of protection of trade marks and publicity rights is significantly very different in regard to the interests required to be protected. Further, Professor McCarthy says that "rights of publicity are only analogous to trade marks despite their many similarities." He identifies four major categories of differences between rights of publicity and trade marks: 1) identification, 2) prior exploitation, 3) tests of infringement, and 4) transfer rules. "While the key to the right of publicity is the commercial value of a human identity, the key to the law of trade marks is the use of a word or symbol in such a way that it identifies and distinguishes a commercial source." The aim of the service marks protection is to avoid the confusion as to the source of service and on the other hand the purpose of publicity right protection is to avoid commercial misappropriation. ⁵⁴⁾

The trade mark infringement test is based upon the likelihood of confusion test but the test to determine the publicity right infringement is based on 'identifiability'. The "right of publicity 'identifiability' is not the same as the 'likelihood of confusion' test of trade mark law."55)

2. Copyright

A close resemblance can be traced between copyright law and publicity rights where copyright "impact upon legal rights which focus on

⁵²⁾ McCarthy, J. Thomas, *Rights of Publicity and Privacy*, 2nd edn., Clark Boardman Callaghan, 1999, § 5:6.

⁵³⁾ *Ibid*

⁵⁴⁾ Heneghan, Patrick J. & Wamsley, Herbert D., "The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen", *Loyola of Los Angeles Entertainment Law Review*, Vo.2 No.1(1982), p.127.

⁵⁵⁾ *Ibid*.

the right of the person to control the use of his or her identity or performance values in marketing and in the advertising media."56)

The persona protected by the right of publicity incorporates copyrightable traits such as name, likeness, and voice.⁵⁷⁾ The claims for protection under copyright can be framed by celebrities for infringement of their persona. The policies underlying copyright law apply equally to protection against misappropriation of the persona. While copyright protection "encourages intellectual and artistic creation by assuring the creator that only he or his heirs will benefit from the fruits of his labour ... so, too, the rationale behind the right of publicity is that a person who has struggled to create a 'persona' should be entitled to the exclusive benefits of that effort."58) Society benefits from the development of these personas. One fundamental problem with arguing for parallel protection of the right of publicity within copyright laws rests in the differences between the policy goals of the two rights. The debate over allowing any celebrity's misappropriation claims to fall under copyright law focuses on whether the "work" in the right of publicity, the persona, qualifies for protection.⁵⁹⁾ For example, "copyright" in a photo can protect against 'any authorized use' of the likeness of the photo ... the difficulty then becomes one of defining exactly what it is that is the 'subject' of copyright sought." One

⁵⁶⁾ Supra note 41, §5:30 at 446.

⁵⁷⁾ Id. s. 5:40 at 477.

⁵⁸⁾ Byers, David C., "CoDyrieht to Life: Toward Copyright Protection for Name and Likeness", Cal. St. B. J., Vol.56(1981), p.52.

⁵⁹⁾ Downing v. Abercrombie & Fitch Co., (2001). 265 F.3d 994 Clothing company used surfers' photos in an advertisement, and when the surfers sued for infringement of publicity rights, the court held that "the subject matter of Appellants' statutory and common law right of publicity claims is their names and likenesses. A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C.§102." Similarly, McCarthy argues that the persona is not fixed in the manner required at least under the U.S. Copyright Act.

is not the 'author' of one's face, no matter how much cosmetic surgery has been performed. Either God, fate, or our parents genes 'authored' this 'work,'⁶¹⁾

These are the few reasons why the celebrity rights fit under the trade mark and copyright protection regime in most appropriate manner. But celebrity rights being combination of proprietary as well as dignitary interest requires a specific legislation to follow the dual approach of protection with special reference to IPR to protect the commercial rights of personality.

V. Conclusion

Publicity rights of the celebrity relating to his or her persona is an unique kind of intellectual property rights which involves perspectives of copyright and trade mark protection with action of passing off on the one hand and on the other it stands as protection for human dignity by including privacy rights protection. Further, the rights need to be enforced with reasonable limitations so that private interest should not overpower the interest of public. The amendment in the copyrights or trade mark laws or even privacy rights is not sufficient but a specific enactment with the combination of all three perspectives is required to undertaken by legislative authorities. The controlled protections to personalities are required to be granted to balance the personal and public interest of the individual and society respectively. Personalities should be protected with limitations and duties imposed on their rights for example

⁶⁰⁾ Supra note 11 § 5:43 at 479.

⁶¹⁾ *Ibid*

duty of due diligence while taking any product endorsing that leads to misleading, immoral or fake advertisement and thus cheating consumers. Being role models they have duty of not being involved in any illicit or immoral activities *etc*

The protection granted in U.S. for celebrity rights holds a great importance as guiding source for developing celebrity rights protection laws and regulations. But, the diverse protection granted in different states of U.S. needs to settle to a federal legislation to govern all the states in U.S. in regard to protection of celebrity rights. Further, the dual approach doctrine is required to be followed in the laws governing the protection of celebrity rights. The privacy rights aspect covering humanitarian grounds of protection with the protection from unauthorised appropriation of commercial aspect of celebrity's persona should be combined together in the legislation. The U.S. laws for protecting celebrity rights though, provides for defences against the claim of right but the duties and liabilities of celebrities are also required to be fixed, to maintain balance between public and private interest in the society. As regards to U.K. and India, both the countries lack specific legislative enactment for protection of publicity rights. The laws and regulations in the countries prove to be inadequate to protect celebrity rights in the present scenario.

The concept of protection of celebrity rights is very new in India but not alien. Not much recognition or acceptance has been granted to the acknowledgement of rights of people who are already celebrated among the public and enjoy huge attention and good sum of money for their work. The understanding and need of publicity rights for celebrities to protect their personality traits and goodwill from exploitation is increasing among the nation. With the increasing cases of misappropriation of their

persona and goodwill attached to it by market forces in the digital world. The effort of judiciary to streamline the protection for celebrity rights seems unsuccessful due to the lack of support from legislation in form of legislative enactment.

To initiate a trend for universal recognition and protection of celebrity rights the international community needs to create a new treaty or add an amendment to an existing intellectual property treaty which deals specifically with the misappropriation of the persona for the commercial benefit of another with due recognition of moral rights to harmonise the recognition and protection of publicity rights of personalities. Following factors are required to be undertaken while incorporating international treaty or an agreement for publicity rights protection:

A. The provision should establish the criteria for individual to be eligible for protection of publicity right. The definition of publicity right and ambit of its protection should be very well stated under the provision. The provision should be divided into different parts so as to accommodate the scope of protection, what exactly is protected, formalities to qualify for the protection and at last the duration of protection.

B. It is important in the provision to recognise the publicity rights of celebrity in way of adapting the dual approach as the commercial and dignitary aspect of rights violation. The moral rights should be extended to the celebrity as provided under Berne Convention article 6*bis*. Celebrity or a personality who has commercial value over his or her personality traits should be treated as author of his or her goodwill established or image developed. Thus, should be provided protection even in non commercial aspects of distortion of their personality traits,

C. The suggested provision in the international law should also take care of the two different interest of public and private and balancing of such interest should be promoted by fixing duties and liabilities of celebrity against the misleading,

fake or immoral advertisements.

D. The provision should also provide limitations and exceptions of right of publicity for celebrity so that undue advantage of exclusive right cannot be taken by the celebrity and further, the interest of the general public in regard to free speech and expression is protected.

The proposal will provide a solution to the current uncertainty generated from the lack of consistency in the way all nations treat the right of publicity. This proposal is the most advantageous because "legal certainty promotes commercial efficiency,"⁶²⁾ it will promote public policy by protecting the fruits of labour of individuals with enhanced protection of consumers, and it institutes a more efficient administrative system. Most importantly, this proposal is a resolution to the harmonization and national treatment issues that the right of publicity faces.

⁶²⁾ Goodman, Eric J., "A National Identity Crisis: The Need for A Federal Right of Publicity Statute", *DePaul Journal of Art*, *Technology & Intellectual Property Law*, Vol. 9 Iss. 2(Spring 1999), pp. 227, 243.

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