

Luthra & Luthra

Celebrity-focused culture highlights need for statutory right to publicity

The need for the Indian legislature to recognise publicity and image rights in a statutory manner has never been greater

Celebrities increasingly seek to protect their publicity and image rights due to the rising commercial value of their fame and identity. The 'right to publicity' can be defined as the right of an individual to command and control the commercial use of his or her name, image, likeness or other unequivocal aspects of his or her distinctiveness (eg, voice, signature, style, gestures, recognisable attire). Image rights are an individual's proprietary rights in his or her personality, giving each individual the right to prevent unauthorised use of his or her personal attributes (eg, physical or stylistic characteristics, signatures, nicknames or associated slogans). Image rights form part of an individual's right to publicity. Although every individual enjoys a right to publicity, the complainants in publicity rights cases are usually celebrities, as they sell the products and services of a company, and infringers exploit their reputation and goodwill in order to sell their products.

Publicity and image rights are generally acknowledged as property rights rather than personal rights. The right to publicity is a proprietary right held by an individual, as distinguished from a right against harm. Two theories justify the establishment of such right:

- the moral right to the fruits of one's own labour; and
- the exclusive right to one's own "commercially marketable image".

In recent years the right to publicity has become more important to celebrities due to its commercial nature, which allows a celebrity to gain financially by using, assigning or transferring this right. Although such right accrues to the celebrity's persona, this does not preclude the protection of works featuring the celebrity through

copyright or any other IP laws. These rights are violated if a third party uses the fame of a celebrity to promote its goods or misappropriates that fame for its own advantage, commercially or otherwise, for the purpose of advertising or exploitation.

Since the unauthorised use of an individual's persona is an invasion of privacy, the right to publicity is often confused with the right to privacy.

The two rights can be differentiated as follows: while the right to publicity provides the individual with a property right in his or her identity, the right to privacy protects an individual from adverse portrayal of his or her personality (eg, publication of intimate private and personal facts, defamatory facts or facts that are wrongly attributed).

In contrast to common law jurisdictions such as India, most civil law jurisdictions have specific statutory provisions that protect an individual's image, personal data and other rights that affect celebrities and public figures.

Various jurisdictions have adopted different approaches to justify such rights and, as yet, there is no uniform regulation. The law relating to the right to publicity is still undeveloped in India as there are no precedents and no codified law governing the right to publicity and image rights. Therefore, in order to protect and prevent against the unauthorised exploitation of such rights, an individual must use both statutory and common law causes of action to enforce them.

The obiter of the Delhi High Court in *ICC Development (International) Ltd v Arvee Enterprises* is the only authoritative precedent on the nature of publicity rights in Indian case law. The defendant had run a promotional sales campaign wherein it had offered Cricket World Cup tickets as prizes and used slogans indicating that the contest

was associated with the World Cup. The plaintiff instigated a passing off action against the defendants in order to restrain them from:

- publishing any advertisement associating themselves with the plaintiff and the Cricket World Cup;
- using the plaintiff's indicia and trademarks; and
- indulging in unfair trade practices by misappropriating the plaintiff's publicity rights.

The judge denied the plaintiff's request for interim relief. When ruling on the alleged violation of publicity rights by the plaintiff, the judge stated that:

"The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be vocative of Articles 19 and 21 of the Constitution of India. No persona can be monopolised. The right of Publicity vests in an individual and he alone is entitled to profit from it. For example if any entity was to use Kapil Dev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action."

After considering foreign precedents, the

judge ruled against the plaintiff and stated that in respect of events, the right of publicity does not vest with an entity. This case was the first judicial recognition of the existence of the right to publicity in principle.

In some cases Indian celebrities have enforced their right to publicity and image rights by basing claims on a framework of IP laws, such as the trademark and copyright laws, in order to prevent the unauthorised exploitation of their names and images. Indian trademark law allows the registration of names, nicknames and images.

Some Indian celebrities, including yoga guru Baba Ramdev, cardiologist Naresh Trehan, chef Sanjeev Kapoor and actress Kajol, are among the few who have sought for protection under the trademark law by applying for registration of their names and images as trademarks.

Individuals may also protect their names in the absence of a statutory protection by bringing a passing off action. However, for such action to be successful, the individual must prove all three classic elements of a passing off action:

- reputation;
- misrepresentation; and
- resultant irreparable damage to the individual.

In several cases the Indian courts have recognised the name of a celebrity to have trademark significance and have restrained third parties from misappropriating such name for use as a domain name. Copyright law also grants an individual the right to protect a specific image in the form of a photograph, painting etc.

Such statutory protection suffers from inherent difficulties. For example, in the case of trademarks, if a registration for an image is secured, it may protect only a particular image used as a trademark and not the general image of an individual. Similarly, copyright law will protect a photograph or drawing of an individual as an artistic work, but not the image of the individual him or herself; and in an action for passing off, the three classic elements must be proven.

The protection of publicity and image rights is expanding, especially in the celebrity-obsessed culture of India. Recently, famous Indian film actor Rajnikanth published a legal notice in major newspapers before the release of his latest film prohibiting anyone from emulating his screen persona or from using his character in the film for any financial gain, including advertisements, broadcasts and impressions by comedians on television. This clearly



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suggests that publicity has emerged as an individual class of IP protection.

With the increasing commercialisation of publicity and image rights by Indian companies and with celebrities eager to prevent the unauthorised exploitation of such rights, it is time for the legislature to recognise publicity and image rights in a statutory manner. Until then, individuals must rely on a framework of IP and other statutes to prevent unauthorised exploitation of their publicity and image rights. **WTR**