

FAME V. FORTRESS: STRIKING THE BALANCE BETWEEN PUBLICITY RIGHTS AND PRIVACY IN INDIA

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ABSTRACT

This passage explores the tension between privacy and publicity rights, particularly for celebrities. It argues that privacy is a fundamental right, but its scope narrows to public figures. Celebrities, defined as widely recognized individuals, deserve protection from the commercial use of their image without consent. This right guards against consumer deception and protects the economic value celebrities hold. Publicity rights are twofold: controlling commercial use of images and the broader right to privacy. These rights work together to prevent unwanted publicity and exploitation. Traditionally, only celebrities enjoyed these rights. However, the concept should extend to protect the persona of anyone, not just celebrities.

Keywords: Publicity Rights, Privacy Rights, Celebrity Rights.

INTRODUCTION

Everyone needs some quiet time and deserves the right to privacy. We all have personal lives that should be respected¹. India recognizes privacy as a cornerstone of individual freedom, granting it fundamental status². The right to privacy, though fundamental, exists on a sliding scale. As an individual's public profile expands, the permissible scope of public intrusion into their private life also adjusts. The dictionary definition of a celebrity is “a widely known person; one popularly honored for some signal achievement.”³ In legal terms, a celebrity is someone who's gained major public fame and media focus. This encompasses actors, athletes, artists, political figures, and royalty. However, the definition extends beyond such established groups. Even fictional characters consistently associated with a single actor, personalities within news media or corporations, notorious individuals facing capital punishment, or lawyers attaining widespread recognition may qualify as celebrities. Notably, the right to publicity potentially

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¹ R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

² Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

³ Webster's Third International Dictionary, P. 359 (1961).

safeguards these individuals as long as their name, likeness, and other identifying attributes hold marketable value.⁴

The contemporary landscape of Intellectual Property Rights (IPR) has witnessed a notable expansion, embracing novel realms like the "right to publicity," a derivative of the right to privacy, and the multifaceted "celebrity rights." Celebrities have a big impact on what's popular and how we see the world. The public keenly follows their lives, with their behaviors and actions shaping societal norms in diverse ways. Given this immense public interest, clear definitions of celebrity rights are crucial to prevent infringements. Establishing legal certainty surrounding publicity rights is essential for safeguarding celebrity endorsement interests, hindering consumer deception, and precluding unjust enrichment. Consequently, a pressing need arises to simultaneously protect the economic interests of celebrities and prevent unauthorized exploitation by others.

Publicity rights encompass two distinct dimensions:

- **Right to control commercial exploitation of image:** This protects individuals from having their image used for commercial purposes without consent. This facet draws upon "passing off" principles in tort law, ensuring consumers are not misled into believing a product or service is endorsed by the individual when it is not.
- **Right to privacy:** This encompasses the broader right to be left alone, safeguarding individuals from unwanted publicity or disclosure of personal information. These rights address non-economic harms not fully covered by "passing off" or similar torts.

Crucially, these rights operate in tandem:

- The right to privacy ensures unauthorized image use does not constitute an intrusion into one's private life.
- Conversely, the right to control commercial exploitation protects the economic value associated with one's image

Traditionally, the concept of publicity rights has been exclusively associated with individuals, primarily celebrities who cultivate readily identifiable personas. Consequently, protection under this right has often been denied on the grounds of "newsworthiness" or the individual's

⁴ Gary M. Ropski, "The Right of Publicity – The Trend towards Protecting a Celebrity's Celebrity", 72 The Trademark Reporter, 251-274 (1982).

life falling within the public domain due to significant public interest. However, it is crucial to recognize that the right to one's persona should not be restricted to celebrities alone.

Against this backdrop, several key questions emerge:

- i. Can the Right to Publicity be subsumed within the Right to Privacy in the Indian legal framework?
- ii. If the answer is affirmative, does the right extend to all individuals, irrespective of their public profile?
- iii. Are there any recognized exceptions to these rights?

To effectively address these questions, this paper embarks on a multifaceted analysis of the Right to Publicity.

PUBLICITY RIGHTS

Publicity rights, a cornerstone of intellectual property law, empower individuals to control the commercial exploitation of their name, image, or other identifiable characteristics. This legal framework safeguards individuals from unauthorized profiteering of their fame or personal identity. Often associated with celebrities due to their prominent public personas, publicity rights are not limited to this group and extend to any individual seeking to protect their image from commercial misuse.

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Philosopher John Locke argued that the economic value associated with an individual's identity, particularly in the case of celebrities, should accrue to that individual as it arises directly from their own efforts and achievements. This perspective aligns with the "unjust enrichment" principle, which views unauthorized appropriation of another's persona as akin to stealing their commercial goodwill. Ultimately, the right to publicity aims to incentivize individual initiative, creativity, and accomplishment by granting control over the economic potential of one's persona.

The legal landscape of publicity rights in India reflects a patchwork of legislation and judicial pronouncements. Their necessity gained attention in the landmark case of ICC Development (International) Ltd v Arvee Enterprises⁵. Although not explicitly mentioned in the Indian Constitution, the concept of publicity rights finds indirect protection through the right to

⁵ ICC Development (International) Ltd v Arvee Enterprises (2003) VIIAD Delhi 405

privacy enshrined in Article 21. The Supreme Court, in *K.S. Puttaswamy v. Union of India*⁶, recognized this inherent connection, paving the way for further development of publicity rights as an aspect of privacy.

In 2015, renowned Indian actor Rajnikanth exercised his right to publicity by invoking personality rights to sue Varsha Productions. He objected to the upcoming film "Mai Hoon Rajnikanth," alleging the unauthorized appropriation of his distinctive mannerisms, including his characteristic walking style and dialogue delivery. Furthermore, he claimed the film's potentially risqué content could disparage his public image. Acknowledging Rajnikanth's personality rights, the Madras High Court imposed a temporary injunction on the film's release.⁷

Three main factors determine if someone's right of publicity has been violated by commercial use:

1. **Public Recognition:** The person claiming infringement must be well-known enough for their image or persona to be valuable for commercial purposes (think character merchandising).
2. **Identifiability:** The unauthorized use of the person's image or attributes must clearly and unmistakably reference them.
3. **Substantial Use:** The commercial use of the person's image or attributes must be significant enough to show that the defendant is trying to benefit from the plaintiff's fame or persona.

The right of publicity shields a person's fame and image from unauthorized commercial use. This protection can even extend after death, known as the post-mortem right of publicity. However, this extension isn't automatic and depends on where you live.

In the United States, for instance, California recently recognized post-mortem rights, and other states might follow suit. This legal recognition typically allows the deceased's family or heirs to control and potentially profit from the use of their loved one's image and likeness.

In India, the recent case involving the movie "Dirty Picture" and the objections raised by the family of the late actress Silk Smita marks a potential first. They claim the film's portrayal

⁶ *K.S. Puttaswamy v. Union of India* (2015) AIR SC 3081.

⁷ *Mr. Shivaji Rao Gaikwad vs M/Varsha Productions Civil Suit No.598 of 2014.*

misrepresents her personality. This case could be a significant development in establishing the post-mortem right of publicity in India.

CONNECTION BETWEEN PUBLICITY RIGHTS AND PRIVACY RIGHTS: TWO SIDES OF THE SAME COIN

The right to privacy stands as a cornerstone of individual liberty. It empowers us to control our personal lives, shielding us from unwanted exposure and safeguarding our fundamental dignity. Recognized as a fundamental right under Article 21 of the Indian Constitution through the landmark *K.S Puttaswamy v. Union of India* judgment, privacy is seen as an intrinsic aspect of who we are. It allows us to embrace our individuality, express ourselves freely, and carve out a private space within the fabric of society.

But the right to privacy takes on a new dimension in the world of celebrities. Here, it transcends the purely personal, acting as a guardian against intrusive publicity that pries into their private matters. This expanded perspective ensures celebrities can maintain a healthy boundary between their public persona and their personal lives.

The right of publicity, while distinct, emerged as an offshoot of this broader right to privacy. In the United States, the concept of privacy as a legal right gained significant traction with the famous 1890 Harvard Law Review article "The Right to Privacy" by Samuel Warren and Louis Brandeis. Their groundbreaking work laid the foundation for the legal concept of "the right to be left alone." This right encompasses various facets identified by legal scholar William Prosser:

- **Protection against intrusion:** This safeguards individuals from unwanted publicity or unwarranted interference in their private lives. Imagine paparazzi lurking outside your home – this right protects against such intrusions.
- **Prevention of disclosure of private facts:** This protects individuals from the harmful exposure of embarrassing or sensitive personal information. Nobody wants their private details splashed across the media without their consent.
- **Defense against false light:** This protects individuals from being portrayed in a false or misleading manner in the public eye. Being misrepresented in the public sphere can be damaging, and this right offers recourse.
- **Control over commercial appropriation:** This allows individuals to control the

commercial use of their name, image, or likeness. This is where the right of publicity becomes particularly relevant for celebrities, allowing them to control how their image is used for commercial gain.

Over time, the right of publicity has evolved beyond its roots in privacy law. It has become a distinct legal right, specifically focusing on the control individuals have over their public image and its commercial exploitation. This right empowers celebrities, but also ordinary individuals, to prevent unauthorized use of their name, image, or likeness for commercial purposes.

Imagine a famous athlete's image being used on a billboard advertising a fast-food restaurant without their permission. Or perhaps a singer's voice is used in a commercial jingle without their knowledge. The right of publicity would allow these individuals to take legal action against such unauthorized use.

It's important to remember that the right of publicity is not limited to celebrities. While they may be more likely to have their image exploited commercially, the right extends to everyone. An ordinary person can take action if their image is used in a commercial advertisement without their consent, even if they are not a household name.

Therefore, the right to privacy and the right of publicity are intricately connected. The right to privacy provides the foundation, for protecting individuals from unwanted intrusions and control over their personal information. The right of publicity builds upon this foundation, specifically focusing on the control of one's public image and its commercial use. Together, these rights work in tandem to safeguard our individuality and prevent the unauthorized exploitation of our identity, both in the private and public spheres.

LEGAL STATUTES SAFEGUARDING PUBLICITY RIGHTS

In India, the legal framework safeguarding publicity rights encompasses various statutes, including:

1. THE TRADEMARKS ACT, 1999

The Trademarks Act safeguards two key groups:

- Registered trademarks: These include names, logos, and other identifiers officially recognized for distinguishing the goods or services of one business from others.

- Well-known trademarks: These are trademarks that have achieved widespread recognition and reputation within India.

Section 14 empowers the Trademark Registrar to protect individuals' connection to their identity. When someone applies to register a trademark associated with a living person (or someone deceased within the past 20 years), the Registrar can require consent from that person or their legal representatives. In essence, without such consent, registration might be denied.

2. COPYRIGHT ACT, 1957

Sections 38 and 57 of the Copyright Act offer protection to various artistic works, including photographs, films, and sound recordings. This protection grants the copyright owner exclusive rights over the reproduction, distribution, and display of the work. Additionally, the author retains the right to claim authorship and prevent distortion, mutilation, or modification that could harm their reputation. While the photographer holds copyright over their captured image, other identifiable elements within the photograph, like a person's signature, may also be protected under this Act.

3. THE EMBLEMS AND NAMES (PREVENTION OF IMPROPER USE) ACT 1950

This Act offers limited protection against the unauthorized commercial use of certain names associated with designated national dignitaries and institutions. However, government permission remains a requirement for full protection.

4. THE COMPETITION ACT, 2002

This act empowers individuals to restrict the unauthorized use of their name or likeness in product endorsements if it creates a false or misleading impression about their association with the product.

THE INTERSECTION OF CELEBRITY RIGHTS AND PAPARAZZI PRACTICES-

Following trends seen globally, India's celebrity culture now faces intense scrutiny from "paparazzi" photographers. These photographers track celebrities constantly, capturing both public and private moments, and share them widely, often on social media.

This raises two main concerns:

- Invasion of Privacy: Celebrities lose control over their personal lives, as even private moments are captured and shared.
- Uncontrolled Image Portrayal: Paparazzi decide how celebrities are presented to the

public, impacting their image and potentially infringing on their right to control it.

Adding to the complexity, Paparazzi often claim their actions fall under freedom of speech laws, even when capturing private moments.

Celebrities sometimes even call the Paparazzi themselves, but when they object to their presence or intrusion, the Paparazzi often hide behind freedom of speech laws. However, sharing private details just for sensational news can damage a celebrity's personal life and violate their privacy. As seen in the "Galella vs. Onassis"⁸ case, just showing a celebrity's daily routine doesn't benefit the public and can be considered an invasion of privacy.

COMPLEXITIES OF POST-MORTEM PUBLICITY RIGHTS

Though privacy rights expire upon death, the commercial value of a deceased person's name, image, or voice (publicity rights) can persist. Publicity rights extend beyond death, offering ongoing legal protection to the heirs of celebrities. This means third parties cannot commercially exploit a celebrity's name, image, or voice without the consent of their legal heirs⁹. In the case of "Deepa Jayakumar vs. A.L. Vijay" the current legal debate that surrounds publicity rights after death is talked about. While the niece of deceased politician J. Jayalalitha was denied such rights by the Madras High Court, the court ruled that "an individual's right to privacy is not inheritable" and ceases with death. However, this decision doesn't represent the final word on the matter, as the Supreme Court has yet to offer its opinion on this complex issue¹⁰.

The case of *Makkal Tholai Thodarpu Kuzhumam Ltd. vs. Mrs. V. Muthulakshmi*¹¹, also known as the "Veerappan case," sheds light on the inheritance of publicity rights in India. While the Madras High Court's order acknowledged that deceased individuals' rights can be inherited by their immediate family, it specifically avoided reaching a conclusion on the post-mortem personality rights of the late politician Jayalalithaa.

⁸ Galella vs. Onassis ,487, (2d Circ. 1973)

⁹ Krishna Kishore Singh vs. Sarla A. Saraogi & Ors., CS(COMM) 187/2021.

¹⁰ Deepa Jayakumar vs. A.L. Vijay, MANU, 3107, (2021)

¹¹ Ms. Makkal Tholai Thodarpu Kuzhuman Ltd. Versus V. Muthulakshmi, AIR 2008 (NOC) 381 (MAD.), 2008 (1) AJHAR (NOC) 302 (MAD.)

This lack of a clear verdict highlights a crucial gap in Indian law. There's currently no specific statute addressing the inheritance of post-mortem publicity rights. This ambiguity creates uncertainty about whether these rights can be passed on after a person's death.

PRIVACY RIGHTS VIS-À-VIS PUBLICITY RIGHTS: JUDICIAL DEVELOPMENTS

Initially, the Supreme Court acknowledged the right to privacy partially in the "Kharak Singh vs. State of U.P" case¹². However, later in "R. Rajagopal vs. State of Tamil Nadu"¹³ (Auto Shankar Case), a court division recognized it as a fundamental right under the Constitution. In this landmark case, the SC also implicitly included the right to publicity within the broader right to privacy. This means unauthorized use of someone's name or likeness, for commercial or non-commercial purposes, can be a violation of this right.

The "Phoolan Devi vs. Shekhar Kapoor & Others"¹⁴ case paved the way for discussions about publicity rights in India. This landmark case raised crucial questions about balancing an individual's right to privacy and personality with the public's interest.

The controversy: The case centered on a film, "The Bandit Queen," which depicted the life of Phoolan Devi, including her criminal activities and experiences of sexual harassment. Devi argued that the film violated her right to privacy, especially considering the sensitive and personal details portrayed.

Key question: The court initially assessed whether Devi qualified as a "public figure," as this would influence the degree of privacy protection she could claim. Despite her public recognition, the court acknowledged her right to privacy, particularly given the intimate details revealed in the film.

Court ruling: Recognizing the potential harm to Devi's reputation and well-being, the court ruled in her favor. They ordered a stay on the film's production and release, highlighting the importance of individual privacy even in the context of public figures.

The case of I.C.C Development (International) vs. Arvee Enterprises and Another¹⁵, decided by the Delhi High Court, is a significant first in India. It delves into the concept of "publicity

¹² Kharak Singh vs. State of U.P, AIR 1964 SC 1295.

¹³ R. Rajagopal vs. State of Tamil Nadu , AIR 1995 SC 264.

¹⁴ Phoolan Devi vs. Shekhar Kapoor & Others , 57 (1995) DLT 154

¹⁵ I.C.C Development (International) vs. Arvee Enterprises and Another, 2003 SCC OnLine Del 2; (2003) 26 PTC 245.

rights," analyzing the extent of control individuals have over their public image. The court established that unauthorized use of a celebrity's persona can be a legal wrong, entitling them to seek compensation.

In *Manisha Koirala v. Shashi Lal Nair*¹⁶ case, Manisha Koirala approached the Bombay High Court seeking to prevent the resale of a film she had acted in. Initially, she consented to a body double being used for nude scenes in the movie script. However, she later objected, arguing that the film would violate her privacy rights. She claimed the objectionable shots exposed a woman's body, which could be misconstrued as hers, causing defamation and harm to her reputation.

*D.M. Entertainment Pvt. Ltd. vs. Baby Gift House*¹⁷ case is a prominent example of how courts in India are interpreting the concept of publicity rights and false endorsements. The well-known singer Daler Mehndi sued a gift shop company for producing dolls replicating his image and voice. These dolls even sang some of his famous songs.

Mehndi argued that the company violated his publicity rights by using his image, voice, and songs without permission, potentially damaging his reputation. The court ruled in Mehndi's favor, recognizing the right of individuals to control how their personality traits, especially their image and voice, are used for commercial purposes. The court also prohibited the company from further producing these dolls. This case further highlights the concept of misleading endorsements. Consumers might be led to believe the celebrity endorses the product when their image or likeness is used without authorization. In this instance, the dolls' commercial use aimed to boost sales by associating the product with Mehndi's fame. The court essentially stated that the defendants were profiting from the publicity value and goodwill associated with Mehndi's persona by incorporating it into their product (the dolls).

The case of *Titan Industries vs. Ramkumar Jewellers*¹⁸, involved a well-known jewelry brand, Titan Industries (Tanishq), and a competitor, Ramkumar Jewellers. Tanishq had signed a contract with the famous couple Amitabh and Jaya Bachchan to promote their diamond jewelry in various media campaigns, including print and video. Tanishq invested significantly in this promotional campaign featuring the celebrity couple.

¹⁶ *Manisha Koirala v. Shashi Lal Nair*, 2002 SCC OnLine Bom 827; (2003) 2 Bom CR 136.

¹⁷ *D.M. Entertainment Pvt. Ltd. vs. Baby Gift House*, CS (OS) No. 893 of 2002, (Del)

¹⁸ *Titan Industries vs. Ramkumar Jewellers*, 2012 SCC OnLine Del 2382; (2012) 50 PTC 486

The issue arose when Ramkumar Jewellers, selling similar jewelry, displayed a large advertising hoarding that was identical to Tanishq's. This included using the same photograph of the Bachchan couple. Since Ramkumar Jewellers did not have permission from either the Bachchans or Tanishq to use their image, the court ruled in favor of Tanishq.

The court found Ramkumar Jewellers liable for two offenses:

- Copyright Infringement: The unauthorized use of Tanishq's copyrighted advertisement design.
- Misappropriation of Publicity Rights: The unauthorized use of the Bachchans' images for commercial purposes.

This case is significant because the court explicitly defined a celebrity's right to publicity in India. This right grants celebrities control over the commercial use of their persona. They have the authority to decide when, where, and how their image or likeness can be used.

In the case of *Sourav Ganguly vs. Tata Tea Ltd*¹⁹, Indian cricketer Sourav Ganguly successfully sued Tata Tea Ltd. after they used his image to promote tea without his permission. The company offered customers a chance to congratulate Ganguly on a postcard included in each tea packet, leveraging his popularity to boost sales.

Ganguly argued that his fame and image belonged to him, just like any other form of property. The court agreed, acknowledging the lack of specific laws protecting personality rights and granting Ganguly an injunction to stop the promotion and monetary compensation for damages.

This case highlighted the importance of celebrities controlling their image and reputation, even when employed by another company.

A recent case, "*Krishna Kishore Singh vs. Sarla A. Saraogi & Ors.*,"²⁰ sheds light on the use of a person's image after death. The father of deceased actor Sushant Singh Rajput took legal action against filmmakers who made a movie about his son's life ("*Nyay: The Justice*") without permission, claiming an infringement of his son's right to publicity.

¹⁹ *Sourav Ganguly vs. Tata Tea Ltd*, Civil Suit No. 361 of 1997.

²⁰ *Krishna Kishore Singh vs. Sarla A. Saraogi & Ors.*, CS (COMM) 187/2021.

The father argued for:

- Violation of privacy: The film exposed private details about his son's life.
- Violation of publicity rights: The filmmaker profited from using his son's image and story without consent.
- Copyright ownership: He claimed copyright over his son's life story.

The court's decision: The court ruled in favor of the filmmakers, stating:

- Harm to filmmakers: Delaying the film's release would harm the filmmakers.
- Limited publicity rights: Publicity rights only exist during an individual's lifetime, and only they can profit from them.
- No injunction: Therefore, claims of publicity rights and an injunction were denied.

REMEDIES AGAINST INFRINGEMENT

1. Lawsuit for Interference: The owner can file a civil suit claiming undue intrusion into their right to control their public image. This approach treats the infringement as a civil wrong. In some cases, the right to privacy might also be invoked through a writ petition or a tort action.
2. Defamation Suit: If the infringement involves false or damaging statements about the owner, they can sue for defamation. This can be filed as a civil suit or, if the statements are severe enough, as a criminal complaint. Defamation is considered both a civil wrong and a criminal offense in India.
3. Passing-off Action: This remedy applies when a third party tries to mislead consumers by creating a false impression that a celebrity endorses their product. The owner can sue to stop such unauthorized misrepresentations.
4. Injunction: If the infringement is ongoing and could cause further harm, the owner can seek an injunction from the court. This is a court order prohibiting the infringing activity. To get an injunction, the owner must convince the court that:
 - There's a strong case in their favor (prima facie case).
 - They'll suffer more harm if the injunction isn't granted (balance of convenience).
 - The harm caused by the infringement cannot be adequately compensated with money (irreparable harm).
5. Damages: In addition to an injunction, the court can award monetary compensation to

the owner for the damages caused by the infringement. This may include actual financial losses, damage to their reputation and goodwill, and in some cases, punitive damages meant to punish the infringer.

RECOMMENDATIONS

The author recommends a clearer legal framework for publicity rights in India. This could involve a dedicated statute or judicial pronouncements that provide more guidance on post-mortem rights and the extent of protection for ordinary citizens.

The article recommends that the Indian legal system recognize the right to publicity as a distinct right, separate from but connected to the right to privacy.

The right to privacy and the right to publicity are intertwined, working together to protect individuals from unwanted exposure and exploitation of their persona. India has made some progress in recognizing these rights, but there are still gaps in the legal framework. By establishing a clearer legal framework, India can better safeguard the privacy and publicity rights of its citizens, both celebrities and ordinary people.

CONCLUSION

The sui generis nature of publicity rights necessitates particular scrutiny. Notably, the judiciary's recent recognition of its dignitary facet underscores the critical need for legislative intervention. Such intervention would necessitate codifying the commercial and property dimensions of publicity rights to remedy lacunae in the legal framework and adapt to the accelerated commercialization of personality in the digital age. However, this legislative endeavor must meticulously calibrate the competing interests of public welfare and celebrity privacy. In essence, while affording celebrities control over the commercial exploitation of their persona, the legislature must also carve out appropriate exceptions for legitimate uses and the fundamental right to freedom of expression, mirroring the approach adopted in the Copyright Act. Furthermore, the statutory framework should demonstrably reflect the paramountcy of upholding human dignity and facilitate the efficient, yet respectful, commercial utilization of personality even after an individual's passing.