

L E X

# WITNESS

Volume 12 Issue 3 | August 2021

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## AN ERA OF HYBRID HEARINGS

### TECHNOLOGY DRIVEN JUSTICE DELIVERY

Our Guest Author



**PSN  
PRASAD**

Hon'ble Member (Judicial)  
NCLT, New Delhi Bench



12<sup>th</sup>

Anniversary Special Issue

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YOUR WITNESS PLEASE!



# Posthumous Survival of a Celebrity: An Immortal Right to Publicity

■ Nupur Lamba

**A**

s students of law, we are theoretically taught that a set of rules, norms and guidelines govern a civilized society and resistance to them

often constitute an offence therefore a deterrent is set in order to avoid disputes and offences. It is a cardinal rule of life that human behaviors change. Thus, the norms change, the deviations change and consequently the law must change. This brings us to the set conclusion that “law is forever dynamic” and must change according to the needs of the living society.

With the above in mind, it is pertinent to discuss the stagnancy in the law relating to celebrity rights, frequently known as the right to publicity.

## WHAT IS RIGHT TO PUBLICITY/ CELEBRITY RIGHTS?

Right to publicity is a common law right of a famous individual/ celebrity to control and profit from the commercial use of his or her name, likeness, and persona. This accrues to a public figure or a celebrity who alone has the right

to allow or disallow usage of his name, identity, persona etc. for commercial benefits. This is although not a codified law in India as yet, but is well recognized and often protected by the Courts from undue exploitation.

## GENESIS OF RIGHT TO PUBLICITY

In the year 2017 the Hon'ble Supreme Court, in the matter of Justice K.S. Puttaswamy v. Union of India<sup>1</sup> held that the right to privacy is fundamental right of every individual in India. As per Black's Law dictionary the word “Privacy” means to be let alone. The natural corollary to this means that the Right to Privacy is that every individual has a right to his/her confidentiality and he/she alone as the power to decide the means and modes of dissemination of personal information and whether or not it has to be distributed. This is categorized under multi-dimensional Article 21 of the Constitution of India 1950, which sanctions that the definition of right to life with dignity and liberty must include one which allows one's life to be meaningful, with dignity and respect. Logically, to lead a life of dignity and respect, every individual has the powerful right to curb dissemination of any private information in order to mitigate any violations of such a right.



Under the umbrella of the Right to Privacy, is also the right of a celebrity/ public figure to be able to curb the dissemination or usage of his name, identity, persona etc. by any third party without authorization and due consent termed as Right to Publicity. This was captured by the Hon'ble Delhi High Court in judgment dated 10.07.2021 in CS(COMM) 187/2021 titled Krishna Kishore Singh vs Sarla A Saraogi & Ors. that right to publicity is "inextricably linked to and birthed from the right of privacy" and further states that "right to privacy is born with the human being and extinguishes with the human being". Hence it is clear that Right to Privacy is the genesis of Right to Publicity.

### **CELEBRITY LIVES AND PUBLICITY RIGHTS ARE IMMORTAL**

At this juncture it is important to examine the nature of right to Publicity. It is clear from various judicial

precedents in the Country that right to Publicity accrues to a celebrity and/or a famous public figure. By the nature of definition, a celebrity or a public figure is a person who is famous or well-known amongst the public at large and thus is also likely to be remembered after his/her demise. In today's day and age, the work, persona, likeness, characteristics of a Celebrity are recorded and disseminated on various platforms until long after the demise of the said celebrity. In other words, the persona, characteristics, information, work, life story etc. of a celebrity lives on and never dies even after the physical death of the said individual. Such a scenario brings to light the question of protection of posthumous publicity rights on behalf of the deceased celebrity.

Upon a simple reading of the law, the Right to Publicity emanates from right to Privacy which accrues to an

individual owing to Right to Life, and as it remains presently, once the umbrella of "Life" collapses, so do all the rights under its roof. However, it is important to recognize that we ought to pull out one wing from under the debris i.e., the right to Publicity, as it continues to breathe under the shadow of an everlasting persona of the celebrity. In such a situation, it may not be the right approach to assume immediate extinguishment of a right that continues to prevail under the illusion of continuing life of a deceased celebrity.

### **CELEBRITY RIGHT IS A COMMERCIAL RIGHT: TRANSFERRABLE AND INHERITABLE**

The Right to Publicity is a common law right that allows a living celebrity to control its image, likeness, persona etc. from unauthorized commercial gains during the life of the celebrity. As explained by renowned media scholar



Melville Nimmer- what performers or celebrities required was a right to control the commercial value of their identity, given the hard work and skill that performers undertook, sometimes over many years, to build their persona and create goodwill in their favour, rather than protection against unreasonable intrusions into privacy.<sup>2</sup>

It is well recognized in India that Right to Publicity includes characteristic of a bundle of commercial rights. By nature of it being an underlying commercial right, it can be transferred as well as inherited upon the demise of a celebrity as expressed by virtue of judgments in *Titan Industries Ltd. v. Ramkumar Jewellers*<sup>3</sup>, *D.M. Entertainment v. Baby Gift House*<sup>4</sup> and *Kirtibhai Raval & Ors. v. Raghuram Jaisukhram Chandrani*<sup>5</sup> The necessary corollary of recognizing personality rights as commercial property would be that the legal heirs of the deceased would posthumously inherit the property. In the case of *Kirtibhai Raval (Supra)*, the direct descendant of Jalaram Bapa of Virpur, had instituted a suit

seeking an injunction against the release of a movie depicting Jalaram Bapa contending that celebrity rights can be transferred to a direct descendant. In the said case, although the Court held that the contentions raised by the parties require detailed consideration based on evidence, the Court granted stay in favor of the Petitioner stating that irreparable harm will be caused by violation of the right to publicity as well as privacy, which cannot be compensated. Hence, it is clear that Indian Courts do recognize the living nature of a celebrity, even posthumously, and disallow unauthorized commercial use of the same on behest of a legal heir. This in turn also stamps the said right as an inheritable one.

### LACK OF CODIFIED LAW IN INDIA

However, at present this is neither codified by legislature nor expressly interpreted by the Judiciary. The lives of public figures, celebrities, performing artist live long after their death and their rights and ought to be protected on their behalf. As far as the creative rights are concerned, the Indian Copyright Act, 1957, under Section 24, recognizes

that the posthumous copyright exists at least 60 years after death of the copyright holder and is automatically transferred to the legal heirs of the owner upon demise. Similarly, Section 18 and 19 of the Act also empower the legal heirs to collect posthumous royalty and effectuate assignment even after the death of the owner. Further, Section 57 of the Act envisages the exercise of moral rights by legal representatives. Similarly, Section 14 of the Trademark Act states that the consent of a legal heir is required to be obtained if the application contains the representation of a person who has died within 20 years of such an application. It is important to note that both the abovementioned codified laws recognize posthumous commercial rights of an individual. In light of the ambiguity revolving around the posthumous commercial control of right to publicity of a celebrity, there is a growing need to either carve out Publicity rights as a distinct right or broaden the definition of right to privacy so as to include the aspect of posthumous exercise of such a right by a legal heir. In fact, in the United States of America this separation between privacy and personality rights was recognized in the *Zacchini v. Scripps-Howard Broadcasting Co*<sup>6</sup> as early as year 1977. In this case it was held that while privacy was a personal right, the right to publicity was a commercial right that had a wider ambit to cover performer's rights. This case led to the development of the right to publicity as a property-based doctrine and the exclusive right of a celebrity to commercial use of fame acquired by him/her as a part of his/her professional persona. The Supreme Court of Georgia, USA in *Martin Luther King Jr. Center for Social Change, Inc v. American Heritage Products, Inc.* (Decided on 28 October 1982 by the Supreme Court of




Georgia, 296 S.E. 2d.697), clearly held that the right to publicity is distinct from the right to privacy, and that the former is an inheritable and devisable right

It cannot be the intention of the law that while a celebrity is alive, he/she is allowed to control its right to publicity and stop any defamation, denigration and tarnishment of his image/ persona but the same cannot be done on his/ her behalf by the legal heirs. The Hon'ble Supreme Court in *Common Cause v. Union of India*<sup>1</sup>, has held that "Law gladly takes cognizance of the fact that dignity is the most sacred possession of a man. And the said possession neither loses its sanctity in the process of dying nor evaporates when death occurs".

The right to life with dignity enshrined in Article 21 also acknowledges the right to die with dignity, thereby ensuring posthumous rights of the dead. Thus, as an extension to the same, the right to die with dignity must include the right to protection of such dignity of the deceased individual and the legal heirs.

### PUTTASWAMY CASE ITSELF HINTS TOWARDS CHANGING DEFINITION OF RIGHT TO PRIVACY AS PER NEED

It is important to once again examine the Puttaswamy case (Supra) in light of the concurrent judgment of Hon'ble Justice A.M Sapre wherein it has also been observed that it is the duty of the Court to be on the lookout to strike a balance between the changing needs

of the society and protection of rights of its citizens. It was observed that the Constitution is a living document, and as and when need arises it is susceptible to interpretation according to the needs of "we the people" of India. Referring to Justice KK Mathew's words it was reiterated in the said judgment that "right to privacy will necessarily go through a process of case-by-case development....." and has to develop on the basis of grievances of the citizen complaining of infringement. Therefore, it is clear that the definition of right to privacy is not yet exhaustive and deserves deliberation on a case-to-case basis. Taking cue from the concurrent view of Justice Sapre, the time is ripe to revisit the definition of right to privacy keeping in mind the current needs of celebrity rights. From the stand point of a celebrity or a public figure, the theory of purposive approach of interpretation of statutes must be applied in order to keep the publicity rights alive, posthumously, despite exhaustion of the 'right to privacy' upon the death of such a person. It is important to revisit and modify the definition of Right to Privacy to either include posthumous recognition of celebrity rights or to accord separate meaning and definition to the same. In my opinion, with the changing times and circumstances, the Indian legislature and Judiciary must consider the question that if the status of being a "celebrity" cannot die and his/her persona, identity, likeness etc. lives on even after the physical presence of such person is gone, then why should the inherent rights associated to such a celebrity not continue to subsist and be protectable? 



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<sup>1</sup>Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

<sup>2</sup>Nimmer, *The Right to Publicity*, 19 *Law and Contemporary Problems* 203 (1954).

<sup>3</sup>2012 (50) PTC 486 (Del),

<sup>4</sup>CS(OS) 893/2002, dated 29.04.2010, Delhi High Court

<sup>5</sup>Appeal from Order No. 262 of 2007, dated 20.01.2010, Gujarat High Court

<sup>6</sup>Zacchini v. Scripps-Howard Broadcasting Co., 1977 SCC OnLine US SC 153, 53 L Ed 2d 965, 433 US 562 (1977)

<sup>7</sup>(2018) 5 SCC 1