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PUBLICITY RIGHT AND RIGHT TO PRIVACY: AN INDIAN PERSPECTIVE

Divya Jain

Research Scholar, Lovely Professional University, Punjab
(corresponding author)

Dr. Meenu Chopra

Associate Professor, Lovely Professional University, Punjab.

Mrs. G. Shalini

Assistant Professor, Department of Business Management, Vignana Bharathi Institute of
Technology, Hyderabad.

Dr. Anita Venaik

Amity Business school, Noida.

Dr. K. Sharath Babu

Professor & Head, Department of Business Management, Vignana Bharathi Institute of Technology,
Hyderabad.

Dr. Shathaboina Raju

Associate Professor, Department of Business Management, Vaagdevi Institute of Management
Sciences, Warangal.

Abstract:

The publicity right is the right pertaining to one's commercial use of image, voice, or any indicia of personality. In India the right has been recognized through judicial proclamations. It is argued that the publicity right is a branch of Intellectual Property Right. Though in India the right has not been given any separate recognition, but it is to some an extent been recognized through the right to privacy. The relation between publicity right and the right of privacy dates long back. In this article the author aims at analyzing the aspect of publicity right and the right of privacy in the aspect of India.

Keywords: Publicity Right, Right to Privacy, Constitution of India, Fundamental Rights.

Introduction:

“Human Rights are the rights and freedom to which every human being is entitled.”¹ “The Human rights are originated to protect, defend and render peaceful enjoyment of the fruits of humanity.”² The fundamental rights garneted in Part III of the Constitution of India is a boon which had been ensured by the framers of the Constitution of India. The basic purpose for the introduction of Fundamental rights in the Constitution of India was to provide maximum protection to the Human Rights of every

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About the authors :Divya Jain

Email:

citizen and in most cases, non-citizens as well. Though the Britishers were opposed to the idea, still the Indian framers made sure to include such concept. The Indian framers made the rights in the light of the international convention of social, economic and political rights. These rights imposed liability and duty on the state to make the lives of the individuals worth living. These rights made sure that every individual can have a space to grow and advance their personality.

Constitutional Interpretation taken up by our Judiciary plays an important role in this factor. It is due to the active and broad judicial interpretation that has framed the today's Indian Constitution. Indian Judiciary have taken a step further and acted as active protector, upholder and to many extents when as whistle blower for the protection of individual's Fundamental rights as it has been envisioned by the framers of the Constitution of India.

The concept of "Publicity Right" is also such right, which has been conceived and strengthened due to the Judicial Activism. The Publicity Right is emerging as a branch of Intellectual Property Right. Publicity right "prohibits the unauthorized commercial use of a person's name, likeness, or other indications of personal identity, such as a nickname, pseudonym, voice, signature, likeness, or photograph." The Celebrities image especially a public image plays an enormous role, as it is directly related to one's monetary value. Due to this reason, it becomes essential to protect their rights as well, so that others are not able to use their personality without their permission and in return gain unauthorized profits from the same. "Creating a space to its own in the market, and not allowing or restricting others to enter the space provides a monopoly as well as enhanced profitability."³ Thus it becomes important for the protection of one's publicity right. It is an intangible and transferable right, which has been granted by the judicial activism from preventing any unfair enrichment.

Every right can be recognized in India only if it is protected through the Constitution of India. This article shall analyse how and if the Constitution of India provide protection and recognition to the publicity right.

Literature Review:

Jennifer in her article, has extensively discussed the growing importance of the right of publicity and how it was always considered a part of right to privacy, but now has gained an independent status. Alongside have analyzed the relationship the right of publicity has with that of copyright, trademark and the first amendment.⁴

Warren and Brandeis in their famous article "The Right to Privacy" has analyzed the different aspects of the right to privacy. They were the ones who anticipated that the right to privacy has to be a part of Right to Life. In the article the authors have provided four basic features of the right to privacy. The fourth feature described by them has close representation with the modern time Publicity right.⁵

Vidushi in her article has discussed the modern relationship between the right of privacy and the publicity right in India. In India the right to some extent have been recognized in the light of right to privacy. Though the publicity right in the modern era is proving to be an independent right and rather the paradigm has been shifting towards the intellectual property right. The publicity right is also related to the person even after their death.⁶

Samarth and Vasundhara in their article have highlighted how the right of Publicity has taken an independent role in some of the contraries like the United States of America, United Kingdom and the effects it had on the people thereafter.⁷

In the current article the author laid emphasis on the impact the Publicity right has on the judicial activism, or rather the judicial activism having the impact on the publicity right. The people are becoming more aware in regards to their right, and not stepping back from accessing such rights.⁸

Right to Privacy and Publicity Rights:

Part III of the Constitution of India, provides the Fundamental rights of every citizen, in such a manner that it ensures that every citizens and non-citizens in some cases are protected through it. Art. 21 plays an important role in this protection. Art. 21 has two main principles to it, first “Right to life” and second “Right to personal Liberty”. Indian Judiciary has played a major role towards the interpretation of Art. 21 of the Constitution of India. It has provided a much wider meaning and explanation to this article, making it the epitome for the protection of human rights. Almost every Judge be it either of High Court or Supreme Court have made their contribution in the expansion of the authority of the right enshrined in Art. 21, making it more in positive light, then the original negative pronouncement it had. In the case of “I.R. Coelho vs. State of Tamil Nadu,⁹ this right has been held to be the heart of Indian Constitution, the most organic, and progressive provision in our living Constitution, the foundation head of all laws.”

“Right to Privacy does not find any definition in any statute, however, the Supreme Court of India has time and again held the Right to Privacy to be encompassing within Article 21 of the Constitution of India, which guarantees a citizen the right to life and liberty.”¹⁰ In India, the Right of privacy is a negative right, because it comes into action only when there is a violation of the right and not otherwise. It has even today have failed to acquire the status of an absolute right. “Alan F. Westin defines privacy as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated.”¹¹ He has grouped privacy in the following headings:

- a) “Personal Autonomy.
- b) Emotional Release.
- c) Self Evaluation.
- d) Limited and Protected Communication”.

Samuel Warren and Louis Brandeis two young lawyers were the reason behind for the legal recognition of the Right to Privacy. It was started to be considered as the legal right, only after an article was issued by these lawyers in Harvard Law Review. “Warren and Brandeis argued that it was necessary for the legal system to recognize the right to privacy because, when information about an individual’s private life is made available to others, it tends to influence and even to injure the very core of an individual’s personality.”¹² “In simplest terms, for Warren and Brandeis the right to privacy was the right of each individual to protect his or her psychological integrity by exercising control over information which both reflected and affected that individual’s personality.”¹³ “While an individual’s

right to privacy generally ends when the individual dies, publicity rights associated with the commercial value connected with an individual's name, image or voice may continue.”¹⁴

“The Right to Privacy as an independent and distinctive concept originated in the field of Torts Law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized.”¹⁵ “Privacy torts protect photographs and voice recordings of individuals’ private activities and communications in ways that may constrain how those materials can be used in art without consent.”¹⁶ “The tort of unreasonable intrusion, which provides sufficient room to an individual's claim to have a right to a personal space, where other citizens and the government are normally not allowed to trespass. To prove the first element of the tort, that an intrusion actually occurred, the plaintiff must have had an objectively reasonable expectation of privacy in the place, conversation or activity upon which the defendant allegedly intruded.”¹⁷ Intellectual property rights are always stolen, but privacy rights are always violated.¹⁸

The right to privacy has two faces like a coin. First, is the basic invasion of the right to privacy of an individual, which attracts the action in the law of tort, resulting in unliquidated damages and secondly, it attracts a constitutional provided remedy, which helps in the protection of one’s privacy from the unlawful governmental invasion.

Celebrity’s Publicity and Privacy Rights in the world of Paparazzi

India has been influenced by the foreign trends in most of the fields, why should the field of paparazzi be any different. Now even in India, the celebrities are actively being followed, watched and reported upon by the paparazzi since the last decade. The growth of social media and paparazzi industry has also played an active role in the violation of the publicity right of the celebrities’. It basically means that it is now upto the paparazzi to decide how to portray the celebrity image in the eyes of the general public and it also raises the issue of the paparazzi having the copyright on the images or the photos they capture. Paparazzi have made sure to violate every aspect of the celebrities whether it be public or the private affairs of their life.¹⁹

When a celebrity or an individual for that matter, is in public, everyone presumes that they have a right to invade their privacy and capture their images. This mostly happens in the areas where the celebrities cannot expect to have any form of privacy available to them. Paparazzi follow the celebrities very closely, they monitor their every move, where they are going, with whom they are meeting, what parties they attend, which they do not attend, etc. And mostly they are called by the celebrities themselves. When objected to their movements and violation of the privacy, the journalist and the paparazzi takes the protection of Art. 19 (1) (a) and (g). This is how they are able to provide sensationalizing news to the public. In most of the situations such a sensationalizing news have adverse effect on the celebrities, they destroy a celebrities personal life as well as their privacy.

In “Galella vs. Onassis”²⁰ the Court held that disclosing celebrity’s daily habits are not essential for any public’s well-being. Therefore, it is a violation of a celebrity’s privacy.”

Privacy Rights and Publicity Rights of Dead Personalities

“While an individual’s right to privacy generally ends when the individual dies, publicity rights associated with the commercial value connected with an individual’s name, image or voice may

continue.”²¹ “They also offer posthumous protection to the legal heirs of the celebrities, and cannot be used by third parties for commercial advantage without the consent of their legal heir”²² In “Deepa Jayakumar vs. A.L. Vijay,”²³ No publicity were granted to the niece of deceased politician J. Jayalalitha. “The Madras High Court adjudged that an individual’s right to privacy is not inheritable after death and all rights relating to personality, reputation or privacy, enjoyed during a person’s lifetime, cease with death.”²⁴ But the Supreme Court is yet to afford its opinions upon this issue.

Privacy Rights vis-à-vis Publicity Rights: Judicial Developments

Initially, the SC did accepted the right to privacy, but not in its totality, in the case of Kharak Singh vs. State of U.P.,²⁵ “But with time, the Courts saw R. Rajagopal vs. State of Tamil Nadu,²⁶ (the popular Auto Shankar Case), in which a division bench recognized the right to privacy not only as right in tort but also as a constitutional right.”²⁷ “In this case the Supreme Court recognized right of publicity in the form of right of privacy as follows: the first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising - or non-advertising - purposes or for any other matter.”²⁸

It is appropriate to note that the first case which in a form had a dealing with the concept of publicity rights is “Phoolan Devi vs. Shekhar Kapoor & Others,”²⁹ this case is the earliest cases, where the question of one’s right to privacy and personality was raised. The defendant in this case had produced a film in the name of “The Bandit Queen”, which has showcased every activity of Phoolan devi involved in her wild days. IT depicted all the criminal activates done by her and also showed with explicit details the sexual harassment faced by her. The Delhi High Court, to decide on the matter more prominently, first decided on the question that, whether the plaintiff forms a ‘public figure’? Because such a determination was important for the determination of the violation of the right of privacy. Such was especially important in the present case, as the information regarding the plaintiff was already in public domain.

The court awarded in the favor of the plaintiff stating that she was in fact a public figure, especially for the legal requirements of the violation of the privacy rights. The court furthered ordered a stay on the film production and releasing, as it would have adverse effect on the plaintiff’s reputation and can have far reaching consequences in her life.

“I.C.C Development (International) vs. Arvee Enterprises And Another,”³⁰ The Delhi High Court for the first time in India dealt with the concept of Publicity right. The court has analyzed the scope that every individual possess in every facet of their personality. “The Court further established a claim for breach of publicity rights as an independent tort, evident from the sentence that use of a celebrity’s persona without their express authorization would entitle them to a claim for damages.”³¹

“Manisha Koirala v. Shashi Lal Nair,”³² The Bombay High Court was approached by the plaintiff for the award of injunction against the resale of the film in which she worked. The plaintiff had at first when the movie script was presented to her had approved the showcasing of her naked body on the screen through a body double, but later on she objected to the same stating that: “She claimed defamation and malicious injurious falsehood, claiming that the film would violate her right to privacy as the objectionable shots attempt to expose the body of a female which is suggested to be the Plaintiff.”

“D.M. Entertainment Pvt. Ltd. vs. Baby Gift House,”³³ is a well-known case in the field of the publicity right. This is one of the case to actively interpret the concept of publicity right and false endorsement. In the present case, the plaintiff a well-known singer had introduced a case against a gift shop company. The defendant had produced dolls in the image of Daler Mehendi and the dolls can also sing some of the famous songs of Daler Mehendi in his voice. The plaintiff argued that the defendants have actively violated his publicity right by using his image, voice and songs in the production of dolls without his permission, which in turn causes harm to his reputation. The Courts have ruled in the favor of the plaintiff as they have uphold their case. The court was of the view that every individual has a right to decide, when and where there any aspect of personality shall be used, especially for commercial purposes. They also prohibited the further production of such dolls by the defendant.

“Furthermore, the accusation of fraudulent endorsement was sustained, as consumers were led to believe that the celebrity in question endorsed their goods. In the present instance the commercial use of an individual’s identity is intended to increase the sales of product by fusing the celebrity’s identity with the product and thereby the Defendants were selling those dolls, on the basis of publicity value or goodwill in the artist’s persona into the product i.e., doll.”³⁴

In the famous case of “Titan Industries vs. Ramkumar Jewellers,”³⁵ In this case, the plaintiff had hired Amitabh Bachchan and Jaya Bachchan to endorse and advertise its Tanishq brand of diamond jewelers. The couple had assigned to the plaintiff all rights in their personality to be used in advertisements in all media, including print and video. The plaintiff had spent a lot of money on the promotional campaign. The defendant, a jeweler who sells identical goods to the plaintiff, was discovered to have erected a hoarding that was identical to the plaintiff’s, including the same photograph of the celebrity couple that was displayed on the plaintiff’s hoarding. “As the defendant had neither sought permission from the couple to use their photograph, nor been authorized to do so by the plaintiff, the court held it liable not only for infringement of the plaintiff’s copyright in the advertisement, but also for misappropriation of the couple’s personality rights.”³⁶ “the Court defined the right to publicity of a celebrity as the right to control the commercial use of their personality, which includes the right to determine when, where, and how the identity shall be used.”³⁷

In “Sourav Ganguly vs. Tata Tea Ltd.,”³⁸ “Cricketer Sourav Ganguly who returned from Lords after scoring magnificent centuries found himself extremely disturbed when he realized that Tata Tea Ltd., in which he was employed as a manager, was promoting its 1 kilo tea packet by offering the consumers a chance to congratulate Sourav through a postcard which was there inside each packet of tea”³⁹ The company was trying to gain profit from the fame of Sourav Ganguly, who has a huge fan base in the Indian market and gain profit from such use. “The court ruled in Sourav's favor, acknowledging that his fame and popularity are his intellectual property. The Court granted Sourav Ganguly relief by ruling that his popularity is his intellectual property, and that selling tea under his name without his consent is a serious breach, despite the fact that he was an employee of the defendants”. As there are no legal provision for the protection of the use of one’s personality without permission, the plaintiff had to take the support of injunction order and award in the form of damages for all the loss which he incurred due to such unauthorized use.

In “Mr. Shivaji Rao Gaikwad vs M/Varsha Productions,”⁴⁰ The courts in this case have interpreted the connection between the film industry in India and the Intellectual Property Rights. “Shivaji Rao Gaikwad”, also known as “Rajnikanth”, has instituted a case for an order of injunction against the resale of the film “Main Hoon Rajnikanth”. This film had used the name, caricature, his voice, his style of dialog delivery and his basic style all without his permission, for the production of the film. The plaintiff was harmed due to such unauthorized use and it depicted him in the wrong light. The defendants were of the opinion that they have not used the image of Rajnikanth for the production and advancement of the film. But when such film was promoted by the third part on the internet, everyone was relating the film to the Rajnikanth, the famous actor and not someone else as claimed by the defendants. The court ruled in favor of the plaintiff stating that the movie had made unauthorized use of the celebrities’ image and fame for their own personal gain, and such a use is not permitted. The film was also depicting some immoral acts done by the plaintiff which would have harmed the plaintiff’s image in the public.

In the recent landmark case of “K.S. Puttaswamy vs. Union of India,”⁴¹ (commonly known as Aadhar Case), “a nine-judge panel of the Supreme Court discussed and declared publicity to be an element of privacy that is protected as a basic right. However, out of nine Judges only Justice Sanjay Kishan Kaul, in his concurring opinion, brought publicity rights within the ambit of the right to privacy. Even though concurring, Justice Kaul's opinion did not constitute the lead judgment or the leading judgment. As a result, unfortunately for the fate of publicity rights in India, it would not provide binding value, instead being merely persuasive and leaving these rights in an undetermined and undeveloped state”.⁴²

In this case, another important factor of publicity right was raised. It was the question whether the publicity right is limited to the celebrities only? Justice kaul was of the opinion that, no the right extends to every individual and is not only limited to the celebrities.

The most recent case in the light of utilizing a person’s personality was raised in the case of “Krishna Kishore Singh vs. Sarla A. Saraogi & Ors.”⁴³ by the father of the demised Shusant Shing Rajput. His father has made a public statement that no one shall utilize his son’s image and life story in any form of movie or another form. In this case, the defendants have done exactly that. They have made a film on the life story of the plaintiff’s sons without his permission, titled “Nyay: The Justice”. His father claimed against the violation of the right of privacy and publicity right along with claiming to have the copyright on his demised son’s life story.

The Court after trial of both the parties, passed a judgment in the favor of the defendant, the court held that “If the film will not be released at this point, the defendants will suffer irreparable harm. The right to publicity subsists only in an individual and he alone is entitled to gain profits from it and none else. Thus, no claim of publicity rights and ad-interim, ex-parte injunction was granted.”

Conclusion:

The long term debate whether the right of privacy should be legalized or not has been recently settled through the nine bench judge case of K S Puttaswamy. Finally it has been given an extended spot in the preview of the Right to Life and Personal Liberty article 21 of the Constitution of India. Though from the above discussion, it can be concluded, that the right of publicity does have similarities with the right to privacy, but is also very different from the basic concept of privacy. India can move forward

and take the example of the United States by legally recognizing the Property rights of the Publicity Right.

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