

Protection of Celebrity Rights – The Problems and the Solutions

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Celebrity rights are unique rights, which are distinct from others. It is a form of property, which can be exclusively enjoyed by the celebrity himself. Being a property, it is also susceptible to unauthorized trespasses. This 'trespass' takes place mainly in two ways- when the privacy of the celebrity is sought to be compromised for the sake of money, and secondly, when the celebrity's right to publicity is defeated by its unauthorized use. Both the situations require law and the judiciary to intervene and ensure justice. In the absence of any specific regulatory mechanism to address these issues, it often becomes difficult to protect various celebrity rights like personality/moral rights, privacy rights & the publicity/merchandising right. In India, there is no specific legal remedy for infringement of celebrity rights. Thus the authors identified merits and demerits of various approaches, which protect the publicity rights of a celebrity and recommended appropriate legal regime suited to India.

Keywords: Celebrity rights, right to publicity, merchandising rights, right to privacy

Many as honour seek celebrity status. In a democracy, it is normally a reward for success. Sportsmen and artist earn it by skill. Executive and TV personality earn it by wit. Politicians earn it by votes. Anyone can aspire to it. It is the public that confers celebrity.¹ This celebrity status not only makes them popular or famous, but also confers certain rights, which can be exploited by them alone. The exclusivity of these rights assumes importance in the present world, where the media is frequently invading the privacy of the celebrities and consequently infringing some of these rights. The faster and easier global communication through the Internet has also made the issue a burning one.

These diverse rights of a celebrity, which are encroached by the media frequently, can be classified under three major categories: (i) moral/personality rights, (ii) privacy rights and (iii) publicity/merchandising rights

Moral/Personality Rights

An individual's personality is a means by which one individual recognizes other and identifies his place in the society. Through the creation of one's personality, an individual creates an expectation of himself in the eyes of others and the way in which he is expected to behave in the society. For instance, members of the society will have different individual

expectations from a sportsperson, actor, a spiritual guru, a politician, an executive with regard to their contributions expected towards the society. Each of these personalities contributes differently to the society according to their individual talents. Such personality rights are also justified by the Hegelian Meta-physical concept of property which says that - "An individual's property is the extension of his personality" similarly an individual's contributions in the society is also an extension of his personality.

There is no doubt that in creating such personality an individual has to put in lot of efforts and conscious care. An individual's personality involves a great amount of emotional, dignitary and moral values attached to it. This personality might be very close to the celebrities' heart. However, the media frequently violates these personality rights of an individual celebrity by associating them with products/activities that run totally contrary to the image created by them in the society and hence sometimes it is against the dignity of the celebrity. For instance, a renowned spiritual guru who has always been against the consumption of tobacco and liquor and has been preaching the same to the society, his 'personality/moral right' would be seriously violated if someone puts his photograph on *Biri* or *Khaini* packets to promote the same amongst his disciples.

In such a situation an action of defamation could

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also lie, since a celebrity could claim that his image in the society has been tarnished by associating him with such products/activities, which he in fact never endorsed or was willing to promote in the society. Therefore, the promotion was based totally on false exploitation of an individual's image. Hence, there is some remedy available to the celebrities in form of an action for defamation, since there is an element of falsehood prevailing in the entire act.

Privacy Rights

Since, the celebrities have a popular image in the society, people generally tend to personalize them as their friends and become curious about every personal aspects of their lives ranging from their personal affairs in lives to something as trivial as to the clothes that they wear, the cosmetics that they apply, the places they visit. However, the celebrities do not know the public and hence there is no natural exchange of information. Therefore, the celebrities try to control their personal information since the disclosure of the same might put them in a situation of embarrassment, humiliation and thus make them feel insecure.

Recently various MMS (Multi Media Service) scandals involving many celebrities have been subject matter of immense popularity amongst the public. Amongst the more popular ones were the videos involving teenage sensation Sania Mirza changing her clothes in the bathroom and cine star Kareena Kapoor getting into some intimate moments with Saheed Kapoor, the latter one being published in *Mid Day*.² These video clips were subject matter of extreme interest amongst the ordinary members of the society but were extremely embarrassing, mentally traumatic for these celebrities and gave them a sense of insecurity about their activities even in their closed personal rooms. Even Supreme Court, while acting on a petition by Hindu, regarding the Constitutional Validity of Section 499 of IPC, observed that the Kareena-Saheed photo was not in good taste. The Court further hinted at the need to create a balance between public interest and defamation so that the freedom of expression of the newspaper was not stretched beyond limits.³ Following Prosser, it can be argued that even newspaper reports can be held to be invading privacy, if it intrudes upon one's seclusion or if there has been a 'public disclosure of embarrassing private 'which would be 'offensive and objectionable to a reasonable man of ordinary sensibilities'. However, in that case the more effective

remedy would be defamation rather than protection through intellectual property rights.

No doubt it is a serious invasion of the celebrity's privacy, which, every human being is entitled as human rights.⁴ Fortunately, there lies a legal remedy in the form of an action for 'invasion of privacy' of an individual wherein truth is no defence unlike in the cases of defamation. One of the most popular judicial opinions has been given by the Missouri Court in the case of *Barber v Times Inc*⁵ wherein a photographer took pictures of Dorothy Barber giving a pregnancy delivery to a baby boy. Ms Barber had filed a suit of 'invasion of privacy' against Time Inc for unauthorized and forceful entry into her hospital room and photographing her despite her protests. Ms Barber was successful in her suit and the court while awarding damages of \$3000 opined:

"In publishing details of private matters, the media may report accurately and yet - at least on some occasions - may be found liable for damages. Lawsuits for defamations will not stand where the media have accurately reported the truth, but the media nevertheless could lose an action for invasion of privacy based on similar facts situations. In such instances the truth sometimes hurts."

Therefore, in this case also we see that there has been a remedy available to the celebrities either in the form of an action of 'invasion of privacy' or in the form of assertion of the fundamental right of right to privacy as a part of Article 21 of the Constitution of India.⁶

Publicity/Merchandising Rights

The right to exploit the economic value of the name and fame of an individual is termed as publicity right. To claim this right, it is necessary to establish that fame is a form of merchandise i.e. an act intended to promote the sale/popularity of a commodity or an activity. Hence, if someone uses the fame of a celebrity to promote his goods it would be termed as an unfair trade practice, misappropriation of the intellectual property of the celebrity, an act of passing off etc.

The publicity right is also a form of intellectual property right, which can be justified by the Lockean Labour theory which says that an object created by the labour and skill of an individual belongs to that individual and that individual alone has got the right to exploit the object created by him for any gainful purpose which he likes. Similarly based on this theory

it can very well be said that the fame and popularity that a celebrity has created is his property since, he has put in enough hard work, conscious efforts, time and skills to harvest such an image and popularity in the society. Hence, the celebrity is at complete liberty to exploit his image for commercial benefits and prevent others from doing it. It would be very unfair if someone else is allowed to exploit this fame or popularity for benefits which would accrue to him rather than the celebrity. Such an approach was visible in, *Edison v Edison Polyform Mfg Co*, where the Court held that if a man's name is his own property, there is no reason for not understanding that the cast of one's feature is also his property, as well as the pecuniary benefit that can be derived from it.⁷

Instances of such cases in the media world are very common. Recently the In Da Club rapper popularly known by the '50 Cents band' accused Gary Barbera Enterprises of running advertisements in Philadelphia, Pennsylvania, newspapers promoting his company with a picture of the rapper and the words 'Just like 50 says!' next to a Dodge Magnum, according to music site AllHipHop.com. 50 Cent, real name Curtis Jackson, insisted that he did not give permission for his likeness to be used in the ads.⁸ The matter is still pending before the court.

However, the law in this regard, i.e. publicity/merchandising rights of the celebrities is still not fairly developed, especially in India. Courts in the various foreign countries have adopted different approach to justify this right and no uniform justification has crystallized yet. Therefore, the authors would endeavour to analyse this particular right of the celebrity and would seek to provide suggestions to the emerging issues.

Celebrity 'Publicity/Merchandising' Rights - An Analysis

Every celebrity should have proprietary rights over his fame and popularity in the society because he has put time, effort, talent and finances to become popular. It is also in conformation with the Locke's labour theory of property. Therefore, the celebrity has the absolute right of publicity.

Origin of the Right

Though the concept of 'right to privacy' was first propounded by Warren and Brandies, who argued that the right to privacy is a separate right, independent of other rights⁹, the concept of right of publicity, as a

right to control the commercial value of identity, was introduced by Nimmer and was established in a sound footing by William Prosser, who identified four types of rights associated with an individual, (i) intrusion upon one's seclusion or solitude, (ii) public disclosure of embarrassing private facts, (iii) publicity which places one in false light¹⁰ and (iv) appropriation of one's name for the defendant's advantage.¹¹ In this paper, we are mainly interested in the last of these rights.

Nature of the Right to Publicity

Brook L J in *Douglas and Zeta Zones v Hello Ltd*^{12,13} has defined the 'right to publicity': "An exclusive right of a celebrity to the profits to be made through the exploitation of his fame and popularity for commercial purpose" Therefore, such a right is distinct from the right against invasion of privacy and also a right against the adverse portrayal of one's personality or in other words the moral rights of the celebrities over his personality. In the same case Sedley L J opined that the damage to the reputation of an individual (or intrusion of privacy) is not normally understood to be a form of financial or economic loss. In this case the plaintiff would suffer loss in the sense that their reputation would be of lesser value as commodities to be exploited by licensing and assignment.¹⁴ Hence, the publicity right concerns with an intangible or non-physical harm and ownership of intangibles. It is in the form of a proprietary right with an individual as different from a right against harm.

Importance of Right to Publicity to a Celebrity

The importance of the recognition of this right in the favour of celebrity is to secure them a form of intellectual property which is meant not for protecting him/her against any harm but to secure him/her some financial benefits to be gained from the use of the property, and this is generally understood to be justified as a reward or incentive for the claimant's work in creating the intellectual property. Apart from this, the right is important because it is assignable and licensable to the players in the media world for commercial gains and benefits. Thirdly, the right to publicity is inheritable therefore; the descendants of the celebrity could also gain from the popularity, which the celebrity has created during his/her lifetime. Fourthly, it prevents unjust enrichment and deceptive trade practice.

Thus, this right to publicity is a negative right,

which allows only a certain group to reap the benefits and the rest are prevented from using the celebrity status of a celebrity. These protect the public from being misled, but only protect the celebrity to the extent that the person does not want to have his/her name used to mislead the public. From this aspect, an interesting question arises when we consider the issue of celebrity fakes. Whether a celebrity can prevent others from using his/her digitally morphed photographs? A relevant case in this regard would be *Associated Publishers v K Bashyam*¹⁵, where the question before the Court was whether a portrait-photo of Mahatma Gandhi made by combining two photos of Mahatma constituted copyright infringement. The Court held that since skill and labour was expended in producing the photo by combining the parts of two other photos, it did not amount to copyright infringement. However, in US, the general test applied is 'Commercial aspect v/s public interest', i.e., if the importance of the digitally altered photo can be found primarily in its social usefulness as a work of art, it would receive the first amendment protection.¹⁶

Society's Interest in Recognizing the Right of Publicity

The society has the following interests in recognition of the right of publicity:

- Nowadays publicity involves immense amounts of money and the public image of a celebrity is of tremendous value. Recognizing this valuable asset as a property would mean that the same would be subject of taxation as a capital asset just like any other intellectual property.¹⁷
- This gives economic incentive to the public for carrying out socially enriching activities.¹⁸
- Entertainers and celebrities are provided with an economic incentives to continue to invest in creating performances.

Celebrity Publicity Rights v/s the Constitution of India – The Inherent Conflict

The media considers that it is their fundamental right to publish and inform the public about all the matters that are of public interest or public concern under Article 19 of the constitution wherein the freedom of press is embedded. At the same time the citizens have the right to information or right to know under Article 19. This freedom has been consistently been challenged by the celebrities on the ground that the media has misused their freedom and under the

guise of giving news 'in the public interest' has interfered with the privacy of the celebrities. The courts have however, restricted the right of privacy of the celebrities in case the event reported is newsworthy or if the public has got legitimate interest in the event.

For instance, in *Montano v San Jose Mercury News*¹⁹ Montano's suit against the newspaper for the invasion of privacy and misappropriation of the celebrity persona failed on 1st amendment grounds, with the California Court of Appeal, concluding that:

"The first amendment protects the posters complained about for two reasons: First because the poster themselves report newsworthy items of public interest, and second because a newspaper has constitutionally protected right to promote itself by reproducing its originally protected articles or photographs. Our conclusion on the First Amendment makes it necessary to discuss the claim that the applicable statute of limitation bars recovery."

Again in another case *Ann Margaret v High Society Magazine*²⁰ wherein the plaintiff who was a super cine star sued the defendant who used to publish the popular *High Society Magazine*. The contention was that the defendant used her photo in the celebrity skin publication, without her consent, was for the purpose of trade and invaded her right to publicity. Judge Goetell held as:

"Ann Margaret who has occupied the fantasy of many movie goers over the year, choose to perform unclad in one of her films; that was the matter of public interest." The Court further went on to express the meaning of 'newsworthiness' as a defence generally useful in privacy actions against the media by the celebrities by stating that:

"And while such an event may not appear overtly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of "entertainment and amusement", concerning interesting phases of human activity in general".

Again in the case of *A v B and C*²¹: in an action for the invasion of privacy by a celebrity soccer star A against the newspaper publisher B for reporting that the superstar was leading an adulterous life with C & D which, was in fact true. D was the wife of A and C was another lady with whom A had adulterous life. The report contained intimate details about the life of

A with C and D. The issue that the court addressed was whether the content was private in nature and whether the newspaper had any public interest in disclosing the revelations made by C & D to the newspaper B. The court held that it would be more accurate to say that the public had legitimate interest in the matter rather than stating that the news was in public interest. The Court held that “when a person is a public figure, he is entitled to privacy in a very limited sense and he should be ready to accept the fact that because of his popularity his life shall be more closely scrutinized”. The Court further held that “the celebrities are considered as role models for many fans and the information that was sought to be published carries with it the element of public interest” However, this defense of public interest was not accepted in *Hyde Park Residence Ltd v Yelland*²² where the defendants’ attempt to market the stills of Princess Diana and Mr Dodi Fayed, just before their leaving the residence, was thwarted by the Court, which opined that allowing the publication would amount to honouring the dishonour.

There are a few more recent decisions related to celebrity publicity rights. In *ETW Corp v Jireh Publ'g, Inc* the Plaintiff, ETW Corp (ETW), the licensing agent for Mr Woods, brought suit against the defendant who sold limited edition prints of a painting of Tiger Woods, a well known professional golfer, commemorating his victory at the Masters Tournament in Augusta in 1997, alleging trademark infringement and dilution due to the use of Mr Woods's name on the envelope, as well as trademark infringement, dilution, unfair competition, false advertising, and right to publicity claims as a result of the use of Mr Woods's image in the painting. However, the court held that “the injury to the Mr Woods's intellectual property right was negligible and significantly outweighed by society's interest in freedom of artistic expression,”²³

Contrast the earlier case with *Comedy III Productions Inc v Gary Saderup Inc*, where an appellate court in California found that T-shirts featuring a silkscreen of an original charcoal drawing of the Three Stooges were not entitled to first amendment protection. The court concluded that although the original drawing was protectable speech, the fact that this image was reproduced countless times and earned the artist approximately \$75,000, removed the shirts from the ambit of the first

amendment because reproductions of an image, made to be sold for profit, do not *per se* constitute speech. The California Supreme Court disagreed and announced what it called a “balancing test between the first amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” The Court affirmed the result of the appellate Court, concluding that the T-shirts were not sufficiently ‘transformative’, an element borrowed from copyright’s doctrine of fair use, to be entitled to first amendment protection.²⁴ This brings out the fact that the issue is far from being settled. A workable proposition would be that while not every likeness of a celebrity can function as a trademark - if in fact a likeness and persona are in use for certain classes of goods or services - trademark protection will follow. However, the similarity between the policy underlying intellectual property protection and right of publicity is still very vague. In fact, in *Cardtoons v Major League Baseball Players Ass'n*, the Court had observed,

“[t]he incentive effect of publicity rights has been overstated. Most sports and entertainment celebrities with commercially valuable identities engage in activities that themselves generate a significant amount of income; the commercial value of their identities is merely a byproduct of their performance values.”²⁵

Therefore, publicity right of a celebrity is limited and subservient to the larger public interest and the right of the citizens to know. The need is to distinguish between what is public interest and what the public is interested in. For instance, people may be interested in watching porn movies, but they cannot claim the publication of such obscene materials as a matter of public interest.²⁶

Publicity Rights in India

When compared to the global regime²⁷, India has been lagging behind in regard to publicity rights, as neither is there a considerable body of case law, nor any comprehensive statute governing, image or publicity rights of individuals. It is only The Emblems and Names (prevention of improper use) Act, 1950, which to a limited extent, protects the unauthorized use of few dignitaries’ names by prohibiting the use

of names given in its schedule. Thus, the legal system in India at present is quite inadequate to deal with the modern phenomena of endorsement advertising. But the market has its own forces and does not wait for the law to catch up. The rate at which advertising using celebrities has increased as well as an increase in the amount of money involved in the entire process, possible abuses are likely to arise in the near future. A beginning has been made by the Hon'ble Delhi High Court, in *ICC Development (International) Ltd v Arvee Enterprises*,²⁸ and its statement on publicity rights is the only authoritative discussion of publicity rights in Indian case law:

"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 organizer/non-human entity of the event would be violative 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 authorization they would have a valid and enforceable cause of action."

Thus, image rights in India as conceived by the Delhi High Court arises from the right of privacy which has emerged through a case-by-case development in India and flows from human dignity as enshrined in articles 19 and 21 of the Constitution. This approach has to be contrasted to the approach of treating publicity rights as commercial property.

When publicity right is treated as a commercial property, it gets a limited amount of protection under the intellectual property protection.

- Section 14 of the Trade Marks Act, 1999, provides that where an application is made for the registration of a trade mark which falsely suggests a connection with any living person, or a person whose death took place within twenty years prior to the date of application for registration of the trade mark, the

Registrar may, before he proceeds with the application, require the applicant to furnish him with the consent in writing of such living person or, as the case may be, of the legal representative of the deceased person to the connection appearing on the trade mark, and may refuse to proceed with the application unless the applicant furnishes the registrar with such consent. So, no unauthorized use would be possible.

- Section 38 of the Copyright Act, 1957 recognizes performers' rights and this can be effectively used to prevent the unauthorized marketing of one's performance. This can be fully understood from the case of *Zacchini v Scripps-Howard Broadcasting Organisation*,²⁹ where Zacchini objected the unauthorized showing of his Human Cannon Ball act by a cameraman, was allowed the remedy.
- Section 57 of the Copyright Act, 1957, which recognizes the moral right of the author, can also be used to protect the reputation of the author. In, *Amar Nath Sehgal v UOI*, the Delhi High Court had observed that many rights flow from a creation, which include the paternity right in the work, i.e. the right to have his name on the work. It may also be called the identification right or attribution right. The second one is the right to disseminate his work i.e. the divulgence or dissemination right. It would embrace the economic right to sell the work or valuable consideration. Linked to the paternity right is the third right, the right to maintain purity in the work. The Court further held that the right to assert authorship also includes a right to object to distortion, mutilation or modification in a work, if it is prejudicial to the honour or reputation of the author. The contours, the hue and the colours of the original work, if tinkered, may distort the ethos of the work. Distorted and displayed, the viewer may form a poor impression of the author. Plaintiff's right to be compensated for loss of reputation, honour and mental injury due to the offending acts of the defendants, was also upheld by the Court.³⁰ An interesting foreign decision in this regard is the *Clark v*

Associated Newspapers Ltd where Lightman J had held that “a parody which occasions only a momentary and inconsequential deception is both successful and permissible; but a parody which occasions an enduring deception is neither.” In the instant case, the Court held the claim liable under passing off, as the attribution of authorship was more than momentary and inconsequential.³¹ In the Indian context, Mira T Sundara Rajan, while writing about famous writer, C Subramania Bharati, had observed that even after expiry of the copyright, a writer continues to retain other kinds of right in his work, including the right to be acknowledged as the author of his own work, and the right to restrain the mistreatment of his work. These rights seek to protect the author's personal relationship with his own work, and in doing so, they play a valuable role in protecting the integrity of important works of culture that make up a country's cultural heritage. The paper observed that the false attribution of the works of other authors to Bharati contravenes his right of attribution. Faulty printing as a modification of his work also could prejudice his reputation, depending on the nature and extent of the errors, and violates his right to the integrity of his work. She concludes her writing by observing that it is logical for moral rights standards to include some kind of protection for an author's personality, since the moral rights doctrine is itself based on the idea that the author's personality is reflected in his works and one of the protection is regarding law of privacy and misappropriation of another's work so as to give false attribute.³²

Appropriate Legal Regime

From the above discussion, one can understand that a celebrity right is a right of its own kind. On one hand, it is the property of the celebrity, who can exploit it in any ways, as he prefers, and the publicity rights are treated as one's own property. Again, we have seen that these rights are subservient to public interest, i.e., it essentially links the publicity rights as emanating from human dignity enumerated under Articles 19 and 21 of the Constitution of India.³³ The

question then remains whether these aspects are mutually exclusive or complementary to each other. The answers to these questions are very relevant if we want to enact a comprehensive legislation. Certain inherent problems in the approach for publicity right as mere property are as follows:

- (a) It does not take into account the inherent uniqueness of the human personae.³⁴
- (b) The second major dilemma of the publicity right is its transferability. By definition a commercial property right even in the nature of an intellectual property right can be licensed or transferred. This might lead to conflicts between licensor and licensee in fundamental areas of personality. For instance, if a former porn actor embraces religion at a later point in his life, dignity and commerce will battle over the remaining in force of the publication rights in his old movies.

However, merely holding publicity rights as a facet of privacy and human dignity may also be problematic for the following reasons:

- (a) The first problem would be that fundamental rights are generally only enforceable against the state within the meaning of Article 12 of the Constitution. Even though a liberal approach has been followed in this regard a citizen might find it difficult to enforce his publicity rights against private entities.
- (b) Fundamental rights cannot be waived. So, a person would find it difficult to engage in commercial transactions with his publicity rights.³⁵
- (c) It has been held that the rights under Article 19 and 21 are extinguished once a person dies.³⁶ One's personae may be a valuable property that a person might wish his successors to protect and commercially exploit just like any other intellectual property. However, under the present regime based on dignity rather than property right, such a case would not be possible.³⁷

Solution- The Dual Approach

Thus, at the outset it has to be realized that publicity rights are a confluence of both dignitary aspects as well as property rights aspect. One cannot be applied in the absence of the other. The law must guarantee the protection of human dignity and the

right to free development of the personality as against the entire world. In this regard, the approach of the civil law countries is the most advanced. All the civil law countries accept publicity rights as emerging from the right to human dignity in their constitutions but also have separate statutory provisions for protecting and regulating these rights. This solves the problem of succession of the rights. Further recognizing the property aspects would allow transfer and commercial exploitation of the rights for the benefit of the owner. On the other hand, a dual approach based on property and dignity would ameliorate the problems associated with pure commercial concept of publicity. For instance, in the aforesaid problem of the porn star, a dignity-based solution would be a Court recognized buy-back right for the licensor with reasonable pecuniary compensation of the licensee.

Conclusion

Publicity right is a distinct right, which requires special attention due to its unique nature. Thus, after the judiciary has recognized the dignitary aspects of publicity rights, it rests with the legislature to statutorily recognize the commercial and property rights aspects of publicity rights to fill up the lacunae in law and keep in pace with the rapid commercialization of personality and the development of the Internet. While doing so the legislature should also adequately balance between the public interest and the individual interest of the celebrity. In other words the legislature while granting the celebrity the right to publicity should also make adequate exception for freedom of speech & expression and other bona-fide uses as done by the Copyright Act. The statute should also reflect the need of preserving human dignity and the need for efficient commercial utilization of property beyond a person's lifetime. In fact, true heroes live on beyond their lives.

References

- 1 In the US, 'celebrity' is not needed. Celebrity suggests that the owner of the publicity right has actively built good will in the identity, which is not true in most US jurisdictions. The US law varies greatly from state to state.
- 2 Sex, lies and MMS: Bollywood talking, <http://www.digi-help.com/pub/indian-mms-scandals.asp>
- 3 Kareena-Shahid photos not in good taste: SC, <http://www.tribuneindia.com/2004/20041218/nation.htm#3> (6 October 2006).
- 4 Whereas most of the International Documents, like Universal Declaration of Human Rights, 1948 (Article 3), International Convention on Political and Civil Rights (Articles 6 and 9(1)), protect privacy as a part of human existence and personal liberty, Article 10(2) of European Convention on human rights more specifically declares that freedom of expression is subject to restrictions and penalties if it threatens the reputation or the rights of others or the disclosure of information received in confidence.
- 5 348 Mo 1199, 159 SW 2d 291, 295 (1942) This judgment of Missouri Court has been analyzed as a case of public disclosure of private embarrassing facts in addition to intrusion. See, Joseph E Martineau, *Invasion of Privacy*, <http://www.mobar.org/9d1c2643-6e03-49a7-881d-9a042ef72fe9.aspx> (5 October 2006).
- 6 The Supreme Court in *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632, on an interpretation of the relevant articles of the Constitution and on analysis of foreign judgments, held that though the right to privacy is not enumerated as a fundamental right, it can certainly be inferred from Article 21 of the Constitution (Para 26). For a detailed discussion on this case, see B D Aggarwal, *Right to Privacy: A Case by Case Development, Supreme Court Cases*, (3) (1996) 9 at 10 (J).
- 7 Cited in, Subhasini Narasimham & Thriyambak J Kannan, Right of publicity: Is it encompassed in the right to privacy, http://www.ebc-india.com/lawyer/articles/2005_5_5.htm. However, in this article it was also argued that this right of publicity differs from common law intellectual property right, to the extent that a publisher makes an unlicensed use of a celebrity for the publisher's commercial gain, without being charged for 'passing of'. "<http://ads.contactmusic.com/advertpro/servlet/click/zone?zid=25&pid=1&lookup=true&position=1&custom8=news&custom9=other>" \t "_top".
- 8 Warren Samuel and Brandies Louis D, "The right to privacy", *Harvard Law Review*, (4) (1890) 193, cited in *Jenifer Hill v NCAA* (865 P2d 633).
- 9 However, it cannot be claimed that a true matter, if it shows the celebrity in an unfavorable manner, would not be allowed. This was the view taken in the case of *Naomi Campbell v Vanessa Frisbee*, 2002 EWCA Cir No 1374.
- 10 Subhasini Narasimham & Thriyambak J Kannan, Right of publicity: Is it encompassed in the right to privacy, http://www.ebc-india.com/lawyer/articles/2005_5_5.htm.
- 11 [2001] 2 WLR 992.
- 12 Wherein, the celebrity actors had licensed the magazine *OK* the right to photograph their marriage ceremony and publish it in its magazine. However, another magazine *HELLO* had in an unauthorized manner sneaked in and taken the photographs and published it in their magazine.
- 13 At Para 15.
- 14 AIR 1961 Mad 114.
- 15 Hoepker v Kruger, 200 F Supp 2d 340 (S D N Y 2002), cited in, Gupta Suvrajyoti, Digital alteration of photographs & intellectual property right, *Journal of Intellectual Property Rights*, (10) (2005) 491 at 495.
- 16 Sports Club plc v Inspector of Taxes [2000] STC (SCD) 443.
- 17 The economic incentive argument is the ratio deridendi of the U.S. Supreme Court's only right of publicity case, *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562, 576 (1976): Ohio's decision to protect petitioners right of

- publicity here rests on more than a desire to compensate the performer for the time and effort invested in her act: the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.
- 18 34 Cal App 4th 790. Wherein the facts of the case were that Football star Joe Montano sued San Jose Mercury News because it published the news that the football star had won the annual bowling tournament and brought out a special edition featuring in form of a poster of an artist's depiction of the legendary football player. Pages of the special edition were sold in 5\$ in the public.
- 19 498 F Supp 401, 403-404 (S D N Y 1980).
- 20 (2002) EWCA Cir 337.
- 21 2000 EMLR 363.
- 22 332 F3d 915 (6th Cir 2003).
- 23 21 P3d 797 (Cal 2001).
- 24 95F3d 959, 973 (10th Cir 1996).
- 25 Swaminathan S Anklesaria Aiyer, Watching cricket is not your right, http://www.swaminomics.org/articles/20040320_watching_cricket_is_not_ur_right.htm (1 August 2006).
- 26 W Van Carnegem, Different approaches to the protection of celebrities against unauthorized use of their image in advertising in Australia, The United States and the Federal republic of Germany, *European Intellectual Property Review* 12 (1990) 452, 455.
- 27 (2003) 26 PTC 45 Del.
- 28 433 US 562 (1977).
- 29 2005 (30) PTC 253 (Del) In this case, The mural created by the plaintiff was pulled down from its place and consigned to the store room of the Union of India in the year 1979. The plaintiff challenged such an action on the ground that his special rights were violated by the defendants, for which the defendants should tender an apology.
- 30 (1998) 1 All ER 959. In this case, Mr Clark challenged a spoof diary written by Peter Bradshaw a columnist of the Evening Standard and claimed passing off and false attribution of authorship. Passing off was established despite the existence of a mixed or conflicting message incorporated in the column. Below the MP's photograph there was a standfirst informing the reader that the column was how Bradshaw imagined the MP would record the events incorporated in the column.
- 31 Mira T Sundara Rajan, Bharati and his copyright, <http://www.hindu.com/2004/12/22/stories/2004122200621000.htm> (6 October 2006).
- 32 As has been done by the Delhi High Court.
- 33 McCarthy Thomas, The Spring 1995 Horace S Menges Lecture-The human persona as commercial property: The right of publicity, *Columbia-VLA Journal of Law & the Arts*, 19 (1995) 129, 130.
- 34 *Bodhisatwa Gautam v Subhas Chakrovorty*, (1996) 1 SCC 490.
- 35 *Gian Kaur v State of Punjab* [1996] ICHRL 17 (21 March 1996).
- 36 For instance, the Delhi High Court says: "*The right of publicity vests in an individual and he alone is entitled to profit from it.*" ICC' *Development*.